INTRODUCTION

ENFORCEMENT OF THE PROHIBITION OF CHEMICAL WEAPONS IN ITS WIDER PERSPECTIVE

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1. INTRODUCTION

The Chemical Weapons Convention is intended to be a verifiable comprehensive ban on chemical weapons as an entire category of weapons of mass destruction. Today there are 145 parties to the Convention. A further 29 States have signed it and they are, in accordance with Article 18 of the 1969 Vienna Convention on the Law of Treaties, under the interim obligation to refrain from any acts which would defeat the object and purpose of the treaty. Thus the conventional comprehensive ban on chemical weapons under any circumstances has nearly become a universal norm.

The key question remains, however: Is the ban enforceable? Could or would persons violating the ban anywhere, anytime be apprehended and punished? The ability to enforce a ban gives it its true meaning. Absent effective enforcement, universality remains a hollow accomplishment.

There are a number of factors in the equation for effective enforcement: national implementing legislation, the modalities of international cooperation and assistance, overcoming problems that can arise politically or constitutionally in trying to put the modalities into practice, as well as actual situations that are faced in the field in trying to prosecute offenders in an international context.

When specifically considering the enforcement of the ban on chemical weapons, one underlying thread should be kept clearly in mind: which norm is being enforced? The conventional norm has gone through several evolutions, each one formulating a stricter norm and each one gaining a greater number of parties. The number of parties to the Chemical Weapons Convention poses a good question for legal scholars to consider now: in the year 2002, what is the content of the customary norm?

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2. The 1993 Chemical Weapons Convention

The Chemical Weapons Convention represents a total ban. The definition is very complete: all toxic chemicals are considered to be a chemical weapon unless they are intended for a purpose not prohibited. Even the empty munitions, devices and equipment, if specifically designed for use in dispersal of toxic chemicals for harm to humans or animals, are banned. Besides its disarmament purpose, the Convention establishes a regime for non-proliferation as well: through the device of trade restrictions, States Parties are under the obligation to control, in varying degrees, the toxic chemicals and their precursors. Transfers of such chemicals to States not Party to the Convention is banned (for the chemicals of most serious concern) or is only possible under strict conditions. In its Article 1, the Chemical Weapons Convention, provides:

1. 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.

The words “never under any circumstances” mean that the Convention applies during peace and during armed conflict, be that international or internal. No reservations are permitted to the Articles of the Convention.

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2 Article II(1) of the Convention.
3 Article II(1)(b) and (c) of the Convention.
4 The Chemical Weapons Convention, Article 1 (General Obligations) provides:

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   (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.

2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party, in accordance with the provisions of this Convention.

4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.


4 Article XXII of the Convention.
3. The Preceding Instruments

For the few States not Party to the Convention (19 States never signed and an additional 29 States have signed but not ratified), the preceding instruments are binding upon them since those instruments are now recognized as forming part of customary international law. The preceding instruments are the 1899 Hague Declaration⁴ and Hague Regulations,⁵ the 1907 Hague Regulations⁶ and the 1925 Geneva Protocol.⁷ The Geneva Protocol is the widest in scope. Expanding upon the preceding instruments, the parties to the Geneva Protocol agreed to accept the prohibition on the “use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices” but also to extend the prohibition “to the use of bacteriological methods of warfare.” As of 2002, there are 132 parties to the Geneva Protocol. The instrument has a number of weaknesses, however. First, it only applies during war. Second, reservations are permitted, and the effectiveness of the prohibition has been reduced by the fact that over 40 parties to it made their adherence subject to a reservation. In essence, the reservation specified that the Protocol would only be binding in respect of the other parties and would cease to be binding in regard to any State whose forces or whose allies failed to respect the prohibition.⁸ Thus the Geneva Protocol in effect constituted only a prohibition against first use in war. The Parties need to continue to be prepared to retaliate justifies the continued development, production and stockpiling of chemical weapons.

4. The Customary Norm

In the North Sea Continental Shelf cases (1969 ICJ Reports 3) the International Court of Justice first recognized the co-existence of identical rules in treaty law and customary law. As it later stated in the Case Concerning Military and Paramilitary Activities in and against Nicaragua, “To a large extent [the North Sea Continental Shelf cases] turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to ‘crystallize’, or because it had influenced its subsequent adoption.” (1986 ICJ Reports 14, at para 177). Examining treaty and customary law again in the Nicaragua case, the Court rejected the argument that customary principles are subsumed or supervened by treaty law and went on to recognize that parallel treaty and customary obligations could be identical or different.

Since States are separately bound by the rule under customary international law, the question then arises: What is the content of the customary norm today? There is no doubt that the prohibition of use of chemical weapons exists as a principle of customary law: The

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⁴ Declaration II Concerning Asphyxiating Gases, annexed to the 1899 Hague Convention, 26 Martens (2nd) 998; UKTS 32 (1907); IAJIL Supp. 157.
⁵ Convention II with Respect to the Laws and Customs of War on Land and annex, Regulations Respecting the Laws and Customs of War on Land, 26 Martens (2nd) at 949; UKTS 11 (1901); I AJIL Supp. at 134.
⁶ Regulations Concerning the Laws and Customs of Land Warfare, annexed to the 1907 Hague Convention regarding the laws and customs of land warfare (Hague IV).
⁷ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, XCI LVNTS (1929) no. 2138.
⁸ Following conclusion of the Chemical Weapons Convention, a number of States have in recent years withdrawn their reservations.
value of identifying the rule, distinct from the treaty obligation, is twofold. First, it is applicable to all States, even those which have not become party to the treaty. Second, parties to the treaty may not opt out of adhering to the rule by withdrawing from the treaty or by exercising their right to terminate or suspend the operation of the treaty on the ground of the violation by another party of a “provision essential to the accomplishment of the object or purpose of the treaty.”

Identifying the scope and content of the customary rule thus warrants significant attention. This is not a simple task since, as seen above, the rule evolved and expanded over time as it was interwoven through successive treaties that crystallised it and developed it further. “Custom” has been described as “an authentic expression of the needs and values of the community at any given time.... It reflects the consensus approach to decision-making with the ability of the majority to create new law binding upon all...” The two elements of international custom, as reflected in Article 38(b) of the Statute of the International Court of Justice (“general practice accepted as law”) are state practice and opinio juris. Opinio juris constitutes the psychological element by which States, in carrying out their practice, do so not out of courtesy or morality but because they believe such practice is consistent with law. As indicated in the 1925 Geneva Protocol, the use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilised world. The Geneva Protocol has long been considered to be declarative of customary international law. The language of the Geneva Protocol was confirmed in the most recent multilateral statement of the content of customary international law in respect of the prohibition of chemical weapons, i.e. the Statute of the ICC, adopted by the United Nations Diplomatic Conference of Plenipotentiaries (with delegations from 160 States participating). Article 8, paragraph 2(b), provides as follows:

2. For the purpose of this Statute, “war crimes” means: ...
   (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
      (xvii) Employing poison or poisoned weapons;
      (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; [Emphasis added]

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12 In 1969 a majority of the UN General Assembly adopted the Resolution 2013 A (XXIV) expressing the view that the Protocol embodied the generally recognised rules of international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare, regardless of any technical developments. In particular, the resolution declared as contrary to the rules of international law the use in international armed conflicts of: (a) any chemical agents of warfare — chemical substances, whether gaseous, liquid or solid — which might be employed because of their direct toxic effects on man animals or plants. See: J. Goldblat, Arms Control: A Guide to Negotiations and Agreements 91 (1994).
The definition of the crime as set forth in the ICC Statute contains the limitation that it is applicable only in international or armed conflict. Article 120 provides that no reservations may be made to the Statute, which expands the prohibition beyond first use to any use at all in international or armed conflict. Is the content of the customary rule limited to the prohibition in international armed conflict? It could be argued that it is not. The ICC Statute is reflective of the consensus that could be reached by States in respect of crimes for which they were willing to confer jurisdiction upon a permanent international criminal court. In their own national jurisdiction, or before an ad hoc tribunal, States may be willing to view the crime more widely.

What is the content of the customary rule in respect of internal armed conflict? State practice consists not only of “external conduct” in respect of other states, but also the state’s internal conduct, including its national legislation, judicial decisions, diplomatic communications, government memoranda, and unilateral declarations (e.g., ministerial statements in Parliaments and elsewhere). In 1995, the International Tribunal for the former Yugoslavia (“ICTY”), in an obiter dictum, examined state practice and opinio juris and determined that the customary rule prohibits the use of chemical weapons by a State on its own population. Using the most recent, publicised allegation of chemical weapons use (the 1998 alleged chemical attack by Iraq on the Iraqi village of Halabja), it examined the reaction of the Security Council and the international community to that attack and concluded:

It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals — a matter on which this Chamber obviously cannot and does not express any opinion — there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.

Where does the Chemical Weapons Convention fit into this? In its most recent codification, the prohibition of chemical weapons constitutes the object and purpose of the most innovative and complex international verification regime ever, encompassing reporting obligations, intrusive international inspections, and trade restrictions. However, the Chemical Weapons Convention is a novelty in the field of international disarmament and arms control law. At this point in time, what is the content of the codified and crystallised rule and what is developing under the Convention as emergent customary law? As adherence to the Convention becomes ever wider, over time its impact on custom will become markedly significant.

Some of the 1993 Chemical Weapons Convention is clearly codification of existing customary international law. The Convention sets forth the prohibition in terms of “never under any circumstances” (Article 1), comprising peacetime, armed conflict (international or internal), acts of State and acts of individuals (thus covering terrorist acts). The reactions of the international community to the incidents of alleged use, whether international armed conflict (Iran-Iraq war), internal armed conflict (Halabja), or peacetime terrorism (Tokyo subway incident) have all been negative. It is clear that opinio juris does not condone use in

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19 Prosecutor v. Tadić, Case no. IT-94-1-AR72, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (2 October 1995), para. 124.
any circumstances and any incidents of state and individual practices have been seen as shocking, unlawful acts.

However, the Chemical Weapons Convention sets forth much more than the prohibition of use. It also prohibits development and stockpiling and requires destruction of existing stockpiles (all of which are a logical consequence of a total ban on use). It prohibits the use of riot control agents as a method of warfare (to close a near loophole). Its non-proliferation element (the Article I obligation not to “assist, encourage or induce, in any way, anyone”) and Article VI obligations concerning dual-use chemicals) prescribes trade restrictions against States not Party (implying export/import controls). Its extensive verification regime involves intrusion into State sovereignty by eliminating the right of States to refuse entry to international inspectors. Article XXII permits no reservations to the Articles of the Convention, thus making these non-derogable norms.

To what extent are those additional treaty obligations developing the content of customary international law? Much will depend on the extent to which the Chemical Weapons Convention is considered to be a law-making treaty.17 The process for the development of custom under a treaty has been stated by the International Court of Justice in the North Sea Continental Shelf cases18 in the following terms:

“... a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice, and ... this rule, being now a rule of customary international law binding on all States ...” (para. 70).

“... involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognised methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained” (para. 71).

The Court indicated criteria for state practice forming a rule of customary international law to be (a) the amount of time the rule has been adhered to; (b) the number and type of states adhering to the rule (especially states having an interest affected by the rule); and (c) uniform state practice. In this respect it stated:

“...Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive

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18 North Sea Continental Shelf cases (Germany v Denmark; Germany v the Netherlands), 1969 ICJ Reports 3.
and virtually uniform in the sense of the provision invoked — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved” (para. 74).

Practice under the Chemical Weapons Convention has undoubtedly been short (since 1997), however, the number of States is large and includes all declared chemical weapons possessor States and nearly all States having chemical industry relevant to the Convention. As consensus-building and interpretation continues, the decisions of the organs of the treaty-implementing body (the OPCW), are drawing state practice into greater uniformity. Over time this aspect may become the most significant feature.

An interesting topic for further research would be an examination of state practice and opinio juris in respect of: (a) export/import controls; and (b) intrusive inspections. Principally under the Chemical Weapons Convention (due to the wide adherence to this innovative instrument), but also supported elsewhere, both are emerging as customary norms. The other existing regimes banning weapons of mass destruction (e.g., the 1972 Biological Weapons Convention and the rolling text of its proposed Protocol), the 1999 Landmines Convention and arms control regimes (the 1970 Nuclear Non-Proliferation Treaty, the voluntary Missile Technology Control Regime) imply export controls. There is also, for example, an informal voluntary arrangement, dating back to 1984, among States, to implement strict export controls on a list of dual use substances and equipment. Under modern treaty law, bans or restrictions on weapons of mass destruction are linked with a non-proliferation element in order to make the ban effective. Reactions by the international community to use of chemical weapons, or threat of use, have also prompted strict export controls. For example, the Security Council resolutions during the Iran-Iraq war called upon all States to continue to apply, to establish, or to strengthen strict control of the export of chemical products serving for the production of chemical weapons, in particular to parties to a conflict, when it is established or there is substantial reason to believe that they have used chemical weapons in violation of international obligations. Also, the Chapter VII ceasefire resolution in the 1991 Gulf War set forth an absolute prohibition on exports to Iraq of all components, means of production, technology or know-how related to weapons of mass destruction and created the binding obligation upon all States to maintain national controls and procedures to ensure compliance with that prohibition. Given this practice and the wide adherence to the Chemical Weapons Convention, under emergent customary international law, will a State’s failure to prevent the export of chemical weapons constitute a breach, leading to State responsibility and individual criminal

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20 Convention on the Prohibition of Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.
21 Convention on the Prohibition of the Use, Stockpiling, Production and Transport of Anti-Personnel Mines and on Their Destruction.
22 Treaty on the Non-Proliferation of Nuclear Weapons, entered into force 5 March 1970.
responsibility for the perpetrators? At first glance, one would think not. But today, the ICTY is prosecuting individuals for violations of customary norms. Time will tell.

The second aspect is the elimination of the right of a State, under the Chemical Weapons Convention, to refuse intrusive international inspections. Is this simply a treaty obligation or is there state practice to support this rule outside the treaty regime? Two recent examples are the United Nations missions sent to investigate the alleged use of chemical weapons in Iran and Iraq during their war 1980-88 and UNSCOM, created under the 1991 Security Council ceasefire resolution to uncover and destroy Iraq’s weapons of mass destruction capability, including its chemical weapons capability. It seems the international community views independent international verification to be warranted in such cases.

Two additional aspects merit further discussion and research would be (a) the practical effect of a State’s right to withdraw from the Chemical Weapons Convention, and (b) the reasons why the small remainder of States have not adhered to the Convention (are they opposed to the ban or are there other reasons unrelated to the ban?).

On the first point, it could be argued that the right of withdrawal, termination or suspension of the treaty would only absolve the State from its obligations to contribute to the budget of the treaty’s implementing body (the OPCW), its obligations to report on its relevant chemical activities to the OPCW, and its obligation to accept OPCW inspections. Article XVI(3) specifically provides that “The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law, particularly the Geneva Protocol of 1925.” And the States not Party to the Convention? The majority of them have not adhered to the Convention for two reasons: (a) they are non-possessor States with little or no relevant chemical industry whose governments attribute little political priority to adhering to the Convention; or (b) they are States which on principle refuse to adhere to an inequitable treaty that requires renunciation of chemical arsenals but leaves nuclear arsenals untouched, particularly since Israel is not yet a State Party.26 It is perhaps only the smallest minority which actually believe that they should retain the right to use chemical weapons. It is significant that 14 of the States which have neither signed nor ratified the Chemical Weapons Convention participated in the Conference of States Parties to the Geneva Protocol and Other Interested States, held in Paris in 1989, and did not block consensus on the Final Declaration calling for a comprehensive ban on chemical weapons.

War crimes are considered to form part of jure gentium, and a few authors have even gone so far as to propose that the prohibition of use of chemical weapons explicitly forms part of jure gentium. Two elements must be present for a crime to be jure gentium: (1) the crime must threaten the peace and security of humankind; and (2) the crime must shock the conscience of humanity.27 The advantage of recognising the norm as a norm of jure gentium is that it is non-derogable by all States under any circumstances (peace or war); the duty to prosecute or


extradite (aut dedere aut judicare) becomes applicable; any statute of limitations become inapplicable; the theory of universal jurisdiction applies; and States have the obligation erga omnes not to grant impunity to the violators.28 While it is clear that the prohibition against chemical weapons is non-derogable, it could be argued that clearer determination on the part of States to prosecute the perpetrators of the use of chemical weapons is necessary before it can be considered to be a jus cogens crime. Historically, such determination is not evident, as will be seen further below. “The gap between legal expectations and legal reality,” as Professor M. Cherif Bassiouni puts it,“ is omnipresent in cases of chemical weapons use. Perhaps the inclusion of the crime (albeit narrow in scope) in the Statute of the ICC is the first step towards its establishment as a jus cogens crime.

5. **Horizonal (Indirect) Enforcement**

The 1899 Hague Declaration and Regulations, the 1907 Hague Regulations and the 1925 Geneva Protocol are all silent on the manner in which they are to be enforced. As they are applicable in “war”, they form part of international humanitarian law which States normally must make provision for in their military penal codes. It is uncertain to what extent States have done so. In contrast, the Chemical Weapons Convention makes specific provision under Article VII that States must “adopt the measures necessary” to: prohibit (including penal legislation), “not permit” (i.e., enforce), and extend such penal legislation to prohibited acts undertaken anywhere by natural persons possessing its nationality. States Parties are thus under the obligation to prosecute and punish in their national jurisdictions. This is the indirect way of enforcing international law and is termed “horizontal enforcement”.

Mueller and Besharov have succinctly summarised horizontal enforcement and the problems inherent in it:

The advantage of enforcing [international criminal law (ICL)] on the national level is obvious: the entire machinery of municipal criminal law can be used for enforcement purposes. The courts’ edicts can be easily enforced. Sentences can be readily executed.

But politics do play their role under such a scheme as well. Depending on political exigencies, there may never be an indictment in the first place, apart from the fact that the locally applicable penal code or code of criminal procedure may not envisage such a jurisdiction. The world simply cannot force national legislatures to include the totality of ICL — and jurisdiction — within the ambit of municipal law.29

The two main obstacles to horizontal enforcement can thus be said to be the following: (1) possible political unwillingness to prosecute; and (2) the necessary criminalisation of the act in order to permit prosecution.

Enforcing prohibitions against diversions of chemical agents can only be possible if the export controls are in place to begin with. The greatest barrier of all to enforcement may be the slow pace, or the failure, of States to enact the requisite implementing legislation.

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28 *Id.*, at 39.
29 *Id.*, at 40.
The OPCW Conference of the States Parties has noted that only 38% of States Parties have complied with their obligation to notify the measures they have taken under Article VII.\textsuperscript{31} If the remaining 62% of the States Parties all enjoy a monist legal system, one could argue that the Convention is enforceable in their jurisdictions. Research into the legal systems of those 90 States is beyond the scope of this chapter, but it could safely be assumed that there are at least a number of dualist systems among them. Failure to enact implementing legislation does not absolve the State of its treaty obligation but it will impair its ability to prosecute individuals.

To rule out the possibility that criminals might evade the Chemical Weapons Convention regime by moving their activities to the territory of a State not Party, Article VII(1)(c) requires States Parties to extend their penal legislation covering the prohibitions to “any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.” However, less than 15% of States Parties have notified the OPCW that they have done this.\textsuperscript{32} This obligation may be problematic for many States Parties which do not recognise the principle of extraterritorial jurisdiction.\textsuperscript{33} Even if the penal legislation is extended extraterritorially, it will only be done so in respect of natural persons, leaving open the problem of transnational corporations which have manufacturing operations in another (State not Party) country.\textsuperscript{34} During the negotiations of the Chemical Weapons Convention, the United States representative reported that any corporation incorporated under United States law wherever its activities took place would be prohibited from aiding a State not Party in chemical weapons production.\textsuperscript{35} In the United States Chemical Weapons Convention Implementation Act of 1998, Section 229 provides:

229. Prohibited activities ...

(c) Jurisdiction. Conduct prohibited by subsection (a) is within the jurisdiction of the United States if the prohibited conduct:

(1) takes place in the United States;

(2) takes place outside of the United States and is committed by a national of the United States;

(3) is committed against a national of the United States while the national is outside the United States; or,

\textsuperscript{35} Conference on Disarmament document CD.PV.42.