

Stop Turning a Blind Eye to Tear Gas Misuse

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Summary

Riot control agents, are often employed for law enforcement. They also are open to misuse. Despite the ongoing misuse of these chemicals by police and security forces, CWC States Parties have not publicly raised any such cases as matters of concern within the OPCW nor has any OPCW policymaking organ addressed the nature and scope of “law enforcement” under the CWC.

Riot control agents (RCAs), which are commonly known as tear gas and pepper spray, are defined by the Chemical Weapons Convention (CWC) as “any chemical not listed” in one of three schedules of toxic chemicals that can produce “rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.”¹ Whilst their use as “a method of warfare” is specifically prohibited under the CWC², they can be employed for “law enforcement including domestic riot control purposes”³, provided they are used in “types and quantities” consistent with such purposes.⁴

When employed in accordance with manufacturers' instructions and in line with international human rights law and standards, RCAs can provide an important alternative to other applications of force more likely to result in injury or death, such as firearms. Law enforcement officials throughout the world regularly use them to disperse violent crowds or to subdue dangerous individuals. Yet, they also are open to misuse. A study of reports from the United Nations and regional human rights bodies and international nongovernmental organizations identified human rights violations committed by law enforcement officials utilizing riot control agents in at least 95 countries or territories from 2009 to 2013.⁵ This included misuse of RCAs to torture and ill-treat prisoners; for suppression of freedom of expression, association and assembly; or in conjunction with excessive force, including firearms.

And police and security forces have continued to misuse RCAs, notably to restrict, intimidate, or punish those involved in peaceful protest around the world, whether it be pro-democracy “umbrella movement”

demonstrations in Hong Kong in September 2014⁶; Kenyan primary school children opposing the seizure of their playground in Nairobi in January 2015⁷, or peaceful church protests in the Democratic Republic of Congo between December 2017 and February 2018⁸. Another worrying RCA application has been along borders against migrants, refugees and asylum seekers. For example, in February 2014 Spanish Civil Guards fired tear gas, rubber bullets and blank ammunition at 200 migrants seeking to swim from Morocco to the Spanish autonomous city of Ceuta; resulting in the death of at least 14 people.⁹ More recently tear gas has been employed, firstly in October 2018 by Mexican Federal Police, and then in November 2018 by US border forces, against a group of refugees and migrants, including infants and children, from Central America seeking to enter the US.¹⁰

A recurring concern voiced by human rights organisations and the medical community has been the use of RCAs in excessive quantities in the open air or in confined spaces, including hospitals, prisons, and homes, where those targeted cannot escape. In such situations, serious injury or death can result from asphyxiation or from the toxic properties of the chemicals employed. This is particularly true for more vulnerable targets including infants, children, the elderly and those with underlying health issues such as asthma, bronchitis or cardiac disease.¹¹ In addition to contravening international human rights standards, the use of RCAs in such excessive amounts appears to breach the CWC “types and quantities” restriction. Regrettably, despite the ongoing misuse of these chemicals by police and security forces, CWC States Parties have not publicly raised any such cases as matters of concern within the Organisation for the Prohibition of Chemical Weapons (OPCW), nor has any OPCW

policymaking organ addressed the nature and scope of “law enforcement” under the CWC, clarified the range of permissible circumstances for RCA use and consequent constraints upon such use in line with CWC obligations and international human rights law.

If the OPCW does not take appropriate action, the situation could dramatically worsen as a result of ongoing development, marketing, and potential subsequent deployment of a range of systems capable of delivering far greater amounts of RCAs over wider areas or more extended distances than currently possible with standard law enforcement RCA dispersal mechanisms, such as hand-held sprays, grenades, and single-projectile launchers. In addition to these new “wide area” RCA delivery mechanisms, concerns have grown regarding the related development of “remote control” RCA means of delivery - incorporating automatic or semi-automatic systems where the controller is directing operation of the platform and/or RCA delivery device at a distance from the target.

Ongoing investigations by Bradford University and the Omega Research Foundation have uncovered the development and promotion by a range of State and commercial entities of a wide variety of such RCA means of delivery including: indoor fixed-installation dispersion devices; external area clearing or area denial devices; automatic grenade launchers; multiple munition launchers; large caliber RCA projectiles and munitions, and delivery mechanisms mounted on unmanned ground vehicles and unmanned aerial vehicles (drones).¹²

Whilst CWC States Parties are prohibited from developing RCA munitions for use in armed conflict, they may manufacture, acquire and utilise delivery systems to

disseminate appropriate “types and quantities” of RCAs for law enforcement. However, there is continuing ambiguity as to the nature and specifications of those means of delivery that are prohibited under the Convention. This ambiguity, allowing divergent interpretations, policy and practice amongst States Parties to emerge with regard to "wide area" and "remote control" RCA means of delivery, has potentially dangerous consequences, including:

- **Employment in armed conflict:** In previous conflicts RCA means of delivery were employed to drive enemy forces from fortified positions; to disable and incapacitate large numbers of combatants; or in conjunction with conventional arms. More recently, a range of contemporary RCA means of delivery, including certain "wide area" and "remote control" devices, have been promoted for use in counterinsurgency operations or urban warfare.
- **Misuse to facilitate large scale human rights abuses:** This could include the blanket application of significant quantities of RCAs against large peaceful gatherings resulting in en masse ill-treatment or punishment; or the employment of RCA means of delivery in conjunction with firearms as a "force multiplier", making such force more deadly.
- **Proliferation to and misuse by non-State actors:** Current weak trade controls and continuing commercial availability of "wide area" and "remote control" RCA means of delivery, including for example via drones, raises the danger of their acquisition and employment by a range of non-State actors including armed opposition forces, unregulated private military and security companies, and terrorist organisations.

- **Potential use in chemical weapons programmes:** A range of “wide area” delivery mechanisms such as cluster munitions, mortar shells or large calibre projectiles, ostensibly designated as RCA munitions could instead be used to disperse central nervous system (CNS)-acting agents or classic chemical warfare agents. Consequently, certain States might seek to evade CWC prohibitions by camouflaging illicit chemical weapons production under the guise of RCA law enforcement munitions programmes.
- **Facilitate development and proliferation of autonomous weapons systems:** Continuing research and development of “remote control” RCA delivery mechanisms and unmanned systems more broadly may potentially contribute to the future development, proliferation and use of fully autonomous weapons systems, i.e. unmanned systems with on-board computers, that once activated, can select and engage targets without further human intervention.

To date the majority of “wide area” or “remote control” RCA delivery mechanisms documented by Bradford University and the Omega Research Foundation do not currently appear to have been utilised by police or security forces. However we may now be at a tipping point - where proliferation, use and misuse may be beginning. A troubling indication of what could lie ahead was first witnessed in Israel from March 2018¹³, most notably during the response by Israeli security forces to wide spread Palestinian protests marking the “Great March of Return”, particularly on the border between Gaza and Israel. In addition to the use of standard hand-thrown or individual weapon-launched tear gas projectiles, the Israeli forces employed drones which flew above the crowds dropping tear gas projectiles onto the people

below, reportedly including peaceful protestors, bystanders and journalists.¹⁴

Despite the ongoing development and promotion of a range of “wide area” and “remote control” RCA means of delivery of potential concern, none of the OPCW policy making organs have effectively addressed this situation to date. However a very welcome development has been the intervention by the Scientific Advisory Board (SAB) on this issue, initially in their report to the 3rd Review Conference¹⁵ and then in their April 2018 report to the 4th Review Conference.¹⁶ In this report the SAB highlight the “continued development, testing, production and promotion of diverse munitions systems capable of disseminating RCAs by remote control” and warn that “availability of such systems opens up the possibility that they could be filled intentionally with alternate types of chemicals including CWAs [chemical warfare agents] or CNS-acting compounds.”¹⁷

In response to the evidence documented by Bradford University and the Omega Research Foundation, as well as the concerns highlighted by the SAB; the OPCW and its Member States should:

- Institute a review, by the Office of the Legal Advisor, of the existing constraints, under relevant international law (notably international human rights law), upon the use of RCAs and related means of delivery in law enforcement; and develop guidance on appropriate use (e.g. halting employment of tear gas in enclosed spaces where chemical concentrations may reach dangerous levels).
- Develop a process for determining which means of RCA delivery are prohibited under the CWC. Use of certain wide-area or remote control RCA delivery mechanisms may be justifiable in

particular large-scale law enforcement situations provided they comply with the CWC provision on “types and quantities” and are employed in strict conformity with international human rights standards. However other forms of RCA delivery mechanisms that have been developed, such as artillery shells, aerial bombs, large-caliber mortar shells, and cluster munitions, are completely inappropriate for any form of legitimate law enforcement; they should be considered to be chemical weapons, reported to the OPCW and destroyed.

- Strengthen existing RCA declaration and reporting measures, and explore the feasibility and utility of introducing appropriate monitoring and verification mechanisms.
- Utilise existing CWC consultation, investigation and fact-finding mechanisms where activities of potential concern come to the attention of Member States, such as the reported development, production, marketing, transfer, stockpiling or use of inappropriate RCA means of delivery.

Given the ongoing serious misuse of RCAs and standard delivery mechanisms by law enforcement officials; and the development and promotion of inappropriate RCA means of delivery; the OPCW should address these issues as a matter of urgency. If it fails to act, it will be turning a blind eye to the continued employment of toxic chemicals in human rights violations and will also be risking the future stability of the CWC itself.

Endnotes:

1. Organisation for the Prohibition of Chemical Weapons (OPCW), Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (CWC), Article II.7.

2. OPCW, CWC, Article I.5.
3. OPCW, CWC, Article II.9(d)
4. OPCW, CWC, Article II.1.a.
5. Crowley, M. Chemical Control: Regulation of Incapacitating Chemical Agent Weapons, Riot Control Agents and Their Means of Delivery, Basingstoke, Hampshire, Palgrave Macmillan, 2016, pp. 50-70.
6. Branigan, T. & Kaiman, J. Hong Kong police use teargas and pepper spray to disperse protesters, *The Guardian*, 28 September 2014; BBC News, Hong Kong: Tear Gas and Clashes at Democracy Protest, 28 September 2014.
7. BBC News, Kenya police fire tear gas on playground protest, 19 January 2015.
8. Amnesty International, DRC: "They came with the intention to do harm." Brutal repression of peaceful protests, 10 May 2018.
9. Amnesty International, Spain: Accountability urged for 'appalling' migrant deaths in Ceuta, 14 February 2014.
10. BBC News, Migrant caravan: Tear gas on Guatemala Mexico border, 20 October 2018; Specia, M. and Gladstone, R. Border Agents Shot Tear Gas Into Mexico. Was It Legal?, *New York Times*, 28 November 2018; Amnesty International, Americas: Stuck at the door: the urgent need for protection of Central American refugees, asylum seekers and migrants in caravans, AMR 01/9447/2018, November 2018; American Academy of Pediatrics Statement in Response to Tear Gas Being Used Against Children at the U.S. Southern Border, 26 November 2018.
11. World Medical Association, Statement on Riot Control Agents, adopted by the 69th WMA General Assembly, Moscow, Russia, October 2015; Weaponizing Tear Gas, Bahrain's Unprecedented Use of Toxic Chemical Agents Against Civilians, August 2012.
12. Crowley, M. Drawing the Line: Regulation of "wide area" riot control agent delivery mechanisms under the Chemical Weapons Convention, Bradford University/Omega Research Foundation, April 2013; Crowley, M. Tear Gassing by Remote Control: The development and promotion of remotely operated means of delivering or dispersing riot control agents, Bradford University/Omega Research Foundation/Remote Control Project, December 2015; Crowley, M. Development and Hostile Use of Toxic Chemical Means of Delivery and Dispersal, pp. 332 - 379, in: Crowley, M., Dando, M., Shang, L. (eds) *Preventing Chemical Weapons: Arms Control and Disarmament as the Sciences Converge*, Royal Society of Chemistry, August 2018.
13. *Times of Israel*, In first, Israel uses drones to drop tear gas on Gaza protesters - report, 12 March 2018.
14. *Times of Israel*, Israel deploys drones to drop tear gas on Gaza protesters, 31 March 2018; Amnesty International, "Israel/OPT: Israel/OPT: Israeli forces must end the use of excessive force in response to "Great March of Return" protests", 13 April 2018; *Daily Mail*, Drones rain tear gas down on protesters as 35,000 Palestinians clash with Israeli security forces on the Gaza border, 14 May 2018; *Al Jazeera*, Gaza protests: All the latest updates, 12 November 2018.
15. OPCW, 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, paragraph 56.
16. OPCW, Report of the Scientific Advisory Board on Developments in Science and Technology for the Fourth Special Session of the Conference of the States Parties to Review the Operation of the Chemical Weapons Convention, RC?4/DG.1, 30 April 2018
17. OPCW, SAB Report (30 April 2018) op.cit, paragraph 154.