

Agata Kleczkowska\*

## **The scope of the prohibition of the use of chemical weapons in international public law**

### **Introduction**

Conducting a war is usually associated with tanks and bullets but the militaries make also use of other types of weapons which are said to maximize the effects of their actions, mostly by employing for this purpose weapons of massive destruction. Obviously, such methods of warfare constitute a serious and a real threat to international security. Insofar, as the legality of the use of nuclear weapon is not clearly determined<sup>1</sup>, the use of biological and chemical weapons is expressly prohibited in international public law. Nevertheless, the belligerents' tempt to employ one of these kinds of weapons is a great challenge that the international community need to face today. As the history of armed conflicts has shown, the prohibition of the use of chemical weapons, even though included in numerous legal instruments, does not constitute the obstacle when one of the parties to the conflict decides to sharply demonstrate its power. However, in the type of the conflict as in Syrian example, i.e. the civil war, there can be doubts whether the prohibition concerns also non-international conflict. This paper aims at finding the scope of the existing prohibition of the use of chemical weapons in this term.

The first part of the article deals with the previous regulations on the chemical weapons. Secondly, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention)<sup>2</sup> is discussed in relation to the scope of the prohibition. Then, the UN Security Council (UN SC) Resolution 2118 upon the Syrian conflict should be analyzed. Finally, the scope of the prohibition is related to the terms 'war' and 'armed conflict'.

---

\* Mgr prawa, Zakład Prawa Międzynarodowego Publicznego, Instytut Nauk Prawnych PAN.

<sup>1</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1. C.J. Reports 1996, p. 226, par. 105.

<sup>2</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Geneva, 3 September 1992, United Nations, Treaty Series, vol. 1974, p. 45.

## 1. Legal instruments before the Chemical Weapons Convention

The use of chemical weapons as the method of fight is not an idea which occurred in last decades. Probably the first legal instrument which approached this issue was the treaty between France and Germany, concluded in Strasburg in 1675. It prohibited the use of poisoned bullets (*it. pallottole avvelenate*)<sup>3</sup>. Then, next important steps were the Hague Conventions of 1899 and 1907, as they banned the employment of 'poison or poisonous arms(weapons)'<sup>4</sup>. Nevertheless, only the tense situation at the beginning of the twentieth century and the events of the World War I prompted more eager works on the regulation aimed at absolute prohibition or at least limiting the use of such weapons. Among endeavors of implementing these regulations, one can mention for instance the Treaty of Peace with Germany, concluded after the World War I, which contained in art. 172 the provision according to which the German Government was obliged to disclose all chemicals used during the war or prepared for such a purpose<sup>5</sup>. Since the use of chemicals constituted in that time the problem in international relations, the abovementioned instruments also related only to the employment of weapons in inter-State conflicts.

The first act which referred specifically to the chemical weapons was the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed in Geneva in 1925 (Protocol of Geneva)<sup>6</sup>. The title of the Protocol already indicates that the prohibition is 'warfare' oriented. The preamble contains the reference to war, when expressing the general condemnation by the civilized world of the use

---

<sup>3</sup> S. Felician, *Le Armi di Distruzione di Massa* [Weapons of Massive Destruction], [http://www.difesa.it/SMD\\_/CASD/IM/CeMISS/Pubblicazioni/Documents/75101\\_Ricerca\\_Fpdf.pdf](http://www.difesa.it/SMD_/CASD/IM/CeMISS/Pubblicazioni/Documents/75101_Ricerca_Fpdf.pdf) [Access date: 12.09.2013], p. 110.

<sup>4</sup> Article 23 (a) of the Regulations Respecting the Laws And Customs of War On Land of the II Hague Convention of 1899 and of the IV Hague Convention of 1907 Respecting the Laws and Customs of War On Land; J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, Washington 1915, p. 116; K. Reddy, *The regulation of chemical and biological weapons in international law: Preserving the paradox of 'human war'*, „Journal of South African Law” 2008, vol. 4, p. 670.

<sup>5</sup> International Legal Studies Series, „US Naval War College” 1919, p. 74; R.R. Baxter, T. Buergenthal, *Legal Aspects of the Geneva Protocol of 1925*, „The American Journal of International Law” 1970, vol. 64, p. 857.

<sup>6</sup> D. Schindler, J. Toman, *The Laws of Armed Conflicts*, The Hague 1988, p. 116.

of chemical weapons. In the main part of the Protocol, 'the High Contracting Parties (...) agree to extend this prohibition to the use of bacteriological methods of warfare', what can be interpreted as the endeavor to ban the use of biological weapons during war, when in the meantime similar prohibition already existed when it comes to chemical weapons. Taking it all into account, the Protocol does not refer to the internal conflict<sup>7</sup>. Consequently, because of its applicability only in time of war, it does not cover also the use of chemical weapons in time of peace, for instance by the national police forces<sup>8</sup>. The Protocol of Geneva is fully reflected in customary law<sup>9</sup>.

## 2. Chemical Weapons Convention

Undoubtedly, the most important act nowadays, which approaches the issue of chemical weapons, is the Chemical Weapons Convention, opened for signature in January 1993. Since the history of the Convention and its overall provisions could be the topic of the separate paper, this article will focus only on the problem of the scope of the prohibition as it is formulated in this act.

The Chemical Weapons Convention mentions 'war' or 'warfare' several times and not even single one the characteristics like 'internal' or 'domestic'. The first paragraph of the Preamble which should be mentioned, refers to the condemnation by the UN General Assembly (UN GA) 'all actions contrary to the principles and objectives of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925'. Clearly, this recall was meant to underline the specific set of rules which must be obey during the warfare and which is included *inter alia* in the Protocol; thus, the Preamble contains the reference to the prohibition concerning the war. However, there is also one more instrument mentioned in the Preamble, that is said to contain these common 'principles and objectives' – the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BTWC)<sup>10</sup>. This act prohibits any activities connected with biological weapons 'whatever their

<sup>7</sup> R.R. Baxter, T. Buergenthal, *op.cit.*, p. 869.

<sup>8</sup> K. Reddy, *op.cit.*, p. 673.

<sup>9</sup> *Ibidem*, p. 675.

<sup>10</sup> Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, London, Moscow and Washington, 10 April 1972, United Nations, Treaty Series, vol. 1015, p. 163.

origin or method of production, of types and in quantities (..) have no justification for prophylactic, protective or other peaceful purposes (...), for hostile purposes or in armed conflict' (Article I)<sup>11</sup>. The meaning of the 'peaceful purposes' and 'hostile purposes' should be analyzed in this specific context. As a result, it seems that the Parties to the BTWC are not prohibited to use biological weapons only during the warfare but in any kind of armed conflict, or even more broadly, in any circumstances. Consequently, the Preamble of the Chemical Weapons Convention recalls the rules banning the use of weapons in not international armed conflict. The Preamble in the seventh paragraph refers also to the prohibition of the use of herbicides as a method of warfare. No provision of the Preamble deals expressly with the employment of chemical or biological weapons as a method of coping with the internal affairs.

Next, the article I (1) and (5) of the Convention should be examined carefully. Article I in general prohibits any activities connected in any manner with chemical weapons. As it is expressed in the Article I (1), 'Each State Party to this Convention undertakes never under any circumstances (...)'. This provision is then followed by the enumeration of the banned employments of chemical weapons. Article I (5) states that: 'Each State Party undertakes not to use riot control agents as a method of warfare'. To understand properly this passage, one needs to refer to the definition of the riot control agents included in art. II (7). Thus, this term stands for 'Any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure'. According to the information on the riot control agents gathered by the International Committee of the Red Cross, these chemicals are considered by different states to include 'tear gas and other gases which have debilitating but non-permanent effects' (Australia's Defense Force Manual); they can be used as 'means of maintaining order, including the control of internal unrest (...). tear gas may still be used, e.g., to disperse a crowd if strictly necessary' (Military Manual of the Netherlands). Consequently, the riot control agents<sup>12</sup> are chemicals which are not used to absolutely eliminate or deliberately cause harm to any participants of the occurrence, but just to slow down temporarily the actions carried

---

<sup>11</sup> <http://www.nti.org/treaties-and-regimes/convention-prohibition-development-production-and-stockpiling-bacteriological-biological-and-toxin-weapons-btwc/> [Access date: 10.09.2013].

<sup>12</sup> According to the Article III (1) (e) each State Party shall submit to the Organization, the declaration in which it shall with respect to riot control agents specify the name of the chemical, its structural formula and the proper registry number.

out by the opposition. Summing up the provisions of Article I, the phrase 'any circumstances' from the paragraph 1 should be understood as the situation of international rather than internal armed conflict, since the use of chemical weapons is undoubtedly prohibited in the first situation, and the specific kind of chemicals, which are riot control agents, can be used in the second case.

Another article, which approaches the problem of the riot control agents, is Article II (9) (d). It explains the notion of 'Purposes not Prohibited Under this Convention,' listing among such aims 'Law enforcement including domestic riot control purposes.' This paragraph *expressis verbis* allows the employment of these chemicals to maintain the public order, but only in reference to internal affairs of the state<sup>13</sup> and not 'as the method of warfare'<sup>14</sup>. In the course of negotiations upon the Convention, the US opposed to such a narrow approach to the permitted law enforcement methods and strived to cross out the word 'domestic'<sup>15</sup>. On the other hand, the expression 'law enforcement' is intrinsically very vague and can be used to justify not only the national purposes for which the chemical weapons is employed but also may be interpreted to conduct fight during international conflict, if the belligerent can find any grounds for it in the norms of international public law<sup>16</sup>. As a result, the paragraph which was meant to endow only the domestic power with the possibility to control the situation in the extreme circumstances by using riot control agents, in fact can legitimate the use of this kind of weapons also internationally. The only thing the State Parties can do if they would like to sustain the original purpose of the art. II (9) (d) is to make reservations or declarations of interpretation<sup>17</sup>. For instance, Peru made such a statement during the negotiations upon the Convention, as it reserved that 'it is true that if law enforcement is not referred to as "domestic", as in Article II, paragraph 9 (d), this might give rise to far-fetched interpretations of what the negotiators intended. Consequently, my delegation [Peru's delegation] considers it appropriate to point out that, as far as Peru is concerned, law enforcement is within the competence

---

<sup>13</sup> M.W. Gehr, W. Lang, *La Convention européenne sur les armes chimiques et le droit international* [The European Convention on the chemical weapon and international law], „Annuaire français de droit international” [French Yearbook of International Law] 1992, vol. 38, p. 138.

<sup>14</sup> <http://www.opcw.org/protection/types-of-chemical-agent/riot-control-agents/> [Access date: 10.09.2013].

<sup>15</sup> M.W. Gehr, W. Lang, *op.cit.*, p. 138.

<sup>16</sup> *Ibidem*.

<sup>17</sup> *Ibidem*, p. 139.

of each geographical State, except for activities that might be carried out by United Nations peace-keeping forces<sup>18</sup>. In this declaration, the representative of Peru clarified the understanding of the 'law enforcement', limiting the 'law' only to internal legal order of each state, making the exception to the legitimization of certain actions by the UN. This passage is another one, after the stipulations of Article I, which expresses the idea that the Convention deals only with the international affairs, excluding the domestic conflict and weapons used in the course of it. Article II (9) (c) lists also '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.' Thus, again there is no reference to any 'military purposes' used as a method of dealing with internal situation<sup>19</sup>.

Much broader list of conditions under which chemical weapons can be applied, is given in article VI, titled "Activities Not Prohibited under This Convention." Art. VI (1) states that: 'Each State Party has the right, subject to the provisions of this Convention, to develop, produce, otherwise acquire, retain, transfer and use toxic chemicals and their precursors for purposes not prohibited under this Convention.' These allowed activities can be summed up as the methods of use of the chemicals for peaceful purposes<sup>20</sup>. The Convention is quite restrict in its provisions regarding the prohibited acts, so the chapter which points out the actions which are not illegal is needed from the standpoint of commercial and scientific significance of chemical industry<sup>21</sup>. Obviously, the State Parties are not free to name certain activities as 'not prohibited' at their own discretion. The annex to the Convention incumbents upon states the obligation to, for instance, deliver to the Technical Secretariat of the Organization for the Prohibition of Chemical Weapons the declarations concerning the facilities aimed at the production, stockpile etc. of the chemicals, as well as to inform about planned changes to the facilities<sup>22</sup>.

---

<sup>18</sup> *Report of the Conference on Disarmament*, „General Assembly Official Record's", Forty-seventh Session Supplement No. 27 (A/47/27), p. 60.

<sup>19</sup> The other purposes of the employment of chemical weapons, which are allowed, are: 'Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes' and 'Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons'.

<sup>20</sup> M.W. Gehr, W. Lang, op.cit., p. 140.

<sup>21</sup> K. Reddy, op.cit., p. 684.

<sup>22</sup> The full text of the Convention with the annexes is available at: [http://www.opcw.org/index.php?eID=dam\\_frontend\\_push&docID=6357](http://www.opcw.org/index.php?eID=dam_frontend_push&docID=6357), p. 123–124 [Access date: 10.09.2013].

The Geneva Protocol and the Chemical Weapons Convention are not the only instruments that concern the chemical weapons. There are also numerous resolutions of the UN GA and UN SC which relate to the Chemical Weapons Convention. The one of the most important of them is undoubtedly the UN SC Resolution 1540<sup>23</sup>. It affirms that the proliferation of nuclear, chemical and biological weapons constitutes a serious threat to international security and obliges all states to take any necessary steps to ensure the prohibition of such proliferation. The Resolution 1540 does not mention the scope of the armed conflict to which the rules set in the act should be applied; rather it refers to the ‘international peace and security’, ‘regional and global stability’ or ‘global threats’. Thus, following the provisions of the Resolution, the prohibition of proliferation concerns all the circumstances when any kind of these three types of weapons can be used, including both the internal and international conflicts, as each of them can endanger international relations.

### **3. UN SC Resolution 2118**

The latest act issued by the UN SC, and already one of the greatest significance, is the Resolution 2118 (2013)<sup>24</sup>, which refers to the chemical weapons attack which took place in Syria in August 2013. It contains two points which could contribute to the topic of this paper.

First of all, in the Preamble of the Resolution, the UN SC affirms that ‘the use of chemical weapons constitutes a serious violation of international law’. In the same paragraph, a line before this statement, the UN SC expressed its outrage of the use of chemical weapons in Syria. In this context, the affirmation of the breach of international law seems to be understood in reference to the Syria’s situation, ergo the Resolution states that the use of the chemical weapons in domestic conflict amounts to breach of international law, even if this message is not direct.

Secondly, in the first point of the Resolution, the UN SC “Determines that the use of chemical weapons anywhere constitutes a threat to international peace and security”. The most relevant word here is ‘anywhere’. The UN SC did not use, as it was done in the previous acts, the expression ‘under any circumstances’ which could be understood both as the reference to the place of the weapons’ employment and the scope of the conflict, but it rather focused

---

<sup>23</sup> S/RES/1540 (2004).

<sup>24</sup> S/RES/2118 (2013).

on the place. 'Anywhere' means not only that the UN SC does consider it relevant where the weapon is employed, whether it happens because of internal or international conflict. What is more important, it could also mean that the most crucial worldwide organ responsible for the maintenance of peace and security underlines the universality of the prohibition of the use of chemical weapons, also with no difference if the State is a party to the Chemical Weapons Convention. It could be a hint that the UN SC finds the prohibition of the use of chemical weapons during wars and any domestic conflicts as the norm of international customary law. Such an approach would be a new chapter in the history of the prohibition of the use of chemicals since no international instrument or organization did ever expressly determined the scope of the prohibition. As it was mentioned, the prohibition is considered as the customary law rule but only in reference to war.

#### 4. "War' and 'armed conflict'"

Apart from the abovementioned problems connected with the formulation of legal instruments, on the other hand there are some dubious issues connected with the meaning of the notions linked with conflicts. Probably, the most agreed-on matter is the definition of war. It is rather clear that war constitutes a conflict between states. One can recall for instance the definition formulated by Lassa Oppenheim, according to whom 'war is a struggle between the belligerent states'<sup>25</sup>.

Prior to the Geneva Convention of 1949, the word 'war' was nevertheless used only to name the conflicts which were determined by the formal acts of states, such as the formal declaration of war<sup>26</sup>. Consequently, the 'law of war' and the whole set of humanitarian rules, were applicable only if these formalities were fulfilled. The Geneva Conventions changed this approach, covering also the *de facto* armed conflicts<sup>27</sup>.

The International Criminal Tribunal for the former Yugoslavia (ICTY) formed a definition of an armed conflict, which states that it 'exists whenever

---

<sup>25</sup> L. Oppenheim, *The Future of International Law*, Oxford 1921, p. 31.

<sup>26</sup> D. Jinks, *The temporal scope of application of international humanitarian law in contemporary conflicts*, Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Harvard Program on Humanitarian Policy and Conflict Research, <http://www.hpcrresearch.org/sites/default/files/publications/Session3.pdf> [Access date: 10.09.2013], p. 1.

<sup>27</sup> Ibidem.



there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State<sup>28</sup>. Such a definition understands the conflict much broader than traditionally the term 'war' was grasped, as it takes into account also the conflicts which are not international. When it comes to such internal conflicts, another distinction should be made, following the Article II (1) of the Protocol II to the Geneva Conventions of 1949, which distinguishes non-international armed conflicts and the 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'<sup>29</sup>. The problem is even more complicated when to mention the conflicts like the Vietnam war, which can be classified as the 'mixed conflict', with the characteristics of both the international and internal conflict<sup>30</sup>, whatever such name may create even more confusion.

When the legal instruments determine their applicability as possible during the 'war' or in the course of 'warfare', it seems that their scope covers solely conflicts between states (nowadays, even with no regard if the conflict has been formally started etc.), and not conflicts only within one state, no matter if it is an armed conflict or a resurrection or any other kind of internal disturbances<sup>31</sup>.

## Conclusions

Even though the problem of the use of chemical weapons was recognized at least four centuries ago and it seems that all important international actors agree upon their exceptionally disastrous effects, there are still many lacunas in the existing prohibition. One of the most relevant issues is the scope of the prohibition which seems to be limited only to international armed conflicts and with no or little applicability during internal conflict. Taking into account regulations of the international humanitarian law, as expressed especially in Protocol II of the Geneva Conventions, one can observe that the international

---

<sup>28</sup> *The Prosecutor v Dusko Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction International Criminal Tribunal for the former Yugoslavia) (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 2 October 1995) par. 70.

<sup>29</sup> *Protocols additional to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Geneva 1977, pp. 89–101.

<sup>30</sup> R.R. Baxter, T. Buergenthal, *op.cit.*, p. 869.

<sup>31</sup> *Ibidem*.

law is interested at most in internal armed conflicts, not understood as 'only' riots or other temporal disturbances. The similar idea is given in Article II (9) (d) of the Chemical Weapons Convention, which lists among 'Purposes not prohibited under the Convention' the use of riot control agents for domestic purposes, in such a way allowing its use as not falling within the scope of interest of the Convention. The purpose of the international community should be to seek for the prohibition of the use of chemicals in general, with no difference to kind of domestic conflict takes place.

Nevertheless, the UN resolutions are not so restrict in this matter, referring more generally to the 'international peace' or 'global threats,' what can be referred to all domestic situations which influence on the international affairs. The resolutions can give a kind of evidence that the customary law rule may emerge in future. Obviously, it would be hard to affirm that there is already *usus* in this matter, not mentioning the *opinio iuris*. However, the UN SC Resolution 2118 has definitely commenced a new perspective for the scope of the prohibition of the use of chemical weapons.

### Abstract

The goal of the article is to examine if in international public law there is the prohibition of the use of chemical weapons during internal armed conflicts. The first part of the article deals with the previous regulations on the chemical weapons. Secondly, the Chemical Weapons Convention is discussed in relation to the scope of the prohibition. Then, the UN Security Council Resolution 2118 upon the Syrian conflict should be analyzed. Finally, the scope of the prohibition is related to the terms 'war' and 'armed conflict'. The conclusions drawn from the abovementioned analyses depict that there is the strong need for an extension of the existing prohibition; however, no legal act has established it for now.

**Keywords:** armed conflict, chemical weapons, Chemical Weapons Convention, international public law, weapons of massive destruction