



Prohibiting Tear Gas for Riot Control with the Chemical Weapons Convention: Reaching Beyond the Battlefield?

Nivia¹

¹Department of International Law, Universitas Gadjah Mada, E-mail: nivia@mail.ugm.ac.id

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Corresponding Author:

Nivia, E-mail:

nivia@mail.ugm.ac.id

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Abstract

Chemical Weapons Convention 1993 prohibits tear gas as a method of warfare but permits its use as a law enforcement tool, particularly for domestic riot control. Such normative provision results in massive violations of human rights towards civilians caused by the use of tear gas in several states. This research analyses tear gas historically and compares its similar characteristic with chemical weapons in general to see whether tear gas shall be banned in all contexts like others chemical weapons. Through normative research and qualitative analysis, this research shows that there is no fundamental difference between tear gas and chemical weapon. It cannot be separated from its characteristic which is also indiscriminate and caused unnecessary suffering, even against non-rioter. That being said, international law shall treat those instruments equally in a way that totally bans both of them

1. Introduction

Contemporary democracy practice exercised in the form of free speech in the public sphere often clashes with State's interest to preserve political stability as well as public order. As a response, State with its security forces, police, conducts various security measures, including utilizing chemical substances, particularly tear gas, as an instrument to control crowds or as Riot Control Agent (RCA).¹ Along with the increasing wave of mass protests, tear gas has been used significantly.² The widespread movement of justice advocacy such as public response to Hong Kong's extradition to mainland China used to encounter tear gas repeatedly. It is because such an instrument

¹ The term tear gas and Riot Control Agent (hereinafter RCA) will be used interchangeably in this research.

² Natasha Williams, Maija Fiorante, and Vincent Wong, "The Problematic Legality of Tear Gas Under International Human Rights Law," accessed November 12, 2022, <https://ihrp.law.utoronto.ca/sites/default/files/media/Legality%20of%20Teargas%20-%20Aug25%20V2.pdf>.

is deemed very effective as well as the most humane way to disperse crowd since it has non-lethal³ nature compared to others, i.e. rubber or real bullet.

Scientifically, tear gas referred to various types of chemical agents whose function is to activate pain-sensing nerves that produce eye, nose, skin, throat, and lung irritation besides lacrimation (watery eyes).⁴ Generally, these chemical elements are non-lethal. Nonetheless, tear gas exposure in certain conditions and periods may cause blindness, glaucoma, sudden death caused by chemical burns in lung and throats, and respiratory arrest.⁵ These were proved by several incidents, such as the death of 37 people in Egypt 2013 caused by respiratory failure after tear gas was released by the police,⁶ the death of 3 people in Palestine 2011 because of tear gas exhalation,⁷ and the death of 134 people at Kanjuruhan Stadium, Indonesia, in 2022 as the consequence of tear gas deployment in an isolated room.⁸

Even though it's commonly used as a national law enforcement tool, tear gas has long a history within international humanitarian law as one of the prohibited chemical weapons. Starting from the utilization of tear gas (ethyl bromoacetate) as a chemical weapon by France in the war against Germany on August 1914, further, approximately 12.000 tons of tear gas has been deployed during World War I.⁹ As a counterattack for France's chemical formula, Germany conducted experiments on several other gases with far more deadly nature, such as phosgene and chlorine¹⁰ that transformed the war's landscape into chemical warfare. As a result, not less than one million soldiers had been the victims and ten percent out of them were dead.¹¹ Not only resulting in death, the chemical weapon also giving more suffering to soldiers, exacerbate the lethal force of conventional weapons, and cause deep psychological infliction.¹²

Collective memory regarding the horrible effects of chemical weapons encouraged States, under the auspices of the League of Nations, convened the International Conference on the Control of the International Trade in Arms, Munitions, and

³ Casey Morin, "Next Steps in Chemical Weapons Control and Protecting the Right to Protest: Improvements to the Legal Regime Controlling Tear Gas," *Fordham International Law Journal* 44, no. 5 (2021): 1269.

⁴ Jennifer L Brown et al., "Technology Assessment: Tear Gas Safety and Usage Practices," *Journal of Science Policy & Governance* 18, no. 1 (2021): 1.

⁵ Centers for Disease Control and Prevention, "Facts About Riot Control Agents," accessed November 13, 2022, <https://emergency.cdc.gov/agent/riotcontrol/factsheet.asp#:~:text=Long%2Dlasting%20exposure%20or%20exposure,to%20the%20throat%20and%20lungs>.

⁶ Morin, op.cit.,p.1276.

⁷ *Ibid.*

⁸ Mahinda Arkyasa, "Kanjuruhan Stadium Incident Death Toll Rises to 134," accessed November 13, 2022, <https://en.tempo.co/read/1647835/kanjuruhan-stadium-incident-death-toll-rises-to-134>.

⁹ James D Fry, "Gas Smells Awful: U.N. Forces, Riot Control Agents, and the Chemical Weapons Convention," *Michigan Journal of International Law* 31, no. 3 (2010): 481.

¹⁰ *Ibid.*

¹¹ Vladimir Pitschmann, "Overall View of Chemical and Biochemical Weapons," *Toxin (Basel)* 6, no. 6 (2014): 1763.

¹² *Ibid.*

Implements of War 1925 (Geneva Conference)¹³ and generated the first international law instrument that bound most of existing States back then, i.e. Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Gas Protocol). However, the protocol that was signed by 38 States and ratified by 146 States doesn't explicitly mention which types of chemical elements are prohibited so it constitutes a degree of flexibility for States to interpret whether tear gas or RCA is qualified as a prohibited weapon. Such legal gap was utilized by the United States (US) to deploy an enormous amount of tear gas in Vietnam War at the end of 1960¹⁴ both for the combatants and domestic American citizens which took protest for the involvement of US in Vietnam War.¹⁵

The term RCA or tear gas finally appeared explicitly in the next international agreement, i.e. Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction (Chemical Weapon Convention 1993). This convention stands as a complement and reaffirmation of the principle and purpose of the Geneva Gas Protocol 1925.¹⁶ Nevertheless, instead of completely banning production, stockpiling, and use of RCA, this convention distinguishes the definition of RCA and chemical weapons. This differentiation brings a legal impact which is the different treatment between RCA and chemical weapons. The use of chemical weapons is totally banned, whereas the RCA is only partially banned for methods of warfare. Hence, RCA is still can be used as a law enforcement tool, including domestic riot control.¹⁷ Such clause raises a controversy by allowing the government to use a tool that is prohibited by international humanitarian law against its own civilian.

Several researches have been conducted on the matter such as tear gas use from human rights perspective by Natasha Williams, et.al.¹⁸ and the international humanitarian law analysis on tear gas by George Bunn¹⁹. However, this article will move further from human rights and humanitarian law perspective into comprehensive analysis relating to the normative development and how this development impacts current use of tear gas.

In order to solve the problem above, this paper will evaluate as well as reconstruct the concept of tear gas utilization for domestic law enforcement on Chemical Weapon Convention 1993. After the introduction, the Writer will proceed to analyze existing conventions on tear gas as a chemical weapon. The next part will discuss the dynamics of States' interpretation of tear gas in those previous conventions followed by the

¹³ Fry, op.cit.,p. 482.

¹⁴ Peter D Trooboff, "Weapons of Warfare," *International Law Studies* 70, no. 1 (1975): 191.

¹⁵ John Darnton, "Antiwar Protests Erupt Across U.S.," accessed November 14, 2022, <https://www.nytimes.com/1972/05/10/archives/antiwar-protests-erupt-across-us-columbia-rally-ends-again-in-clash.html>.

¹⁶ Vide Chemical Weapon Convention 1993 preamble: "Recognizing that this Convention reaffirms principles and objectives of and obligations assumed under the Geneva Protocol 1925, and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction signed at London, Moscow and Washington on 10 April 1972."

¹⁷ Vide Art. II par 9 *jo.* Art. IV CWC 1993.

¹⁸ Williams, et.al, loc.cit.

¹⁹ George Bunn, "Banning Poison Gas and Germ Warfare," *Wisconsin Law Review* 1, no. 2 (1969): 375.

political background of Chemical Weapon Convention 1993. Finally, it will present Writer's standpoint regarding the misconception of the differentiation between tear gas and other chemical weapon as well as its implications.

2. Research Method

This research is normative legal research. According to Peter Mahmud Marzuki, normative legal research prescriptively describes the law as an object in coherence between legal norm and legal principle, legal rules and legal norm, as well as individual behavior and legal norm.²⁰ It is done by analyzing literature or secondary data. Therefore, the sources are primary legal data and secondary legal data. The primary source of law includes international law sources, i.e. The Hague Declarations (IV,2) Concerning Asphyxiating Gases 1899, Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, as well as The Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction. The secondary source includes scholarly writings or reports (including books, journal articles, reports, among others) that will be used to elaborate and understand further what the primary source says.

3. Result and Discussion

3.1 Tear Gas as Part of Chemical Weapon in International Law

In general, there are at least three primary international instruments governing and reflecting States' perspectives on the use of gas as a chemical weapon. Those are The Hague Declarations (IV,2) Concerning Asphyxiating Gases 1899, Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Gas Protocol 1925), and The Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction (the Chemical Weapons Convention 1993). These three instruments are still in force until this day and complement each other. The Hague Declarations (IV,2) Concerning Asphyxiating Gases 1899 is an independent instrument in the form of States' declarations. Meanwhile, although both Geneva Gas Protocol 1925 and Chemical Weapon Convention 1993 are stand-alone document, in Chemical Weapon Convention 1993's preamble, it is firmly stated that the CWC 1993 is complementary to Geneva Gas Convention 1925.²¹

First, the Hague Declarations (IV,2) Concerning Asphyxiating Gases 1899. The Hague Declarations (IV,2) 1899 is an initial instrument that regulate the use of poisonous weapons and demonstrate a customary rule between States in prohibiting poison and other materials which caused unnecessary suffering.²²The Declaration prescribed that State Parties agreed to abstain from the use of projectiles that contained the diffusion of

²⁰ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2005), p. 119.

²¹ See The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the Chemical Weapons Convention 1993).

²² Lassa Oppenheim, *International Law: Disputes, War and Neutrality*, 7th ed. (Pennsylvania: D. McKay, 1955), 342.

asphyxiating or deleterious gases.²³ Moreover, The Declaration is only applicable to the war between Contracting Powers.²⁴ Thus, if there are any States that are not part of the Contracting Parties intervening in the war, this Convention ceases to be binding.²⁵ The substance of this declaration then formalized to article 23(a) and (e) of The Hague Convention (II) with Respect to the Laws and Customs of War on Land 1899: “Besides the prohibitions provided by special Conventions, it is especially prohibited: (a) to employ poison or poisoned arms... (e) to employ arms, projectiles, or material of a nature to cause superfluous injury.”

Second, Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Gas Protocol 1925). Initiated in Geneva Conference 1925, Geneva Gas Protocol 1925 had been the first international norm relating to a chemical weapon which still in force and binding on 146 States.²⁶ The protocol laid down basic principles and purpose by prohibiting gas that has asphyxiating or poisonous nature and other weapons with similar characteristics in war. Nevertheless, there was a debate on the range of the Geneva Gas Protocol on non-lethal chemical substances, such as tear gas. This debate is stirred by the terminological differentiation between official text in English and translated versions in France.

In English, the Protocol prohibits “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices.” The phrase “or other gases” reflected a broad scope which maybe include tear gas.²⁷ Meanwhile, in France, that phrase is slightly changed into “gaz asphyxiantes, toxiques ou similaires.”²⁸ “Similaires” means similarity which in turn narrows the Protocol’s scope only against gases that have identical effects (lethal) so it doesn’t encompass irritants like tear gas.²⁹ In the third section, this Paper will depict how each phrase was exploited by States in pursuance of their political interest.

Third, the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction (the Chemical Weapons Convention 1993). Chemical Weapon Convention 1993 (CWC 1993) accommodates a broader and more rigid regulation about the destruction, conversion, as well as verification of weapons and chemical weapons production means. The Convention explicitly states its purpose to effectively destroy the development, production,

²³ The Contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.

²⁴ The Present Declaration is only binding on the Contracting Powers in the case of a war between two or more of them.

²⁵ It shall cease to be binding from the time when, in a war between the Contracting Powers, one of the belligerents shall be joined by a non-Contracting Power.

²⁶ International Committee of the Red Cross, “Protocol for the Prohibition of the Use of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925,” accessed November 14, 2022, <https://ihl-databases.icrc.org/en/ihl-treaties/geneva-gas-prot-1925>.

²⁷ R R Baxter and Thomas Buergenthal, “Legal Aspects of the Geneva Protocol of 1925,” *The American Journal of International Law* 64, no. 5 (1970): 855.

²⁸ *Ibid.*, p. 856.

²⁹ *Ibid.*

acquisition, retention, stockpiling, transfer, and use of chemical weapons.³⁰ In CWC 1993, for the first time tear gas, which was referred to as Riot Control Agent (RCA), was regulated. Article II distinguishes the definition between chemical weapons³¹ and RCA. RCA is defined as chemical substances not listed in a Schedule, which can rapidly in human sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.³²

Article I Paragraph 5 regarding General Obligations determined that State Parties are prohibited to use RCA as a method of warfare. Besides, Article II Paragraph 9 precisely qualifies RCA for law enforcement including domestic riot purposes into Purposes Not Prohibited Under This Convention³³ so that tear gas still be used for law enforcers either in domestic or international sphere. Such rules allowing police to use tear gas in the national law enforcement context.

3.2 States Interpretations Towards International Law Instrument on Tear Gas as Chemical Weapon and Law Policy Behind Chemical Weapon Convention 1993

Principally, the prohibition of chemical weapons because of suffering caused by it has been international customary law, particularly, after reaching its culmination point subsequent to World War I. Citing President Roosevelt at the beginning of World War II that the utilization of poisonous matter has been "outlawed by general opinion of civilized mankind".³⁴ However, when it came to tear gas or RCA, every state has a variety of perspectives on the matter.

The history of chemical weapon regulation that began with The Hague Declarations (UV,2) 1899 gave rise to a problem in practice as a result of limitative wording. Noting on previous analysis, The Declaration affirms states' consensus to not use "**projectiles the sole object** of which is the diffusion of **asphyxiating or deleterious gases**". France

³⁰ *Vide Preamble Chemical Weapon Convention 1993.*

³¹ Chemical Weapons" means the following, together or separately:

- (a) 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;
- (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;
- (c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

³² *Vide Article II Paragraph 7 "Riot Control Agent" means: Any chemical not listed in a Schedule, which can produce rapidly in human sensory irritation or disabling physical effects which disappear within a short time following termination of exposure*

³³ "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;
- (d) Law enforcement including domestic riot control purposes

³⁴ George Bunn, "Gas and Germ Warfare: International Legal History and Present Status," *N. A. S. Symposium* 65, no. 1 (1970): 256.

in World War I deployed tear gas and interpreted it in a way that tear gas is not “asphyxiating or deleterious” therefore it was legal to use.³⁵ Likewise, Germany on the first fatal attack in Ypres 1915 used chlorine and expressed that it was not in the form of a projectile but a large cylinder.³⁶ The Declaration also failed to gain support from the United States. Navy Captain Mahan, a US representative back then, express US refusal and submitted that chemical weapon is a new weapon that have not developed yet and besides there are no proof that it's more lethal than others.³⁷ As a consequence, The Hague Declaration was not able to prevent chemical warfare in World War I.

Responding to such a normative gap, in 1925, the United States proposed a draft on chemical and biological weapon prohibition that was supported and ratified by 30 States,³⁸ i.e. Geneva Gas Protocol 1925. Even though the US had a crucial role in its formulation and signation, the US itself didn't ratify The Protocol as Senate refused to do so. The absence of US ratification should be analyzed through US domestic political context. There was massive political lobbying from U.S. Army's Chemical Warfare Service (CWS), the chemical industry, and veteran to reject Geneva Gas Protocol 1925's ratification.³⁹ CWS was part of the US national military which functioned to investigate, develop, manufacture, and procure poisonous chemical substances and other gases for national defense.⁴⁰ For CWS and the chemical industry back then, the existence of Protocol will hold chemical weapon market. Thus, both of them conducted propaganda during Senate debate by spreading narration that for the sake of civilization, humanity, and national security, the Senate must refuse to ratify chemical weapon prohibition.⁴¹ Against those backgrounds, Mr. Hugh Gibson, a US representative, released an official statement that the US didn't ratify for two main reasons.⁴² First, how does it even possible for government to prohibit the use of chemical weapons, mainly tear gas, in a war context, whereas tear gas itself has been commonly used in peaceful context towards civilians?⁴³ Secondly, even though it's caused contemporary inconvenience, several chemical substances don't resulted in manifest suffering or permanent disability. Hence, those substances are more humane than other weapons used in emergency situations.⁴⁴

The refusal to ratify Protocol institute friction which encouraged its use in Vietnam War on the basis of humanitarian intervention. In the beginning, it's indeed directed towards helping humanitarian missions like withholding small-arms fire against helicopters during rescue periods as well as separating combatants from non-combatants amid the utilization of non-combatants as human shields.⁴⁵ However, as time goes by, such an

³⁵ *Ibid.*,p. 253.

³⁶ *Ibid.*

³⁷ McElroy R J, “The Geneva Protocol of 1925,” in *The Politics of Arms Control Treaty Ratification* (New York: Palgrave Macmillan, 1991), 126.

³⁸ *Ibid.*, p.125.

³⁹ *Ibid.*, p. 146.

⁴⁰ Al Mauroni, “The U.S. Army Chemical Corps: Past, Present, and Future,” accessed November 16, 2022, <https://armyhistory.org/the-u-s-army-chemical-corps-past-present-and-future/>.

⁴¹ McElroy, *op.cit.*,p.149.

⁴² Baxter, *op.cit.*,p. 863

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ George Bunn, “Banning Poison Gas and Germ Warfare,” *Wisconsin Law Review* 1, no. 2 (1969): 375.

instrument was used as a force multiplier and defense. To illustrate, tear gas was often deployed to bunker, tunnels, and caves so the inhabitants inside, including civilians, scattered outside.⁴⁶ While they were scattering, the military will use explosive conventional weapons.⁴⁷ Hence, individuals who were getting outside their shelter because of tear gas would be the next victims of conventional weapons.⁴⁸

Such facts demonstrate that a partial ban on tear gas potentially triggers a broader abuse caused by the difficulty to determine in what condition tear gas is permitted. Interestingly, though was not bound by The Protocol, the US never stated that the use of RCA in Vietnam War was an effect of its detachment from The Protocol, but instead, the US insisted that RCA was not part of prohibited chemical substance. Moreover, it added, the US fully supported the purpose of Protocol.⁴⁹ In 1966, the US even supported and sponsored General Assembly Resolution which asserted “.. called for strict observance by all states of the principles and objectives of the Protocol.”⁵⁰ This action reflects US inconsistency towards its official statement in Protocol’s ratification process while its representatives worried that Protocol would entirely stop the use of RCA which was deemed as a more humane weapon. In this stance, the US indirectly admit that Protocol encompassed chemical weapons such as RCA. However, after Vietnam War, the US turned around its stance by saying Protocol doesn’t include RCA.

Consistent undertaking to ratify Protocol reappeared in President Richard M. Nixon's presidential term and succeed in 1975 under President Gerald Ford.⁵¹ In spite of this achievement, ratification was carried out with a note. As a compromise to secure Senate’s support, President Ford issued Executive Order 11850 which contained several exceptions in which the US military is still allowed to use tear gas and herbicide in various situations, i.e.⁵² (a) Use of riot control agents in riot control situations in areas under direct and distinct U.S. military control, to include controlling rioting prisoners of war, (b) Use of riot control agents in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided, (c) Use of riot control agents in rescue missions in remotely isolated areas, of downed aircrews and passengers and escaping prisoners, and (d) Use of riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organization. From the Writer’s point of view, Executive Order 11850 doesn’t interpret The Protocol but moves further to the extent of modifying it, especially for the US.

In contrast to US, UK and France interpret Protocol from a wider perspective by adding RCA as one of the prohibited instruments. British delegations released an official statement that according to Protocol, term “other gases” by its nature encompasses

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Trooboff, *op.cit.*,p. 192.

⁴⁹ Bunn, *op. cit.*,p. 257.

⁵⁰ *Ibid.*

⁵¹ Kyle M Ballard, “Convention in Peril? Riot Control Agents and the Chemical Weapons Ban,” accessed November 15, 2022, <https://www.armscontrol.org/act/2007-09/features/convention-peril-riot-control-agents-chemical-weapons-ban>.

⁵² *Ibid.*

lachrymatory gases.⁵³ On the other side, France delegations interpreted the term “similar gases” as all chemical materials which has poisonous effects on human, regardless of whether such materials give rise to permanent or temporary irritation.⁵⁴ Furthermore, Geneva Gas Protocol 1925 has been subjected to various reservations from 40 State Parties.⁵⁵ Reservation inflicts a legal gap in which chemical weapons may still be utilized when State Party is being attacked first with such weapons. Therefore, the prohibition is directed only to first use (no first use).⁵⁶ A prolonged debate regarding the existence of RCA as part of a chemical weapon was only limited to wartime but neglected its use in domestic law enforcement. The latter topic was begun to discuss only in Chemical Weapon Convention 1993.

Between the 1960s and 1970s, tear gas or RCA has been part of law enforcement standards in several states.⁵⁷ Such situations depict the policy of tear gas in the majority of states so that it arose a compromise in the creation of Chemical Weapon Convention 1993, i.e. RCA will only be banned if it's used as a method of warfare, but still be allowed for law enforcement purposes.⁵⁸ Even so, the phrase “... **law enforcement including** domestic riot purposes” generates several ambiguities. First, law enforcement terms may be understand as international law enforcement. Meanwhile, in the international sphere, it will be hard to differentiate when an action qualified as international law enforcement and when it's a method of warfare. Secondly, the term “including” indicates a non-exhaustive clause as it opens other purposes outside of domestic riot control. These two understandings results in ambiguity and encouraged US President back then, Bill Clinton, in his speech about Chemical Weapon Convention 1993 ratification, to interpret

⁵³ Baxter, *op.cit.*, p. 862.

The British Delegation made the following statement: Basing itself on this English text [of the Geneva Protocol], the British Government have taken the view that the use in war of "other" gases, including lachrymatory gases, was prohibited. They also considered that the intention was to incorporate the same prohibition in the present Convention. From every point of view it is highly desirable that a uniform construction should prevail as to whether or not the use of lachrymatory gases is considered to be contrary to the Geneva Protocol.

⁵⁴ *Ibid.*

The French Delegation responded with the following statement:

- I. All the texts at present in force or proposed in regard to the prohibition of the use in war of asphyxiating, poisonous or similar gases are identical. In the French delegation's opinion, they apply to all gases employed with a view to toxic action on the human organism, whether the effects of such action are more or less temporary irritation of certain mucous membranes or whether they cause serious or even fatal lesions.
- II. The French military regulations, which refer to the undertaking not to use gas for warfare (*gaz de combat*) subject to reciprocity, classify such gases as suffocating, blistering, irritant and poisonous gases in general, and define irritant gases as those causing tears, sneezing, etc.
- III. The French Government therefore considers that the use of lachrymatory gases is covered by the prohibition arising out of the Geneva Protocol.

⁵⁵ Thomas Bernauer, “The Projected Chemical Weapons Convention: A Guide to the Negotiations in the Conference on Disarmament,” accessed November 15, 2022, <https://www.armscontrol.org/act/2007-09/features/convention-peril-riot-control-agents-chemical-weapons-ban>.

⁵⁶ *Ibid.*

⁵⁷ Alex Milan Tracy, “Tear Gas and Pepper Spray Are Chemical Weapons. So, Why Can Police Use Them?,” accessed November 16, 2022, <https://theconversation.com/tear-gas-and-pepper-spray-are-chemical-weapons-so-why-can-police-use-them-140364>.

⁵⁸ *Ibid.*

the article as covering other actions outside of domestic law enforcement, i.e. peacekeeping operations, humanitarian and disaster relief operation, counter-terrorist and hostage rescue operations, and non-combatant rescue operations.⁵⁹ Besides this broader understanding, the exemption of situations that might result in chemical weapon use on Executive Order 11850 is still in force within the US military.⁶⁰ Such measures inflict a conflict between international law that has been ratified and national law. As if US legal obligation towards The Convention has been changed or revised through Executive Order 11850.

3.3 The Misconception of Tear Gas Differentiation With Chemical Weapons and Its Implication

Tear gas qualification as a distinct type under Riot Control Agent's terminology shall not be separated from the dichotomy of lethal and non-lethal. Nonetheless, it must be questioned whether "nonlethal" is appropriate to be accorded to RCA? RCA basically is also a chemical substance with function to stimulate a sense of damage and harm.⁶¹ Moreover, underlines that pain is not the sole effect of RCA, but there's another effect, i.e. snowball effect of inflammation which can damage surrounding cells.⁶²

RCA's position as a chemical substance is supported by Toxic Chemical's definition in Article II Paragraph 2 Chemical Weapon Convention 1993, i.e. "Any chemical which through its chemical action on life processes can cause death, **temporary incapacitation** or permanent harm...". From this point, it can be concluded that there are no differences between chemical weapons and RCA scientifically. Both are chemical substances with dangerous effects if used in certain conditions and concentrations. Hence, the differentiation of lethal and non-lethal that instituted partition between chemical weapons and RCA is clearly irrelevant. As delivered by Scientific Advisory Board Organization for the Prohibition of Chemical Weapons, the term "non-lethal" is not eligible to be accorded to RCA. It is because when we talk about how dangerous a chemical substance and poison is, we talk about how much it's being used, or simply, its dose, and whether it's lethal or non-lethal is determined by its way of use.⁶³ Amnesty International qualifies five situations that increase the lethal force of tear gas, i.e. the use of tear gas in an isolated room, directed towards individuals, the overdose of RCA, directed to peaceful demonstration, and RCA use for vulnerable persons.⁶⁴

One important note about tear gas is its indiscriminate nature. According to Peter Sloterdijk's analysis, the utilization of tear gas against the population may be seen as atmosterrorism phenomenon, i.e. targeting an enemy's environment instead of the enemy's body.⁶⁵ He explained chemical warfare as an attack on vital functions of an enemy which depend on the surrounding environment, i.e. breathing, central neural

⁵⁹ Fry, *op.cit.*, p. 505.

⁶⁰ Ballard, *loc.cit.*

⁶¹ Brown, *op.cit.*, p.2.

⁶² *Ibid.*

⁶³ Yasemin Balci et al., *The Future of the CWC In the Post-Destruction Phase* (France: European Union Institute for Security Studies, 2013), 57.

⁶⁴ Ara Marcen Naval, "Tear Gas How Is It Abused," accessed November 17, 2022, <https://teargas.amnesty.org/#expert-testimonies>.

⁶⁵ Sloterdijk P, "Airquakes," *Environment and Planning D: Society and Space* 27, no. 1 (2009): 44.

regulations, temperature, as well as sufficient radiation to live.⁶⁶ Through this mechanism, tear gas is deemed fit to isolate an individual from mass power. While the vicinity is unliveable, someone thinks about nothing other than escaping from suffering and mass will eventually disintegrate.⁶⁷ However, such a mechanism has consequences. Whoever is in the contaminated room will be affected (indiscriminate weapon) so it clearly violates the principle of distinction in international humanitarian law.

As *jus in bello*, international humanitarian law has two purposes, i.e. to reduce violence in armed conflict by prohibiting and/or limiting certain weapons and unnecessary suffering (The Hague Law) and protect people who don't actively involve in the conflict from the adverse impact of war (Geneva Law).⁶⁸ Those two purposes are manifested through the principle of distinction as a foundational principle of international humanitarian law in Article 48 Protocols Additional (I) to the Geneva Conventions of 12 August 1949 which state "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

This norm has two forms of actualization in regard to weapon use in wartime. First, international law prohibits the use of weapons of indiscriminate nature, i.e. weapons that can't differentiate between combatant and civilian or can't be controlled of their effect.⁶⁹ Secondly, international law prohibits "the use" of weapons indiscriminately, regardless of whether the weapon is indiscriminate in nature or not.⁷⁰ All of the concepts are aimed to ensure that the human rights of people who are not actively involved in war are protected. Citing International Court of Justice Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, "at heart of the rules and principles concerning international humanitarian law lies the 'overriding consideration of humanity.'"⁷¹ From this rationale, chemical weapon use with indiscriminate nature is a manifest violation of human rights. It is indeed right that humanitarian law isn't applicable to situations outside of an armed conflict, i.e. riot, attack, demonstration, and conventional criminal act, even if the military is authorized to involve.⁷² However, if we based our analysis on human rights logical thinking, how can we protect a combatant from RCA but allow civilians to be a victim of continuous use of tear gas?

Such a problem is getting complex when in practice, a riot from demonstration is not conducted by demonstrators, but third party illegally, but the demonstrator must also bear the effect of tear gas. Eventually, tear gas violates citizen's constitutional rights to

⁶⁶ *Ibid.*

⁶⁷ Anna Feigenbaum, "100 Years of Tear Gas," accessed November 17, 2022, <https://www.theatlantic.com/international/archive/2014/08/100-years-of-tear-gas/378632/>.

⁶⁸ Michael N Schmitt, "The Principle of Discrimination in 21st Century Warfare," *Yale Human Rights and Development Law* 2, no. 1 (1999): 145.

⁶⁹ *Ibid.*, p.148.

⁷⁰ *Ibid.*

⁷¹ REQUEST FOR ADVISORY OPINION transmitted to the Court under the United Nations General Assembly resolution 49/75 K of 15 December 1994 LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS.

⁷² Schmitt, *op.cit.*, p. 145

deliver their thoughts peacefully as stated by the European Court of Human Rights in *Ziliberberg v. Moldova* Case that an individual shall enjoy right to peaceful assembly even if there exists sporadic violence or act against the law conducted by other parties.⁷³ Meanwhile, the use of tear gas will stop individuals from exercising their right to assemble and express their thoughts.

If the security of RCA's use is given to each state's responsibility, the next question is whether international law is capable to guarantee the security of chemical substance use by domestic law enforcers? The facts show that violations repeatedly occur even if states have obligation to report the type of RCA they use. One illustration of how tear gas is used abusively in the domestic sphere is the use of tear gas in an isolated room at Kanjuruhan Stadium.⁷⁴ Other examples at international level including the abuse of tear gas used in Bahrain⁷⁵, Egypt⁷⁶, Hong Kong⁷⁷, and other territories.

For the Writer, the construction of tear gas in Chemical Weapon Convention 1993 which formed in partial ban following the failure of international law in overseeing and bringing States into responsibility for the abuse of RCA will give three consequences. First, the production of tear gas will increase along with the regularity of its utilization for domestic law enforcement. Secondly, if the utilization of tear gas that resulted in irritation is permitted, with the same analogy, other chemical substances with incapacitator effects and non-permanent harm are potentially utilized. Finally, there will be more variables of what it's called a "non-lethal" chemical substance to be utilized by law enforcers in the future. Thirdly, with the development of the tear gas industry, the purpose of Chemical Weapons Convention 1993 to eliminate weapons of mass destruction is going to be failed. It is because there will be very difficult for international institutions to oversee the level of chemical substance that has been used to formulate tear gas. Thus, it's possible that such substances are misused to construct a chemical weapon.

4. Conclusion

As the only chemical weapon that is supported by international convention, tear gas use shall be reconsidered by the global community. They similar characteristics to other chemical weapons, i.e. poisonous, indiscriminate, and lethal in certain conditions and

⁷³ European Court of Human Rights, *Ziliberberg v. Moldova*, application No. 61821/00 (2004). According to the European Court of Human Rights, "an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behavior".

⁷⁴ Mahinda Arkyasa, "Indonesian Police Admit Using Expired Tear Gas in Kanjuruhan Stadium Disaster," accessed November 17, 2022, <https://en.tempo.co/read/1643802/indonesian-police-admit-using-expired-tear-gas-in-kanjuruhan-stadium-disaster>

⁷⁵ Richard Sollom and Holly G Atkinson, *Weaponizing Tear Gas: Bahrain's Unprecedented Use of Toxic Chemical Agents Against Civilians* (New York: Physicians for Human Rights, 2012).

⁷⁶ *Ibid.*

⁷⁷ Amnesty International, "End the Abuse of Tear Gas for the Sake of Peaceful Protesters," accessed November 17, 2022, <https://www.amnesty.org/en/latest/news/2020/06/end-the-abuse-of-tear-gas-for-the-sake-of-peaceful-protesters-in-hong-kong-the-usa-and-everywhere-else/>.

levels, resulting in the same violation of human rights as in common chemical weapons. Further, the violation of human rights is probably more massive since there is no legal limitation in producing and using RCA. Various misuse either in the national or international sphere shows the internal regulation of each state is not capable of avoiding the abuse of tear gas use. With that being said, there is an urgency to totally ban the use of tear gas in Chemical Weapons Convention 1993.

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Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Gas Protocol 1925)

The Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction (the Chemical Weapons Convention 1993).