



TOXIC CHEMICALS AS WEAPONS FOR LAW ENFORCEMENT: A threat to life and international law?

SUMMARY

Introduction

During the past ten years there has been much discussion and analysis of so called “incapacitating chemical agents” and of the use of these toxic chemicals as weapons for law enforcement. The International Committee of the Red Cross (ICRC) has highlighted significant risks associated with these weapons, and has held two international expert meetings to explore the implications of their use.

This document is the ICRC’s summary of the subject. (A six-page synthesis is also available). It summarises the issue and describes the toxic chemicals in question, the relevant international law, the main risks, and the broad policy choices available to States.¹

What is the issue?

There has been continued interest in the development and use of certain toxic chemicals as weapons for law enforcement. This has focused on toxic chemicals that incapacitate through causing sedation or unconsciousness. These weapons have been described as “incapacitating chemical agents”, “incapacitating agents”, “knock-out gas”, “calmatives”, “pharmacological weapons”, and “drugs as weapons”.

The development and use of so called “incapacitating chemical agents” as weapons raises a contradiction that has not been adequately addressed by government policy makers. On the one hand, in agreeing the Chemical Weapons Convention, States are “determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons”. On the other hand, the development of toxic chemicals as weapons for use in law enforcement has continued.

Which toxic chemicals?

The toxic chemicals in question, and that have been considered or used as weapons for law enforcement in recent years, are mostly powerful anaesthetic and sedative chemicals, such as fentanyl and its derivatives. They cause sedation, unconsciousness and death by severely impairing the functioning of the brain.

On a technical basis, there is no dividing line between the toxic chemicals considered as “incapacitating chemical agents” for law enforcement and the toxic chemicals developed and used as “lethal” chemical warfare agents in past conflicts to incapacitate and kill.

This issue is not about riot control agents, often referred to as ‘tear gas’, which cause temporary irritation and pain, and have long been considered legitimate means for law enforcement. Put simply, riot control agents cause people to flee or to be temporarily compromised by the pain caused whereas “incapacitating chemical agents” cause people to collapse and become extremely vulnerable to suffocation and further injury.

What is the applicable legal framework?

In armed conflict there is an absolute prohibition on the use of toxic chemicals as weapons under the 1925 Geneva Protocol, the 1993 Chemical Weapons Convention, and customary international humanitarian law. This includes a prohibition on the use of riot control agents as a method of warfare.

Outside armed conflict, the diverse legal framework of the Chemical Weapons Convention, the 1972 Biological Weapons Convention, international human rights law, and international drug control law regulate any use of toxic chemicals as weapons for law enforcement.

Under the Chemical Weapons Convention, a specific provision is made for “law enforcement including domestic riot control” as one of the “purposes not prohibited”. However, there is ambiguity on which toxic chemicals may be used for this purpose, and there remain differing interpretations. Some take the view that only riot control agents are permitted. Others argue that an unspecified wider range of toxic chemicals may be used.

The Biological and Toxin Weapons Convention prohibits the development, production and stockpiling of biological and toxin weapons. Unlike the Chemical Weapons Convention, there is no provision permitting the use of any biological agents as weapons for law enforcement.

International human rights law safeguards the right to life by placing strict constraints on the use of force and weapons for law enforcement that are ‘potentially lethal’. Toxic chemicals described as “incapacitating chemical agents” must be considered as potentially lethal given current knowledge about their effects. In the scenarios in which these toxic chemicals have been proposed for use, as weapons to incapacitate groups of people, it is not possible to control their effects or to target them solely at the persons who are threatening life. In light of the certainty that bystanders will also come to harm, the questions to be asked are whether such a means is absolutely necessary to save the lives of those who are threatened and whether it is proportionate to the aim pursued.

The 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances place strict controls on some of the toxic chemicals that have been considered as weapons for law enforcement. They require that the production, manufacture, export, import, distribution of, trade in, use and possession of these controlled substances must be limited exclusively to “medical and scientific purposes”.

In summary, this overlapping legal framework leaves little room, if any, for the legitimate use of toxic chemicals – other than riot control agents – as weapons for law enforcement under international law.

¹ This document is not a report of the April 2012 ICRC Expert Meeting, which will be published separately.

What are the risks to life?

There is no such thing as a safe “incapacitating chemical agent” used as a weapon, and this will not change with foreseeable advances in science and technology. Sedative and anaesthetic chemicals are used safely as drugs in medicine. However, the use of these toxic chemicals as weapons to cause effective incapacitation of a group of people will inevitably cause deaths and serious injuries among some, including permanent disabilities and other long term effects.

This is because, in a tactical situation, when used against a group of people without their consent, it is not possible to provide the safeguards used in highly controlled medical environments. It is not possible to control the ‘dose’ of the chemical each victim receives, therefore risking overdose. Nor is it possible to make adjustments for wide variations in effects due to differences in age, weight, and health. It is extremely difficult, if not impossible, to provide the necessary immediate medical care including support for breathing, which is often impaired during anaesthesia.

The tactical utility of these toxic chemicals as weapons for law enforcement is also questionable. It is a common misconception that incapacitation can ever be instant. In a tactical situation it will take at least several minutes to cause complete incapacitation in all those targeted and so the use of toxic chemicals cannot immediately prevent aggressors from using force. Countermeasures, such as gas masks or specific antidotes, may also be available to aggressors but not to innocent bystanders.

What are the other potential risks, in particular to international law?

A major risk is the erosion of the historic prohibition of poisoning and the specific prohibition of chemical weapons set out in the Chemical Weapons Convention. With convergence of chemistry and biology this risk could extend to the Biological and Toxin Weapons Convention as well.

If weapons development continues then proliferation will be inevitable but unpredictable in nature. It will likely occur both among different forces within countries and among a growing circle of countries. It could be expected to extend to non-state and criminal groups. Use of these weapons, or demand for such use, may range from limited domestic law enforcement scenarios to wider military operations in which the boundaries between law enforcement and conduct of hostilities in armed conflict can become blurred.

Programmes to weaponise toxic chemicals for law enforcement are likely, by default, to establish a pathway for the application of advances in science and technology to the development of new chemical weapons. There is a risk that a range of toxic chemicals would eventually be weaponised with various adverse effects on human metabolism, consciousness, behaviour, and identity. Some could exploit this to focus on new highly “lethal” agents.

The development and use of toxic chemicals as weapons for law enforcement creates a ‘slippery slope’ that will increase the likelihood that chemical weapons could be reintroduced to armed conflicts. If acquired and used by special forces or military forces for law enforcement operations, it might generate an interest to use such means for law enforcement

within the context of an armed conflict, possibly even in the conduct of hostilities.

What are the policy choices for States?

There are four broad policy choices that can be envisaged. The first two assume it can be legitimate under international law to use certain toxic chemicals – other than riot control agents – as weapons for law enforcement. The second two choices can be taken independently of this legal assessment.

Continuing ambiguity: This is the current situation, where ambiguity remains on which toxic chemicals are permitted as weapons for law enforcement, and in which circumstances. State practice in response to unpredictable events will determine what is acceptable and the extent of the resulting risks.

Regulation: This approach would aim to set internationally agreed boundaries on the types and quantities of toxic chemicals and their means of delivery that would be considered acceptable as weapons for law enforcement, or at least to increase transparency in this regard, as a way of reducing risks. From a practical perspective it may not be possible to set meaningful boundaries on what is acceptable as there is no dividing line, on a technical basis, between “incapacitating chemical agents” and “lethal” chemical warfare agents.

Moratorium: This approach would involve States enacting a moratorium on toxic chemicals (other than riot control agents) as weapons for law enforcement. A moratorium would be a temporary measure to reduce the risks associated with continuing ambiguity. It could be agreed internationally or enacted by individual States or groups of like-minded States. It would lead either to prohibition or to regulation.

Prohibition: This approach would involve States enacting a prohibition on toxic chemicals (other than riot control agents) as weapons for law enforcement. It would clarify that only riot control agents would be used for these purposes. National prohibitions could be put into place without the need for international agreement. Ultimately an international prohibition could be agreed that either clarified an existing prohibition under international law or developed existing law to exclude current ambiguity.

What action is needed?

States that have been involved in these discussions now have the information required to make informed policy decisions. Leadership is needed from individual States – or a like-minded group – to take national policy decisions and promote them at the multilateral level.

At a time when attention is turning from completing chemical disarmament to preventing the re-emergence of chemical weapons, policy development on the issues raised here should be a high priority. In addition, the third Review Conference of the Chemical Weapons Convention in April 2013 provides an important opportunity to build and shape international consensus.

*International Committee of the Red Cross
Geneva, September 2012**

* For further information please contact the Arms Unit, Legal Division, International Committee of the Red Cross.