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Recommended Citation

Sucato, Mea. "Enforcing the Ban on Chemical Weapons." *Sustainable Development Law & Policy*, Spring 2006, 57-72.

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ENFORCING THE BAN ON CHEMICAL WEAPONS

by Mea Sucato*

Chemical weapons present a great risk to international security as a result of the low costs and ease with which they can be purchased, used, manufactured, and stored.¹ One of the most notorious examples of chemical weapons use occurred on March 16, 1988, when Saddam Hussein unleashed a mixture of mustard gas and nerve agents on Kurdish civilians in Halabja, Iraq.² At least 5,000 civilians, including women, children, and the elderly, died immediately as a result of the attack and 10,000 more were blinded, maimed, or disfigured.³ In subsequent years, thousands more died from debilitating diseases and birth defects associated with the after-effects of chemical weapons.⁴

A study conducted in Halabja of the long-term effects of chemical weapons exposure showed that “[t]hese chemicals seriously affected people’s eyes, and respiratory and neurological systems. Children are dying ... of leukemia and lymphomas ... [there is a] large proportion of pregnancies [with] major malformations ... [which] suggest[s] that the effects from these chemical warfare agents are transmitted to succeeding generations.”⁵ This indicates that chemical weapons exposure causes “long-term damage to the DNA”⁶ and can affect the ability of an ethnic group to produce healthy offspring. By affecting the reproductive health of an ethnic group, countries that use chemical weapons, particularly against civilian populations, arguably commit crimes against humanity that rise to the level of genocide.⁷

The Chemical Weapons Convention (“CWC”) prohibits the use of chemical weapons and further mandates that State Parties shall not “develop, produce, otherwise acquire, stockpile or retain chemical weapons.”⁸ Each State Party must undertake to destroy all chemical weapons and production facilities.⁹ The Organization for the Prohibition of Chemical Weapons (“OPCW”) is the enforcement body of the Convention,¹⁰ and State Parties must grant the OPCW access to conduct inspections inside their territory.¹¹ A State Party may also call upon the OPCW to inspect the territory of another State Party to investigate allegations of non-compliance.¹²

The CWC is widely criticized for its failure to ensure adequate compliance; the primary complaints are: (1) its inability to enforce its provisions over countries that have not yet ratified the treaty; (2) its failure to impose its provisions with respect to terrorist groups; and (3) that the OPCW only has power to issue sanctions after a violation is found, but cannot authorize military force.¹³ These criticisms are not particular to the CWC, but to all international treaties, and describes the problems of an international system that is largely based on comity.

While far from perfect, the CWC is an effective step towards the ban of chemical weapons. First, while the OPCW is not authorized to use force, it can consult with the UN Security Council to request military action if needed.¹⁴

Second, the CWC makes it difficult for non-Party States and terrorist groups to acquire both the chemicals and the equipment needed for their manufacture.¹⁵ The CWC induces its ratification by limiting the transfer of controlled-chemicals, which a non-State Party may need for industrial purposes.¹⁶ Third, the CWC slows chemical weapon proliferation by isolating a small number of “rogue states,” such as Iraq, Libya, and North Korea, which brings shame onto these countries, along with political and economic pressures.¹⁷

As with all treaties, the CWC cannot ensure complete compliance. The looming threat to international security posed by chemical weapons warrants a complete ban on such weaponry. Further, the incredible and unnecessary suffering caused by chemical weapons, such as those used in Halabja, in addition to the devastating consequences extending to subsequent generations, shows that the use, development, or transfer of such weapons should be considered a universal crime against humanity. The international community should consider the prohibition against chemical weapons to be a *jus cogens* norm, a law that is so fundamental to international law that no State may derogate from it.



ENDNOTES:

¹ Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT’L L. & POL’Y 483, 492 (1999); see also Megan Eshbaugh, *The Chemical Weapons Convention: With Every Step Forward, We Take Two Steps Back*, 18 ARIZ. J. INT’L & COMP. LAW 209, 210 (2001).

² Press Release, U.S. Dep’t. of State, Bureau of Pub. Affairs Saddam’s Chemical Weapons Campaign: Halabja (March 14, 1988) [hereinafter Chemicals Campaign], available at <http://www.state.gov/r/pa/ei/rls/18714.htm> (last visited Mar. 8, 2006).

³ Chemicals Campaign, *id.*

⁴ Chemicals Campaign, *id.*

⁵ Christine Gosden, *Why I Went, What I Saw*, WASH. POST, Mar. 11, 1998, at A19.

⁶ Gosden, *id.*

⁷ Cf. Margaret Sewell, *Freedom from Fear: Prosecuting the Iraqi Regime for the Use of Chemical Weapons*, 16 ST. THOMAS L. REV. 365 (2004) (arguing that Saddam Hussein’s attack on the Kurds with chemical weapons constitutes genocide and should be prosecuted as such).

⁸ Convention on the Prohibition, Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, art. I, *opened for signature* Jan. 13, 1993, 32 I.L.M. 800.

⁹ Convention on the Prohibition, *id.*

¹⁰ Convention on the Prohibition, *id.* at art 8.

¹¹ Eshbaugh, *supra* note 1, at 223.

¹² Eshbaugh, *supra* note 1, at 223.

¹³ See Matthew Linkie, *The Defense Threat Reduction Agency: A Note on the United States’ Approach to Threat of Chemical and Biological Warfare*, 16 J. CONTEMP. HEALTH L. & POL’Y 531, 552-53 (2000); Kevin J. Fitzgerald,

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The Chemical Weapons Convention: Inadequate Protection from Chemical Warfare, 20 SUFFOLK TRANSNAT'L L. REV. 425, 446-47 (1997); Sewell, *supra* note 7, at 379.

¹⁴ Eshbaugh, *supra* note 1, at 224.

¹⁵ Cecil Hunt, *The Potential Contribution of the Chemical Weapon Convention for Combating Terrorism*, 20 MICH. J. INT'L L. 523, 528 (1999).

¹⁶ Hunt, *id.* at 533.

¹⁷ U.S. Arms Control & Disarmament Agency, Fact Sheets, The Chemical Weapons Convention, <http://dosfan.lib.uic.edu/acda/factsheet/wmd/cw/cwcfs.htm> (last visited Mar. 8, 2006).

¹⁸ The Vienna Convention on the Law of Treaties, art. 53, May 23, 1960, 1155 U.N.T.S. 331.