

DEPARTMENT OF THE NAVY

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From: Deputy Assistant Judge Advocate General, International and Operational Law Division

To: Commander, Marine Corps Systems Command

Subj: LEGAL REVIEW OF OLEORESIN CAPSICUM (OC) PEPPER SPRAY

Ref: (a) Commander, Marine Corps Systems Command Itr Ser 5800 of 9 Feb 1998, with attachments

(b) DoD Directive 5000.1, Defense Acquisition of 15 Mar 96

(c) SECNAVINST 5000.2B, Implementation of Mandatory Procedures for Major and Non-major Defense Acquisition Programs and Major and Non-major Information Technology Acquisition Programs of 6 Dec 9

(d) DoD Directive 3000.3, Policy Directive for Non-Lethal Weapons of 9 Jul 96

(e) Manufacturer's Description of Product

(f) Proposed Concept of Employment for Oleoresin Capsicum (OC) Spray

(g) Chief, Bureau of Medicine and Surgery Letter Ser 24/98U24041, Medical Review: Purchase and Use of Oleoresin Capsicum of 13 May 98

(h) Department of the Army (DAJA-IO) Memo for the Office of the Deputy Chief of Staff for Operations and Plans, Request for Legal Review – Use of Oleoresin Capsicum Pepper Spray for Law Enforcement Purposes

(i) Chairman of the Joint Chiefs of Staff Memo Ser CH-393-94, Use of Riot Control Agents of 1 July 1994

(j) Department of Justice, National Institute of Justice, Technology Assessment Program Bulletin, March 1994

(k) <u>Draft</u> Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3110.07A, Nuclear, Biological, and Chemical (NBC) Defense; Riot Control Agents; and Herbicides Annual Review, of 1 March 1998.

1. <u>Background</u>. Reference (a) requested a legal review of the Marine Corps' acquisition and use of Oleoresin Capsicum (OC) pepper spray. References (b) and (c) require the Judge Advocate General of the Navy to conduct a legal review of all potential weapons and weapon systems acquired or developed by DoN to ensure that these weapons or weapon systems and their intended use are consistent with domestic and international law. No specific DoD Directive or Department of the Navy instruction specifically defines weapon. However, reference (c) defines weapon systems as an: "overarching term that applies to a host platform (e.g., ship, aircraft, missile, weapon), combat system, subsystem(s), component(s), equipment(s), hardware, firmware, software, or item(s) that may collectively or individually be a weapon system acquisition program (i.e., all programs other than information technology programs)."

This very broad definition encompasses the proposed system and therefore review of Oleoresin Capsicum as a weapon system is appropriate under reference (c). Reference (d) specifically requires legal review in the case of non-lethal weapons (NLW). This office regularly conducts legal reviews of Department of the Navy weapon systems on behalf of the Judge Advocate General of the Navy.

2. Weapon Description.

Background.

Reference (j) is a Department of Justice, National Institute of Justice, Technology Assessment Program Bulletin concerning Oleoresin Capsicum. This bulletin discusses the properties and effects of OC described herein. Oleoresin Capsicum (OC), popularly known as pepper spray, has gained acceptance and popularity with law enforcement officers and police agencies as a safe and generally effective method of incapacitating violent or threatening subjects. Although OC can be produced synthetically, it is a naturally occurring substance. It is found in the oily resin of cayenne and other varieties of peppers - the same peppers used to "heat up" spicy foods. Contact with OC particles in a spray incapacitates subjects by inducing an almost immediate burning sensation of the skin, and more important, a burning, tearing and swelling of the eyes. When the agent is inhaled, the respiratory tract is inflamed, resulting in a swelling of the mucous membranes lining the breathing passages and temporarily restricting breathing to short, shallow breaths. Most people have the same physiological reactions to OC exposure - they cannot keep their eyes open at all after being sprayed with OC unless they actually hold apart their eyelids with their fingertips. Fear and disorientation often result from this temporary blindness. There have also been reports of loss of strength and coordination perhaps due to shortness of breath. Consequently, employment of OC gives a decided advantage to the user in situations requiring individual or force protection measures.

Another benefit of OC is that in most cases no special decontamination procedures are required. It is biodegradable and unlike chemical irritants, OC has not been found to linger in clothing or affected areas. After an individual is sprayed with OC, only proper ventilation and access to water for flushing the eyes and skin are required to render the substance inert.

OC sprays are available in a variety of different concentrations, usually anywhere from 5 to 10 percent by volume. These percentages may be misleading, however, because it is the strength of the OC in the spray that determines its effectiveness, not its percent by volume. The strength of the OC in the spray depends on the grind of the pepper before the oil is extracted. Moreover, strength is usually measured in Scoville Heat Units¹ (SHU's); the higher the SHU's,

¹ Despite its scientific sounding name, Scoville Heat Units (SHU's) are not scientific measures. They are based originally on what were essentially taste tests.

the greater the inflammatory capacity of the OC. For example, oil from a 1 million SHU pepper grind would not be as inflammatory as oil from a 1.5 million SHU grind. A variety of vendors market different types of OC products. Aside from cost, choices involve product formulation, concentration level, range, type of trigger mechanism, spray pattern (mist, fog, or stream), and presence or absence of a safety device. One of the most important considerations is whether the product is included with an isopropyl alcohol-based carrier or one with a non-alcohol based carrier. Of particular concern is the potential inflammability of pepper spray products that use isopropyl alcohol as a carrier. Some manufacturers defend the use of alcohol-based carriers by highlighting the fact that isopropyl alcohol has been used in household aerosols for cosmetic and pharmaceutical products for many years. However, they admit that no OC product should be used near sparks or open flames. Furthermore, some manufacturers and product users believe that alcohol-based products are more effective than non-alcohol-based products because they work better under all temperature conditions. They also believe that alcohol-based products are better at atomizing the active ingredient, opening pores and dissolving skin oils. Advocates contend that the reaction of pores and skin oils may slow the time it takes for the product to take effect. Nonflammable carrier systems use Freon, Dymel, methylene chloride, and other industrial chemicals. These chemicals, in sufficient quantities, may be ozone depleting, toxic, or carcinogenic. Regardless of the carrier, aerosol cans of any type can leak, rupture, or explode when exposed to extremely warm weather.

Marine Corps OC System Contemplated for Acquisition and Purchase:

The system contemplated for acquisition and use by the Marine Corps is described in reference (e) and is discussed herein. The unit contains an irritant formulation of Oleoresin Capsicum mixed with water, a combination of propylene alcohol and specially denatured alcohol, which are food grade quality and FDA approved. The formulation is non-flammable and the propellant is non-ozone depleting. The propellant employed is environmentally safe nitrogen and contains no HCFCs or CFCs. The OC employed in the product is water soluble. It is processed further than oil based OC, removing natural oils, waxes and fats. Water soluble OC decontaminates easier than oil based solutions. The Capsaicinoid content will be not less than 0.18% nor more than 0.22%. The 0.2% capaicinoid level is formulated to be consistently effective, but not so excessive that decontamination time / simplicity is compromised. The capaicinoid level by volume translates to an SHU strength of 500,000. The delivery system utilizes a target specific stream of ballistic droplets for controlled delivery and minimal cross contamination. This allows a safer margin of effective distance and is less affected by environmental factors, such as wind and rain as compared to "fog" type aerosols. The manufacturer identifies "hazardous ingredients" as Oleoresin Capsicum (10%); Propylene

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² In one reported incident, police sprayed an armed, extremely agitated adolescent with OC and then shot him with an electrical stungum; the charge from the stungum apparently ignited the OC carrier liquid on his clothing and set him after.

Glycol USP (5%); Specially Denatured Alcohol (SDA) 408 (35%); Distilled H2O (50%). It lists possible "health hazards" associated with exposure to the product as:

Ingredients cause irritation, through all routes of entry. Repeated contact may cause dermatitis. Ingestion may cause nausea, vomiting, and /or diarrhea. May cause more severe, temporary, effects on those persons who are asthmatics or suffer from emphysema.

Reference (e) also describes the physiological effects of exposure to the product. It states that physiological effects will vary from subject to subject, but the majority may exhibit the following effects: the subject's eyes may close completely or blink in a rapid fashion; the respiratory system may become inflamed causing coughing, gagging, hiccuping or a feeling by the subject that they cannot catch their breath; subjects will experience anxiety and panic due to the above effects.

Reference (f) further describes the system contemplated for acquisition and generally describes intended methods of employment, as reflected herein. The Marine Corps intends to field OC dispensers to support mission requirements. Dispensers will be fielded in three sizes to accommodate individual, fireteam, and squad employment and will provide point and area target coverage. Smaller dispensers are light, portable and effective against individual targets, but sacrifice range and are prone to the effects of weather. Larger dispensers are heavier and more bulky, but provide more volume, increased ranges and an area coverage capability. Dispensers of like capacity and capability and filled with inert liquids are provided to facilitate realistic training. A brief description of each dispenser follows:

-Individual OC Dispenser with carrier. This system would provide the individual Marine the capability to defend him or herself from targets at ranges out to ten feet with a highly portable OC dispenser. The four ounce dispenser will project a ballistic stream rather than an aerosolized spray, and has a capacity of ten, half-second bursts. This dispenser is intended to address individual targets.

-<u>Team OC Dispenser with carrier</u>. This system would provide the individual Marine the capability to defend him or herself and members of his team from targets at ranges out to twenty feet with a highly portable OC dispenser. The twenty ounce dispenser projects a ballistic stream rather than an aerosolized spray, and contains enough OC material to yield twenty, half-second bursts. This dispenser is intended to address point and area targets.

-High Volume Output, High Capacity OC Dispenser. This system would provide an individual Marine the capability to defend himself and members of his squad from targets at ranges out to twenty-five feet with a highly portable OC dispenser. The fifty ounce dispenser projects a ballistic stream rather than an aerosolized spray, and contains enough OC material to

yield twenty-five, half-second bursts. This dispenser is intended to address point and area targets. The dispenser is factory refillable.

-Inert Individual, Tearn, and High Volume Output, High- Capacity OC Dispensers. This system will provide Marines inert dispensers for familiarization and training purposes which emulate the live dispensers in all respects. However, they are loaded with a non-irritant, non-toxic formulation payload. All are rechargeable at the unit level and contain a non-toxic, water soluble marker to allow immediate feedback on content delivery to target.

Reference (f) indicates that mission planning factors for OC deal almost exclusively with tactical employment considerations in an "operations other than war" (OOTW) environment. Traditionally, U.S. military legal reviews of weapon systems have focused upon employment of that system against combatants in the context of armed conflict. The non-lethal nature of this weapon system and its range of possible uses dictate that this review broaden the scope of the traditional legal review. Therefore, this legal review addresses employment of Oleoresin Capsicum (OC) pepper spray as a weapon system across the spectrum of conflict and force continuum, ranging from use in war through use in operations other than war and peacetime military operations, including civil disturbances, and for law enforcement purposes. The laws and regulations governing employment of OC depend upon the context of its use. The law of war and rules of engagement (ROE) relevant to a particular operation govern use of OC in war and Operations Other Than War. Domestic law and other instructions promulgated for law enforcement activities and civil disturbance operations govern use of force (including use of OC) for protection and security purposes, riot control, and civil disturbance operations within the United States and aboard United States bases, posts, embassy grounds and installations. Reference (k), discussed in paragraph 7 below, addresses permissible uses of OC.

The Chief, Bureau of Naval Medicine and Surgery, Department of the Navy conducted a medical review of the purchase and use of Oleoresin Capsicum (OC) pepper spray. The results of this medical review are reflected in reference (g). Reference (g) approves the proposed use of OC pepper spray, with comments, including: that exposure to OC can cause respiratory failure in susceptible individuals and that the Marine Corps use an OC product that is free of potential or known carcinogens.

3. Weapons Review. A weapons review under international law traditionally addresses the following issues: (1) whether the weapon causes suffering that is needless, superfluous, or disproportionate to the military advantage reasonably expected from the use of the weapon; (2) whether the weapon is capable of being controlled so as to be directed against a lawful target, i.e., can it be used in a discriminate manner in order to minimize risk to civilians not taking a direct part in hostilities; and (3) whether there is a specific rule of law or treaty provision prohibiting the weapon's acquisition or use. These three issues are analyzed in relation to the weapon's primary intended employment. Of course, law of war principles are not satisfied by

the mere fact that a weapon is itself deemed legal. A weapons review cannot anticipate all the targeting issues and circumstances surrounding employment of the weapon reviewed. Commanders and individuals contemplating use of a particular weapon must make such determinations on a case-by-case basis and must always comply with applicable rules of engagement. Nonetheless, this review attempts to identify the legal considerations most likely to arise in the context of employment.

The principles of unnecessary suffering, military necessity and distinction discussed in paragraphs 4 and 5 below are traditional law of war concepts applicable in armed conflict. These concepts distinguish combatants and non-combatants and govern the legality of weapons and their employment and are discussed in the context of the application of force in war. These principles may be applied by analogy to the employment of a weapon system in the context of operations other than war, including, for example, peace operations and humanitarian assistance operations. The principles should be no less applicable when the intended target may not be a combatant, but rather any individual or group committing hostile or threatening acts as defined by the applicable rules of engagement in force for that operation.

Operations other than war are frequently executed under rules of engagement or a use of force policy which generally permit the application of force only in self or unit defense. Any application of force under such policy must be necessary, in response to a hostile act or demonstration of hostile intent and any force applied in self-defense must be proportional to the threat. All uses of force, whether in war or operations other than war, must be in consonance with the rules of engagement or use of force policy applicable to that operation.

4. <u>Unnecessary Suffering / Military Necessity</u>. The touchstone for legality of a weapon under traditional concepts in the law of war is whether that weapon's intended use or method of employment is calculated to cause unnecessary suffering. In the context of weapons employment under the law of war, the requirement of avoiding unnecessary suffering is equally applicable to both the intended combatant target and the potential incidental injury to noncombatants or damage to civilian property. The discussion of incidental injury or damage resulting to unintended persons or property is largely a function of distinction or target discrimination and is discussed in more detail in paragraph 5 below.

The Regulations to the Hague Convention on Land Warfare of 1907 codify the prohibition on the employment of arms, projectiles, or material "calculated to cause unnecessary suffering." This customary prohibition requires a balancing of the military necessity in

³ Hague Convention (No. IV) Respecting the Laws and Customs of War on Land and annexed Regulations, Oct. 18, 1907, art. 23, 36 Stat. 2277, 75 U.N.T.S. 287. This provision parallels that from the antecedent 1899 Hague Convention No. II which prohibited the employment of arms, projectiles, or material "of a nature to cause superfluous injury." Hague Convention (No. II) Respecting the Laws and Customs of War on Land, Jul. 29, 1899, art. 23, 32 Stat. 1803.

employing a weapon and the likely suffering occasioned by that employment. Any injury, collateral damage, or general suffering wrought by a weapon's use should be justified by a military need. Historically, this analysis has involved comparisons to other existing technologies and comparable wounding mechanisms as well as a survey of the practice of other States regarding use of a particular weapon.⁴

The principles of unnecessary suffering and military necessity must also be considered in light of the definition and policy underlying the Department of Defense Non-Lethal Weapons (NLW) Program (reference (d)). The program is designed to develop weapons that minimize fatalities, while expanding the range of options available to commanders. These goals mirror and support compliance with the general principles of the law of war, i.e., development of weapons that reduce human suffering while furthering military effectiveness. Finally, the general principles of military necessity, avoidance of unnecessary suffering, and proportionality frequently are manifested in more specific treaty provisions. Thus, while the weapon may not violate the general principles, specific treaties may restrict or prohibit the use of a particular weapons. Relevant treaties in this regard are discussed in paragraph 6 below.

Oleoresin Capsicum is not calculated (i.e., designed), nor does it in fact cause unnecessary suffering. It is designed specifically to temporarily incapacitate violent or threatening subjects while reducing human suffering and is in consonance with the DoD NLW program. Its physiological effects, while relatively painful, are temporary and do not rise to the level of unnecessary suffering contemplated in the prohibition. This view is supported by references (g) and (j). Provided a military necessity justifies its employment, the principle of unnecessary suffering would not preclude employment of OC in appropriate circumstances.

5. <u>Distinction / Discrimination</u>. A related concept under the law of war is that a weapon must be discriminating, or capable of being controlled (*i.e.*, it can be directed against intended targets). Those weapons which cannot be employed in a manner which distinguishes between lawful combatants and noncombatants violate these principles.⁶ Indiscriminate weapons are prohibited by customary international law⁷ and treaty law.⁸

⁴ Sec DEP'T OF ARMY, FIELD MARKIAL 27-10, THE LAW OF LAND WARFARE, art. 34 (Jul. 1956) [bereinafter FM 27-10].

⁵ DEP'T OF DEFENSE, DIRECTIVE 3000.3, POLICY FOR NON-LETHAL WEAPONS, PACES. C., D.1. (9 July 1996).

⁶ DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONORESS, at 611 (1992).

⁷ FM 27-10, supra ngtt: 2, at para. 40.

⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), Dec. 12, 1977, art. 51(4) & (5), 16 LL.M. 1391 [hereinafter Protocol I].

The OC system contemplated for acquisition and employment by the Marine Corps is specifically designed to limit its effects only to intended targets. The contemplated OC dispensers utilize a target specific stream of ballistic droplets for controlled delivery and minimal cross contamination (i.e., point target delivery), rather than an aerosolized spray which increases the likelihood of unintended subject impact. Provided the weapon is employed in a discriminating manner, the principle of distinction / discrimination presents no prohibition to acquisition and employment of OC in appropriate circumstances.

6. Specific Treaty and Statutory Proscriptions. The following is a discussion of potentially relevant treaties and U.S. federal statutory law. At the outset, it is critical to note that the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (hereinafter, the CWC), ratified by the United States in April 1997, prohibits the use of Riot Control Agents (RCA) as a "method of warfare." Relevant inquiries for purposes of this legal review, therefore, include whether Oleoresin Capsicum (OC) pepper spray is a Riot Control Agent within the meaning of the CWC and, if so, under what circumstances OC may be employed. This review will first examine potentially relevant treaty and statutory proscriptions which may relate to the acquisition and employment of Oleoresin Capsicum.

(a). Torture Convention and The Torture Victim Protection Act of 1991.

Oleoresin Capsicum is not designed to cause death or permanent injury. However, it is conceivable that some may argue that the potential injuries associated with its use or the method and circumstances related to its employment violate the Torture Convention and/or the Torture Victim Protection Act.. For the reasons stated below, this legal review concludes that neither the Convention nor the statute place any restriction on the employment of Oleoresin Capsicum.

Torture is prohibited during armed conflict through various provisions of the Geneva Conventions, and, outside of armed conflict, through the Torture Convention. The Torture Convention, however, would apply to the operations of deployed U.S. Forces only in the most limited circumstances, for example during an operation other than war. First, the convention applies only to state acts occurring on territory under its jurisdiction. This provision, of course, underscores the application of the convention to a sovereign's treatment of its own citizens. While an argument exists that individuals detained by U.S. Forces in the course of an operation other than war have fallen under U.S. jurisdiction, the U.S. practice in such cases has been to apply the protections of the Geneva Prisoner of War Convention, which provide equal if not

⁹ Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 23 LL.M. 1027 [hereinafter Torture Convention].

¹⁰ Id at art. 2.

greater protections to detainees.¹¹ The definition of torture described in Article 1 strongly implies a custody-type situation. The U.S. Senate emphasized this point in attaching an understanding to its resolution of advice and consent stating that "the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.²¹² Subsequently, Congress passed legislation implementing the Torture Convention. The Torture Victim Protection Act of 1991¹³ implemented U.S. obligations under the Torture Convention, as well as the United Nations Charter and other international agreements pertaining to the protection of human rights. This legislation confirms the U.S. position that the convention would not apply to many situations, including crowd control not involving custody, in which U.S. forces might employ OC. It is conceivable, though, that OC might be employed in situations involving custody, such as subduing persons presenting some threat to U.S. forces or escaping enemy prisoners or detainees. The Torture Convention and the Torture Victim Protection Act, would, nonetheless, be inapplicable for the reasons stated below.

The substantive provisions of Article 1 of the Convention place OC outside its proscriptions. Article 1 of the Convention defines torture as "severe pain or suffering," which is intentionally inflicted" for a particular purpose, and which is not "incidental to lawful sanctions."14 Section 3(b)(1) of the Torture Victim Protection Act similarly specifies that "torture" refers to acts causing severe pain or suffering other than pain or suffering arising only from, or incidental to, lawful sanctions. While the application of OC will result in some pain, including a burning sensation associated with the eyes and mucous membranes, shortness of breath, and other limited physiological effects, it is doubtful that it would be severe enough to trigger application of the Torture Convention or the Torture Victim Protection Act. Furthermore, the temporary discomfort associated with the use of OC would clearly be less injurious than lawful means for the use of deadly force, the use of which do not per se violate either Torture Convention or Torture Victim Protection Act. An example of the type of pain contemplated by the Torture Convention and its implementing statute is that which results from sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging individuals in positions that cause severe pain.13 Even if the use of OC were to cause severe pain, it would not be the type of intentional infliction of pain contemplated by the Torture Convention or the Torture Victim Protection Act. The convention and statute require a specific intent to inflict the pain for purposes such as coercing a confession, punishment, or intimidation.

¹¹ CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL OF THE ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995, 54 (1995).

^{12 136} CONG. REC. 17491 (1990).

^{13 106} Stat. 73 (1991).

¹⁴ Torture Convention, supra note 10, at art. 1.

¹⁵ S. Treaty Doc. No. 100-20, at 4 (1988).

The intention behind the use of OC is to accomplish a variety of military goals, such as force protection, through means which significantly limit the chances of a fatality. Such uses are not consistent with the type of malicious intent the convention and statute seek to outlaw. Finally, as mentioned above, article 1 of the convention and section 3(b)(1) of the statute explicitly exempt from the definition of torture, conduct that is "incidental to lawful sanctions." While law enforcement sanctions are clearly envisaged in interpreting this exclusion, it would also appear to exempt the lawful actions of military personnel acting within their official duties. Assuming then, that the custody or physical control of a prisoner or detainee were lawful, no violation of the Torture Convention or the Torture Victim Protection Act would limit the employment of Oleoresin Capsicum. The widespread use of OC by domestic law enforcement agencies (federal, state and local) as a less-lethal alternative to deadly force, as evidence of subsequent state practice, serves to confirm the U.S. view is that OC use does not violate the Torture Convention or Torture Victim Protection Act.

(b). Biological Weapons Prohibitions.

The 1925 Geneva Gas Protocol prohibits, in addition to "asphyxiating, poisonous, and other gases," the use of bacteriological methods of warfare. ¹⁹ The 1972 Biological Weapons Convention broadens the reach of the Geneva Protocol. ²⁰ This Convention proscribes the development, production, stockpiling, acquisition, or retention of "[m]icrobial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes. ¹²¹ Thus, this convention, an arms control treaty, extends beyond the weapon's use in armed conflict and prohibits an entire class of weapons.

OC, however, falls outside the BWC definition. It is, in fact, used as an additive in foodstuffs and pharmaceutical products. This legal review concludes that neither the 1925 Geneva Gas Protocol nor the 1972 Biological Weapons Convention prohibit the acquisition or employment of Oleoresin Capsicum.

¹⁶ DEP'T OF DEFENSE DIRECTIVE 3000.3, POLICY FOR NON-LETHAL WEAPONS, p. 2 (9 July 1996).

¹⁷ S. Treaty Doc., supra note 15, at 4.

¹⁸ kd at 4-5.

¹⁹ Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, T.I.A.S. No. 8061 [hereinafter Geneva Gas Protocol].

²⁰ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

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(c). Chemical Weapons Convention.

Introduction.

The United States ratified the 1993 Chemical Weapons Convention (CWC), on 25 April 1997 and the treaty entered into force on 29 April 1997. This convention prohibits the development, production, acquisition, stockpiling, retention, and use of chemical weapons and limits the use of Riot Control Agents (RCAs) and prohibits their employment as a method of warfare. Like the Biological Weapons Convention, the CWC is an arms control treaty and is not limited to application during international armed conflict (i.e., it applies at all times and under all circumstances unless the treaty indicates otherwise). Whether Oleoresin Capsicum is governed by the strictures contained in the CWC hinges upon whether it is a riot control agent within the meaning of the treaty. If OC is an RCA, then it is subject to those Treaty limitations specifically applicable to RCAs, including its limitations on use and prohibition of employment as a "method of warfare."

For reasons articulated below, this review concludes that Oleoresin Capsicum is a riot control agent within the meaning of the CWC and its employment is subject to the strictures contained in that Treaty as discussed herein. Justifying these conclusions requires a close (if somewhat tedious) examination of the Treaty and the manner in which it distinguishes between RCAs and chemical weapons. This discussion follows immediately below.

The CWC regulates chemical weapons and riot control agents (RCAs). Article I (General Obligations) sets forth the Convention's basic prohibitions and obligations. It proscribes the development, production, acquisition, stockpiling, retention, transfer, use or preparation to use chemical weapons. It also requires Parties to destroy their stocks of chemical weapons and their chemical weapon production facilities. Article I closes by stating that "each State Party undertakes not to use riot control agents as a method of warfare" (emphasis added). Thus, to review the legality of Oleoresin Capsicum under the CWC, one must determine if it falls under the Convention's definition of chemical weapons or riot control agents.

Chemical Weapons:

Article II (Definitions and Criteria) of the Convention defines chemical weapons as "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" (emphasis added).²³ The key elements to the definition of chemical weapons are the terms toxic chemicals

²² Convention on the Prohibition of the Development, Production, Stockpilling and Use of Chemical Wespons and on their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (1993)[hereinafter CWC].

²³ Id., at art. II(1)(a.). The definition of chemical weapons also includes "munitions and devices specifically designed to cause death or other harm through the toxic properties" of toxic chemicals released by those munitions, as well as "(a)ny equipment specifically

and purposes not prohibited under this Convention. A weapon is not a chemical weapon under the Convention if it is not associated with a toxic chemical or if it is used for a purpose not prohibited by the Convention. Toxic chemical is defined as "[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." This definition has four elements, toxic chemicals are: (1) a chemical; (2) which can cause death, permanent harm, or temporary incapacitation; (3) through its chemical actions on life processes; (4) of humans or animals. This definition is, and was apparently intended to be, extremely broad. It includes any type of toxicity with respect to man or animal, whether lethal or non-lethal, and whether permanent or temporary. It was designed to apply to currently known toxic chemicals and their precursors, as well as potential future toxic formulations. The chemical, of course, must be potentially toxic, i.e., have a harmful chemical action on life processes. Furthermore, the toxicity must affect humans or animals. Thus, herbicides would be excluded from the CWC's proscriptions. Nonetheless, the CWC sets the threshold intentionally low in an attempt to capture all possible chemical weapons.

Since the first element of the definition of chemical weapons is so inclusive, the second element, purposes not prohibited, becomes critical in analyzing any proposed weapon. One CWC commentary describes this criterion as the "general purpose criterion." For what purpose are the toxic properties of the chemical being used? The Convention specifically defines purposes not prohibited in article II (9). Of the four non-prohibited purposes listed in that paragraph (peaceful purposes, protective purposes, military purposes not relying on toxic properties, and law enforcement including domestic riot control purposes), the most relevant ones for this discussion of Oleoresin Capsicum are the latter two: II (9)(c) - [m]ilitary purposes not connected with the use of chemical weapons and not dependent on the use of the toxic

designed for use directly in connection with the employment" of such munitions and devices. Id at art. II(1)(b)& (c).

^{24 *[}C]hemical weapons are distinguished from other weapons containing/utilizing a chemical or chemicals, by reference to their toxicity and the Intent of utilizing that property." WALTER KRUTZSCH & RALF TRAPP, A COMMENTARY ON THE CHEMICAL WEAPONS CONVENTION 25 (1994)[hereinafter CWC COMMENTARY].

²⁵ CWC, supra note 22, at art. II.2.

²⁶ S. TREATY DOC. No. 103-21, at 8 (1993).

²⁷ On the other hand, if a particular herbicide were toxic to humans and was intentionally employed against humans, it would be considered a chemical weapon. CWC COMMENTARY, supra note 24, at 30.

^{28 &}quot;[[]ntent is the ultimate enterior to decide whether such a chemical was indeed a chemical weapon or not." Id. at 25; "With regard to the term purposes not prohibited under the Convention," the negotiators of the CWC chose to define what chemical activities were to be based by forbidding all activities except those specifically not prohibited. This inclusive approach was chosen to facilitate verification and to preclude loopholes with regard to unknown or future chemicals of possible concern." S. TREATY DOC. 103-21, supra note 26, at 12.

²⁹ CWC COMMENTARY, impro note 24, at 26-27.

properties of chemicals as a method of warfare; and II(9)(d) - [1]aw enforcement including domestic riot control purposes.

Article II (9)(c) is unfortunately circular in that it uses the term chemical weapons in a paragraph that essentially serves to define a constituent of the chemical weapons definition. Nevertheless, a common sense paraphrase of the article II (9)(c) purpose is that a toxic chemical can be used for military purposes so long as those purposes do not rely on the toxic properties of the chemicals as a method of warfare to cause the intended injury. There appears to be little controversy regarding this interpretation.30 There is a valid and legitimate role for toxic chemicals, even in weapons to be used during armed conflict. The CWC, while capturing a broad array of toxic chemicals, only limits weaponry that relies on those toxic chemicals as a wounding mechanism. As described in article II (9)(c), the wounding mechanism cannot be dependent on the use of those properties for the weapon to fit the purpose not prohibited exclusion. In other words, simply using a weapon containing a potentially toxic chemical is not prohibited. The clearest examples include rocket fuels, incendiary weapons, and smoke weapons because, while the chemicals used in the devices may be toxic to humans, they are not primarily designed to depend on the toxic properties of chemicals to be effective.11 Implicit in article II (9)(c) is that the toxic properties must also be used against humans or animals. This flows from the definitional requirement of Art II (2) that chemicals are only toxic if they cause harm to humans or animals.

The other relevant non-prohibited purpose is contained in Article II (9)(d). That article permits the use of toxic chemicals for [I]aw enforcement including domestic riot control purposes. The fact that the only example provided is that of domestic riot control begs the question of whether toxic chemicals may be used for law enforcement purposes in an extraterritorial context. The nature of activities permitted under article II (9)(d) is one that will be determined by the practice of states.³²

The CWC contains an additional mandate on the use of toxic chemicals for a purpose not prohibited. Toxic chemicals intended for such legitimate purposes must be "of a type and quantity consistent with such purposes." Thus, while weapons not relying on their toxicity are not considered chemical weapons, they may, nonetheless, contain toxic chemicals. If that is the case, article II (1)(a) requires that they must not be produced in quantities in excess of that

³⁰ Id. at 42 (stating that "any chemical can be used for military purposes, including as a weapon as long as the predominant effect utilized in the weapon is not toxicity vis-a-vis man or animals.").

^{31 14}

³² Id. at 43.

³³ CWC, supra note 22, at art. II(1)(a).

required for their particular purposes. This provision was designed to prevent abuses of the purposes not prohibited regime.34

Riot Control Agents (RCAs).

The Second major category of chemicals regulated by the CWC is Riot Control Agents. The CWC defines RCAs as "[a]ny 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." Like the definition of toxic chemicals, this definition has essentially four elements. RCAs are: (1) chemicals that are not listed in one of the schedules in the Annex on Chemicals; (2) which can produce sensory irritation or disabling physical effects; (3) that do so rapidly; and (4) whose effects disappear within a short time following termination of exposure.

While the proscriptions imposed by the CWC on chemical weapons are stated as absolute, the Convention seems to permit employment of RCAs, provided they are not used as a method of warfare. The CWC does not address whether a given substance can be subject to both the restrictions placed on RCAs and those placed on chemical weapons. Subsequent analysis in this memorandum concludes that RCAs are only constrained by the method of warfare restriction, that is, the CWC Treaty establishes a regime for treatment of RCAs separate from the regime dealing with chemical weapons.

As previously indicated, the CWC contains an ambiguity regarding the restrictions to which a given chemical may be subject. This ambiguity arises from a comparison of the definitions of RCAs and toxic chemicals. The definition of toxic chemicals appears broad enough to include many, if not all, RCAs. Specifically, the use of the term temporary incapacitation in the definition of toxic chemical is difficult to distinguish from the term disabling effect used in the definition of RCAs. Thus, some contend that RCAs fall under the CWC's definition of toxic chemical. If that is the case, then RCAs become subject to the CWC's chemical weapon regime as well as the RCA regime. The consequences of such an interpretation are significant. RCAs would then be a chemical weapon, subject to all the limitations applicable to such weapons, unless they were used for a purpose not prohibited. This is problematic and would have a major impact on the use of RCAs since the purposes not prohibited exclusion for use of chemical weapons is an enumerated and apparently exclusive list of four activities only. Alternatively, if

³⁴ See CWC COMMENTARY, supra note 24, at 43.

³⁵ CWC, supra note 22, et art. II(7).

³⁶ ld at art. I(5).

the CWC provides for a regime for RCAs separate than that for chemical weapons, then the only limitation on their use is that they may not be employed as a method of warfare.³¹

Several commentators on the Convention, Dr. Matthew Meselson, Walter Trapp, and Ralf Krutzsch, subscribe to the view that RCAs are governed by the chemical weapon regime. Their views stem from their interpretations of the definitions of toxic chemicals and RCAs, and from the language of the law enforcement purpose not prohibited language in Article II (9)(d). Regarding the definition of toxic chemicals, Trapp and Krutzsch argue that because of the breadth of the definition and the absence of any specificity about the extent of non-lethal harm required for a chemical to be a toxic chemical, RCAs are toxic chemicals. Specifically, they point to the lack of a definition of the term temporary incapacitation to support their argument that "no type of toxicity against man or animals should be exempted." During Senate hearings, Professor Meselson explicitly stated that RCAs fall under the definition of toxic chemicals because they cause "temporary incapacitation." The apparent similarity of the term "disabling effect" in the definition of RCA to "temporary incapacitation" contributes to this impression.

Dr. Meselson, as well as Trapp and Krutzsch, bolster their argument that RCAs are toxic chemicals by referring to the "purposes not prohibited" definition, specifically Article II(9)(d). Dr. Meselson argued that "[t]he specific inclusion of "riot control purposes" in the list of purposes permitted by the Convention underscores the fact that riot control agents are subject to the same definition of chemical weapons as any other toxic chemicals." Trapp and Krutzsch are even more explicit in making this point:

The inclusion of this subparagraph [art. II(9)(d)] in the list of 'purposes not prohibited' has profound consequences for the main undertakings under the Convention: if Article I is read in isolation, it might seem that riot control agents are covered by a profoundly different regime than are other toxic chemicals. However, if all provisions relating to riot

³⁷ If RCAs were subject to the chemical weapon regime, then the only "purpose not prohibited" that would permit employment of RCAs is article II (9)(d), the law enforcement exclusion.

³⁸ Chemical Weapons Convention Hearings Before the Committee on Foreign Relations of the U.S. Senate, 103d Cong. 59 at 98-99 (statement of Dr. Matthew Meselson, Department of Bio-Chemistry and Molecular Biology, Harvard University); CWC COMMENTARY, supra note 24, at 26.

³⁹ CWC COMMENTARY, supra note 24 ± 29.

⁴⁰ CWC Hearings, supra note 50, at 98.

⁴¹ As an example, the Army Manual dealing with RCAs attributes incapacitating effects to standard RCAs such as CS, CSX, CS1, CS2, and CR. Dep't/of Army, Field Manual 3-11, Flame, Riot Control Agents, and Herseline Operations, 6-1 - 6-3 (16 Aug. 1996).

⁴² CWC Hearings, sugra note 38, at 99.

control agents in Articles I and II are read together, it can also be argued that this subparagraph effectively clarifies what the phrase 'as a method of warfare' in paragraph 5 of Article I means. It can be contended that the explicit link between paragraph 9 [of art. II] and paragraph 1 of Article II [definition of chemical weapons and toxic chemicals] establishes that riot control agents can under certain circumstances be considered chemical weapons. In such cases, all prohibitions under paragraph 1 of Article I will apply. In such an interpretation, the prohibition under paragraph 5 of Article I on the use of riot control agents as a method of warfare becomes a clarification, rather than a limitation, of paragraph 1 of the same Article: it can be argued that any hostile use of a weapon disseminating a riot control agent as defined in paragraph 7 of Article II other than for law enforcement (including domestic riot control) purposes is to be considered a method of warfare, and hence prohibited, and that any agent so used is to be considered a chemical weapon. 43

This discussion raises issues of treaty interpretation. The fundamental legal principle applicable to treaty interpretation is that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The context for purposes of treaty interpretation includes, in addition to its text, the treaty preamble and annexes. The following paragraphs apply these principles.

First, in referring to the plain language of the convention, while there are areas of overlap in the two definitions, they do contain different elements. In comparing the elements, it is apparent from their differences that the nature of the harm caused by RCAs is generally much less severe and that the toxic effects of RCAs are transient. Thus, it is clear from the definition of RCAs that the CWC envisages RCAs to be a relatively benign category of chemicals. The fact that the definition excludes those chemicals listed on Chemical Annex Schedules, many of which are extremely toxic, bolsters this point. While RCAs may well be toxic chemicals, in establishing a separate regime for a particular category of toxic chemicals, RCAs, the CWC has limited the boundaries of this category by narrowly defining the chemicals that qualify as RCAs.

Next, while the commentator's arguments are colorable, viewing them in light of the treaty, as well as its object and purpose, they are incorrect. At the outset, it should be noted that even Trapp and Krutzsch, by using language such as "it might seem" and "it can also be argued," acknowledge that the issue is subject to differing interpretations. At another point, they also

⁴³ CWC COMMENTARY, suprin note 24, at 42-43.

⁴⁴ Vienna Convention on the Law of Treatics, May 23, 1969, art. 31(1), 8 I.L.M. 679. While the U.S. has not ratified this treaty, it considers it to reflect customary international law.

⁴⁵ Id. at art 31(2).

admit that this issue presents a "complex situation." More importantly, given the placement of Article I(5) as a general obligation, and the CWC's subsequent treatment of RCAs, the CWC does create a separate regime for RCAs than it does for chemical weapons. Not only are RCAs treated differently in Articles I and II but also in Articles III and X. Article III(1)(e) discusses specific declaration requirements for RCAs: "[s]pecify the chemical name, structural formula and Chemical Abstracts Service (CAS) registry number, if assigned, of each chemical it holds for riot control purposes. This declaration shall be updated not later than 30 days after any change becomes effective." Article X, the article discussing assistance and protection against chemical weapons, accords Parties the right to seek assistance and protection when chemical weapons have been used against it or when RCAs have been used against it. Thus, at all logical parts of the CWC, the general obligations, definitional, and declaration sections, the convention addresses RCAs separately from chemical weapons.

The commentators overlook the entire context of the CWC. Instead, they focus solely on articles I and II and the CWC's purpose of destroying chemical weapons in their attempt to categorize RCAs as toxic chemicals subject to the chemical weapon definition. In doing so, however, they fail to grasp the CWC's other purpose of addressing the RCA issue, which the negotiators considered important enough to include in Article I.

Additionally, Trapp and Krutzsch's text quoted above relies on the definitions in Article II, particularly Article II(9)(d), to interpret the meaning of Article I(5). They contend that Article I(5) cannot be read "in isolation." Based on treaty interpretation principles, it would appear just the opposite is true. The general obligations of Article I establish the object and purpose of the treaty and should be used to interpret subsequent provisions of the treaty, not vice versa.

Finally, if any ambiguity still exists, the Vienna Convention permits resort to "supplementary means of interpretation, including preparatory works of the treaty and the circumstances of its conclusion." In his testimony to the Senate Foreign Relations Committee, Ambassador Stephen Ledogar, the head of the U.S. delegation the final three years of CWC negotiations, discussed the background behind the negotiation of the RCA provisions. Ambassador Ledogar described the negotiations surrounding RCAs as "contentious."

⁴⁶ CWC COMMENTARY, supra note 24, at 42 n. 44 (stating that "[w]ithout that sub-paragraph (article IK(9)(d)), it might have been possible to argue that riot control agents are exempted altogether from the term 'chemical weapons.' With that sub-paragraph, however, a much more complex situation arises.")

⁴⁷ CWC, supra note 22, at art. 111.(1)(e).

⁴⁸ Vienna Convention on the Law of Treaties, supra note 44, at art. 32.

⁴⁹ CWC Hearings, supra hote 38, at 36.

That the negotiations surrounding the use of RCAs were contentious is not surprising given their historical treatment in the context of the 1925 Geneva Gas Protocol. That Protocol bans the "use in war of asphyxiating, poisonous, or other gases, and of all analogous liquids, materials or devices." The U.S. ratified that Protocol in 1975 with a reservation that rendered the United States' obligation under the Protocol as being a prohibition on the first use of chemical weapons. That reservation was not controversial. However, disagreement swirled around the Protocol's coverage of RCAs. Since the 1960s, the U.S. has maintained that the Protocol applies only to lethal and incapacitating chemical agents and not to RCAs. The U.S. therefore maintained that RCAs could be used during armed conflict. That view was not universally shared in the international community. The United States' extensive use of RCAs during the Vietnam War brought the differing interpretations to light. As a matter of national policy, however, the U.S., upon ratifying the Protocol in 1975, renounced the first use of RCAs in war except in defensive military modes to save lives. Nonetheless, the U.S. maintained that RCAs were not chemical weapons covered by the Protocol.

Against this historical backdrop, Ambassador Ledogar continued to assert the position that RCAs were not chemical weapons. Some nations, however, expressed concern that "RCAs would constitute an immediate risk and danger if they were allowed to develop into a new generation of non-lethal but effective chemical agents of warfare, causing insurmountable problems in trying to distinguish between 'real' and 'non-lethal' chemical weapons on the battlefield, as well as between 'real' and 'non-lethal' chemical warfare units." The result was a compromise in which the U.S. accepted the CWC's Article I (5) prohibition on the use of RCAs as a "method of warfare" in exchange for their categorization outside the chemical weapon

⁵⁰ Geneva Gas Protocol, supra note 19.

⁵¹ FM 27-10, supra note 4, at p. 2 (change 1).

⁵² United States Arms Control and Disarmament Agency, Arms Control and Disarmament Agreements 19 (1990) (including Canada, France, United Kingdom, and the Netherlands) (bereinafter Arms Control and Disarmament Agreements).

⁵³ Memorandum of Law by Roberts B. Owen, Legal Advisor, Department of State (Apr. 9,1980), reprinted in Office of the Legal Advisor, U.S. Dep't of State, Digest of United States Practice in International Law 1980, 1026, 1027 (1986)[hereinafter Digest of U.S. Practice]

⁵⁴ Id. For a detailed discussion of the opposing view see STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE (SIPRI), THE PROBLEM OF CHEMICAL AND BIOLOGICAL WARFARE: CB AND THE LAW OF WAR 41 - 66 (1973)[hereinafter SIPRI].

⁵⁵ Digiest of U.S. Practice, supra note 53, at 1032.

⁵⁶ Exec. Order 11850, 3 C.F.R. 980 (1971-1975), reprinted in 50 U.S.C. 1511 (1995)[hereinafter E.O. 11850].

⁵⁷ Dioest of U.S. PariCTICE, supra note 53, at 1032.

⁵⁸ CWC Hearings, supra note 38, at 36.

⁵⁹ This restriction represents a concession on the part of the United States as it previously admitted no restrictions on the use of

regime. Ambassador Ledogar emphasized the latter point by expressly testifying that "RCAs are defined in a section separate from chemical weapons to indicate that while the Convention prohibits their use as a method of warfare, they themselves are not considered chemical weapons."

Given the foregoing, this legal review concludes that RCAs are subject only to the method of warfare restriction contained in the CWC and not to those restrictions placed on chemical weapons. As previously indicated, this legal review further concludes that Oleoresin Capsicum is a riot control agent within the meaning of the CWC. This determination is inescapable given the Convention definition that RCAs include 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. This definition describes precisely the temporary physical effects intended and actually resulting from the application of OC. Furthermore, this determination is supported by prior U.S. precedent. In reference (h), W. Hays Parks (Colonel USMCR, Ret.), eminent law of war scholar and publicist and Special Assistant to the Judge Advocate General of the Army for Law of War Matters, reviewed OC for use in a military law enforcement capacity. Colonel Parks noted interagency disagreement surrounding the matter, but squarely concluded that "OC should be considered a RCA." Moreover, in reference (i), the Chairman of the Joint Chiefs of Staff, General John M. Shalikashvili, reached the same conclusion, stating:

Cayenne Pepper Spray has been used for riot control purposes, and although an argument might be made to the contrary, it is considered a riot control agent (RCA) for purposes of the Chemical Weapons Convention (CWC). Its use in war will be subject to the same US policy as the more traditional RCAs.⁶²

Given the conclusion that Oleoresin Capsicum (OC) pepper spray is a riot control agent within the meaning of the CWC and subject to its *method of warfare* restriction, the relevant inquiry is what uses of RCAs are permitted under the CWC.

RCAs in war. Article I(5) essentially indicates the U.S. acceptance of an international legal obligation regarding RCAs, a restriction the U.S. formerly assumed only as a matter of policy.

⁶⁰ CWC Hearings, supra note 38, at 36.

⁶¹ Department of the Army, Office of the Judge Advocate General (DAJA-IO) Memorandum for the Office of the Deputy Chief of Staff for Operations and Plans, Request for Legal Review - - Use of Oleoresia Capsicum Pepper Spray for law Enforcement Purposes of 20 Sep 1994.

⁶² Chairman of the Joint Chiefs of Staff Memo Ser CH-393-94, Use of Riot Control Agents of 1 July 1994.

7. Employment of Riot Control Agents.

The phrase method of warfare is not defined in the CWC or in the negotiating record and has been the subject of significant debate in the United States.⁶³ The Administration view is that United States Armed Forces must be involved in an armed conflict, either international or non-international to engage in a method of warfare.⁶⁴

Prior to ratification of the CWC, RCA employment in war was governed by Executive Order 11850 (E.O.11850)⁶³ and the rules of engagement relevant to a particular operation. E.O. 11850, promulgated by President Ford in 1975, prohibits, as a matter of national policy, the first use of RCAs in war except in defensive military modes to save lives. The Executive Order lists four examples of permissible "uses[s] of riot control agents in war...in defensive military modes to save lives." These are:

(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. (d) Use of riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys and paramilitary organizations.⁶⁷

U.S. ratification of the Chemical Weapons Convention, however, created debate regarding the continuing efficacy of E.O. 11850, particularly exceptions (b) and (c) quoted above. ⁶⁸ This

⁶³ CWC Hearings, supra note 38 (statement of Hon. Walter B. Slocombe, Deputy Under Secretary of Defense for policy).

Letter from President William J. Clinton to the Senate of the United States (June 23, 1994). This letter sets forth the Administration's interpretation of article I (5) of the CWC, the article proscribing the use of RCAs as a method of warfare. President Clinton stated that "[o]ther peacetime uses of RCAs, such as normal peaceteceping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and noncombatant rescue operations conducted outside...[international and non-international armed conflicts] are unaffected by the Convention.

⁶⁵ Exec. Order 11850, supra note 56.

⁶⁶ Id

⁶⁷ Id.

⁶⁸ Military Implications of the Chemical Weapons Convention: Hearings Before the Senate Armed Services Committee, 103d Cong. 77 (1994)(statement of General John Shalikashvili). President Clinton's letter to the Senate, supra note 64, states that "[t]he CWC does prohiblt the use of RCAs solely against combatants...and the CWC's prohibition on the use of RCAs as a "method of warfare" also precludes the use of RCAs even for humanitarian purposes in situations where combatants and noncombatants are intermingled, such as the rescue of downed air-crews, passengers and escaping prisoners and situations where civilians are being used to mask or screen attacks."

debate has focused upon what uses of RCAs constitute "methods of warfare" so as to fall within the CWC's proscriptions. If a use of RCAs constitutes a "method of warfare" then the CWC prohibits such use as a U.S. treaty obligation under international law. The executive order, however, authorizes use of RCAs, in war in certain situations. Though not explicitly stated, the apparent intent of the Executive Order permits RCA employment against combatants in war in situations like those enumerated in exceptions (b) and (c). Although the CWC does not define the phrase method of warfare, the apparent intent seems to prohibit the uses of RCAs contemplated in exceptions (b) and (c) to E.O. 11850.

The President has not rescinded Executive Order 11850, however, and it continues in force. This position is reflected in reference (k). Reference (k), when promulgated, will enumerate permissible uses of RCAs in war, peacetime military operations and operations other than war. This instruction will also establish the command authority necessary to order RCA employment. It provides, in pertinent part:

1. (U) General The CWC prohibits the use of Riot Control Agents (RCA) as a method of warfare.... Use of RCAs in war will be promulgated in the rules of engagement (ROE). As used in EO 11850, war is any period in which the United States is engaged in a use of force of a scope, duration and intensity that would trigger the laws of war with respect to U.S. Forces. Use of RCAs...in Operations Other Than War is set forth below.

2. (U) Use in War.

- (a). (U) The Armed Forces of the United States are prohibited from using any RCAs...in war unless such use is approved by the President in advance.
- (b). (U) The United States had renounced first use of RCAs in war except in defensive military modes to save lives. Requests to use RCAs in such situations shall be in accordance with [CJCSI 3121.01, Standing Rules of Engagement]....
- (d). (U) In war, use of RCAs outside the war zone is authorized as prescribed for peacetime.

The Senate conditioned its advice and consent to ratification of the CWC on the continuing viability of E.O. 11850, 143 Cong. Rec. S3378 (daily ed. Apr. 17, 1997)(stating the "President shall take no measure, and prescribe no rule or regulation which would alter or eliminate Executive Order 11850 of April 8, 1975). President Clinton agreed to implement these conditions in a letter to the Congress (April 25, 1997). The President's letter affirmed the continuing viability of E.O. 11850. It should be noted, however, that this is not a universally held position within the U.S. Government. Some agencies express a far less certain view with respect to the continuing efficacy of E.O. 11850, particularly, exceptions (b) and (c). A complete discussion of both positions is available upon request to the Office of the Judge Advocate General of the Navy, International and Operational Law Division.

- 3. (U) Peacetime Military Operations and Operations Other Than War (OOTW).
- (a). (U) The Secretary of the Army, as Executive Agent for the Department of Defense for civil disturbance operations, has promulgated instructions... [Department of the Army Civil Disturbance Plan, GARDEN PLOT], governing the use of RCAs in civil disturbances in the United States....
- (b). (U) RCAs may be used on United States bases, posts, embassy grounds, and installations for protection and security purposes, riot control...and evacuation of United States noncombatants and foreign nationals. The United States controlled portions of foreign installations are considered United States installations.
- (c). (U) Chemical aerosol-irritant projectors may be used by military law enforcement personnel for the performance of law enforcement activities.
 - (1): (U) On-base and off-base, when authorized by exception to the Posse Comitatus Act, Section 1385 of Title 18, United States Code in the United States and its territories and possessions.
 - (2). (U) On-base overseas.
 - (3). (U) Off-base overseas in those countries where such use is specifically authorized by the host-nation government.
 - (4). (U) RCAs may be used off-base (worldwide) for the protection or recovery of nuclear weapons under the same conditions as those authorized for the use of lethal force.
 - (5). (U) RCAs may be used in training.
- (d). (U) In accordance with [Presidential Letter to the Congress of the United States of April 25, 1997], the United States is not restricted by the CWC in its use of RCAs, including against combatants who are party to a conflict, in any of the following cases (ROE constraints will apply):
 - (1). (U) The conduct of peacetime military operations within an area of ongoing armed conflict when the United States is not a party to the conflict.
 - (2). (U) Consensual peacekeeping operations when the use of force is authorized by the receiving state including operations pursuant to Chapter VI of the United nations Charter.
 - (3). (U) Peacekeeping operations when the use of force is authorized by the Security Council under Chapter VII of the United Nations Charter.
- (e). (U) Subparagraphs (a) (d) above do not constitute an exhaustive list of authorized occasions for peacetime use of RCAs. Other scenarios may have to be evaluated on a case by case basis to determine whether Presidential authority is required under E.O. 11850.

4. (U) Authority.

- (a). (U) Only the President may authorize:
 - (1). (U) Use of RCAs in war, including defensive military modes. However, advance authority to use RCAs in war for protection or recovery of nuclear weapons has been delegated to the Secretary of Defense....
- (b). (U) The Secretary of Defense may authorize:
 - (1). (U) Use of RCAs...in peacetime. However, certain uses of RCAs in peacetime have been delegated to the CINCs and Chiefs of the Services as described below.
 - (2). (U) Use of RCAs, including in war, for the protection or recovery of nuclear weapons....
- (c). (U) CINCs and the Chiefs of the Services may authorize:
 - (1). (U) The use of RCAs in peacetime on United States facilities and installations for riot control, installation security, civil disturbance operations, and noncombatant emergency evacuation operations. The United States controlled portions of foreign installations are considered United States installations....
 - (3). (U) The off-base use of RCAs in peacetime for the protection or recovery of nuclear weapons under the same situations as authorized for the use of lethal force.
- (d). (U) The use of RCAs in peacetime situations not covered by the above (e.g., to save lives in counter-terrorist operations and conducting peacetime military operations within an area of ongoing armed conflict) will be addressed in plans and requested by the CINCs for Secretary of Defense approval.

This legal review highlights the fact that reference (k) is currently only in Draft form undergoing its final military department and CINC re-staffing. This review reiterates that the continuing efficacy of E.O. 11850 is currently an issue of debate. The draft instruction and its list of permissible uses of RCAs is, however, currently the U.S. military position. Should appropriate U.S. Government authority determine that E.O. 11850 is no longer valid authority, such a decision would only impact the use of RCAs in war (paragraph 2 (b) of reference (k)) when the U.S. is a party to the conflict. All other uses of RCAs listed in the draft instruction would remain unaffected.

8. Conclusion.

This legal review concludes that Oleoresin Capsicum is a riot control agent within the meaning of the Chemical Weapons Convention and its use is therefore limited only by the method of warfare limitation contained in the treaty. This legal review further concludes that the OC system contemplated for acquisition by the Marine Corps is consistent with international and domestic law. No legal impediment exists to the acquisition of this OC system. Employment of OC must be in consonance with international law and domestic law and regulations, including the rules governing permissible uses of RCAs contained in reference (k), and the rules of engagement or use of force rules in effect for a particular operation. Units seeking to employ OC must obtain command authority as stated in paragraph 7.

This legal review has been coordinated with the Office of the Staff Judge Advocate to the Commandant of the Marine Corps (Code JAO) and the Offices of the Judge Advocate General of the Army and the Judge Advocate General of the Air Force. Coordination is pending with the Office of Legal Counsel to the Chairman of the Joint Chiefs of Staff.

M.C. Jordan

By direction