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Introduction

The use of chemical agents as a weapon of war has a history that extends back over two centuries. The first instance of a large-scale deployment of chlorine gas, for instance, occurred in April 1915 when German troops attacked Ypres (France Diplomacy, 2022). Moreover, the two world wars saw the greatest proliferation of chemical weapons on the battlefields of Europe, in Nazi concentration camps or in Asia (Office for Disarmament Affairs, 2023).

Despite the current regulatory framework, specifically the Chemical Weapons Convention, which prohibits the use of chemical weapons as well as their production and acquisition, these continue to be used today and not solely by states but also by non-state actors, as evidenced by the 1995 sarin terrorist attack on the Tokyo Underground (France Diplomacy, 2022). The evolution in the nature of armed conflicts, and in particular the emergence of asymmetrical conflicts, has led to a resurgence in the use of chemical weapons (Lion, 2009) and recent reports indicate that the threat of their use has intensified, particularly in the context of the ongoing armed conflicts (France Diplomacy, 2022; Amnesty International, 2023; HRW, 2023).

This paper examines the prohibition of the use of chemical weapons and the most recent instances of chemical weapon use. Firstly, the 1993 Chemical Weapons Convention (CWC) and the EU's support to the Organisation for the Prohibition of Chemical Weapons is examined. After, the articles of the 1998 Rome Statute of the International Criminal Court, which explicitly identify the use of poison, poisoned weapons, prohibited gases, liquids, materials, or devices as war crimes are analysed, as well as the mens rea element required to prosecute the perpetrators of said crimes. Finally, the paper will evaluate several instances of the international community's response to the use of chemical weapons in armed conflicts, with a consequent violation of the CWC, such as in Iraq, Syria and Ukraine.

I. The Evolution of the Banning of Chemical Weapons and the 1993 Chemical Weapons Convention

According to Article II of the CWC, "chemical weapon" refers to all toxic chemicals and precursors. Toxic chemicals are described as 'any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals', whereas precursors are chemical reactants which take part "at any stage in the production by whatever method of a toxic chemical" (Article II, CWC, 1993).

The history of international efforts to ban chemical weapons dates back to 1675, when France and Germany signed the first international instrument which banned the use of chemical weapons (Organisation for the Prohibition of Chemical Weapons, n.d.). Around two-hundred years later, in 1899, The Hague Convention banned the use of projectiles intended to disperse asphyxiating gases and later, a subsequent The Hague Convention in 1907 reaffirmed bans on poisoned weapons (ICRC, n.d.)

Despite these early efforts, during World War I there was an unprecedented use of chemical weapons, such as chlorine and choking agents, which caused almost 100,000 deaths (United Nations, n.d.). The evident devastating effects led to the 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, known as the Geneva Protocol (Organisation for the Prohibition of Chemical Weapons, n.d.). Building upon earlier treaties, such as the aforementioned 1899 The Hague Convention and the 1919 Treaty of Versailles, which prohibited the use, manufacture and importation of asphyxiating and poisonous gases as well as all analogous liquids, materials or devices in Germany, the Geneva Protocol prohibited the use of chemical and biological weapons in warfare (International Humanitarian Law Database, n.d.).

However, several states, including the United States and India, made reservations upon ratification stating that the Protocol was no longer considered binding when an enemy State or an ally failed to respect the provisions included in the Protocol itself (International Humanitarian Law Database Reservation / Declaration, n.d.). Furthermore, the Protocol lacked a crucial element: the production, storage, testing, and transfer of the forbidden weapons was not prohibited, a shortcoming which was later addressed by the 1993 Chemical Weapons Convention.

In 1978, during the Tenth Special Session on Disarmament of the United Nations, the General Assembly (henceforth UNGA) recognised the Conference on Disarmament as a multilateral disarmament forum (UNGA, 1978). Said Conference followed three earlier fora - the 1960 Ten-Nation Committee on Disarmament, the 1962-1968 Eighteen-Nation Committee on Disarmament, and the Conference of the 1969-1978 Committee on Disarmament - during which discussions on chemical weapons, among other topics, were held (UN Office for Disarmament Affairs, n.d.).

In 1980, the Committee on Disarmament, the negotiating body within the Conference on Disarmament, established an ad hoc Working Group on chemical weapons, which was re-established annually until 1992 and had the task to identify and delineate the issues that needed to be addressed during the negotiations for the chemical weapons convention (UNGA, 1980; Audiovisual Library of International Law, n.d.).

On 3 September 1992, the Committee's report and its appendix including the text of the draft convention were adopted by the Conference, and the Chemical Weapons Convention (CWC) was opened for signature in January 1993 (UNGA, 1992; OPCW, n.d.). On 29 April 1997, the CWC came into force, becoming the first multilateral disarmament agreement mandating the elimination of an entire category of weapons of mass destruction (UN, 1992). The Agreement was the result of extensive negotiations in the Conference on Disarmament and the work of the Preparatory Commission, established at the signing ceremony of the CWC held in Paris on 13 January 1993 to lay the groundwork for the Organisation for the Prohibition of Chemical Weapons (OPCW) (Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons, 1993; OPCW, n.d.).

The OPCW, comprising three main bodies - the Conference of the States Parties, the Executive Council, and the Technical Secretariat - began its operations officially in 1997 (CWC, 1993, Article VIII). It works to prevent the use of chemical weapons by conducting verification activities, eliminating existing stockpiles, and enhancing the capabilities of its Member States. Moreover, it is also responsible for responding to the use or alleged use of chemical weapons (OPCW, n.d.).

Ratifying the CWC, each State Party undertook the obligation to never develop, produce, acquire, stockpile, transfer or use chemical weapons; furthermore, it undertook the obligation to destroy all chemical weapons in its possession or located in its territory (Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993, Article I). Additionally, in accordance with Article VII CWC, State Parties are required to take the necessary measures to enforce the prohibitions in respect of natural and legal persons under their jurisdiction (CWC, 1993).

All EU member states are parties to the CWC and the EU and the OPCW have a 'close and collaborative partnership' (Arias, 2018). At the first Review Conference of the CWC held in 2003, the EU stressed that Article 1 of the CWC, which prohibits the use of chemical weapons under any circumstance, "is the very base of the Convention and there can be no room for compromise" (Ghionis & Kelle, 2024). The EU has been supporting the activities of the OPCW since 2004, starting with the adoption of the Council Joint Action 2004/797/CFSP, which explicitly stated "the European Union shall support activities of the OPCW" and allocated funds to specific projects carried out by the Organisation (Council Joint Action 2004/797/CFSP, Article 1 and Article 2). Since then, Joint Actions and Council Decisions have been periodically taken to allocate funds to the OPCW (Ghionis & Kelle, 2024).

Having allocated over €38 million in voluntary funding to the OPCW to support capacity-building activities as well as verification missions since 2004, the EU is the largest voluntary contributor to the OPCW. Moreover, €16.2 million was invested in the Centre for Chemistry and Technology which was inaugurated in 2023 with the aim of carrying out chemical research and analysis to strengthen and improve the verification process established by the CWC as well as eliminating chemical weapons and preventing their re-emergence (EEAS, 2023). Since chemicals can be used for both peaceful and harmful purposes, a verification process has been established by the CWC and is regulated by the Annex on implementation and verification (known as the "Verification Annex"). In fact, States are required to provide information on toxic chemicals, precursors, chemical weapons and chemical facilities in general. Subsequently, the Verification Division and the Inspectorate Division of the OPCW review and evaluate the declared data as well as inspect the declared sites related to chemical weapons (Boehme, 2008). The collaborative partnership between the EU and the OPCW has been reaffirmed more recently by the 2024 Memorandum of Understanding, which aims at increasing the "coordination, strategic cooperation and exchange of views and information to implement the Chemical Weapons Convention (CWC) in its post-chemical weapons destruction phase" (EEAS, 2024).

It is important to note that specific measures against the use of chemical weapons have been adopted by the EU as well. Following the Salisbury attack on 4 March 2018 and ongoing chemical weapons attacks worldwide, on 28 June 2018 Member States called for the swift adoption of a new EU regime of restrictive measures to address the use and proliferation of chemical weapons (Gotev, 2018). Consequently, on 15 October 2018, the Council adopted said restrictive measures (Council of the EU, 2018). The newly implemented measures included travel bans and asset freezes for individuals and entities directly responsible for developing and using chemical weapons, as well as those providing financial, technical, or material support, and those who assist, encourage, or are associated with them (Government Offices of Sweden, n.d.).

II. The Prohibition of Chemical Weapons Use under the Rome Statute of the ICC

Article 1 of the 1998 Rome Statute sets the criteria for a crime to fall under the jurisdiction of the International Criminal Court (ICC), specifying that said crimes must be both serious and of significant concern to the international community (Rome Statute of the ICC, 1998). In the final negotiations of the Rome Statute, it was decided to exclude the crime of using nuclear, chemical and biological weapons from the Statute itself, mainly due to an unresolved dispute about nuclear weapons (Cottier, 2008; Hovell, 2023). However, although the words “chemical weapon” cannot be found in the Statute, Article 8 (2)(b)(xvii) recognises employing poison or poisoned weapons as a war crime and Article 8 (2)(b)(xviii) acknowledges employing prohibited gases, liquids, materials or devices as a war crime too (Rome Statute of the ICC, 1998).

The war crime defined by Article 8(2)(b)(xvii) involves several key elements. First, the perpetrator must have used a substance or weapon that releases a substance when deployed (Elements of Crimes, Article 8). Second, this substance must inherently cause death or serious health damage due to its toxic properties (Elements of Crimes, Article 8). Conversely, the war crime enshrined in Article 8(2)(b)(xviii) requires the perpetrator to have used a gas, substance or device during the commission of the act and that said employed gas, substance, or device had properties capable of causing death or severe harm to health under normal circumstances, either through its asphyxiating or toxic nature (Elements of Crimes, Article 8).

Furthermore, to be prosecuted for said crimes, perpetrators must have committed the prohibited actions within the context of and related to an international armed conflict, and must have been aware of said factual circumstances (Elements of Crimes, Article 8).

Subsequently, it is important to analyse the mens rea element required to prosecute the aforementioned war crimes. According to Article 30 of the Statute, unless otherwise provided, individuals can be prosecuted if intent and knowledge are present, specifically the intention to achieve a particular result and knowledge that a certain event will occur in the ordinary course of events (Rome Statute of the International Criminal Court, 1998). Hence, awareness regarding the effects of the use of poison and poisonous weapons as well as asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, is not required to prosecute those who use said prohibited weapons. The emphasis is on the intent and knowledge of using such substances, rather than the awareness of their specific effects (Vierucci, 2022).

In summary, although the Rome Statute does not specifically mention chemical weapons, Article 8(2)(b)(xvii) and Article 8(2)(b)(xviii), explicitly recognise the use of poison, poisoned weapons, and prohibited gases, liquids, materials, or devices as war crimes, allowing the prosecution of individuals who use said methods of warfare.

III. The International Community's Response to the Use of Chemical Weapons

Despite the strengthening of the legal framework and international disarmament policy over the years, the threat of the proliferation and use of chemical weapons persists (Council of the EU, 2022). In the 1980s, Iraq made chemical weapons its “trademark”, using mustard, cyanide and tabun gas against the Iranian population and troops. The year 1990, marked by the Gulf War, was considered a major event in the history of chemical warfare” and revealed the extent of the Iraqi threat, which was now ranked third in the world with almost 50,000 shells and bombs containing mustard, sarin and cyclohexyl sarin gas (Jalouneix, 2015). Saddam Hussein did not hesitate to use this arsenal against the Kurdish and Shiite populations of the South (Jalouneix, 2015).

The Security Council was quick to take the necessary measures, issuing a stern warning the same day Iraq invaded Kuwait and four days later imposing restrictive measures, before setting the conditions for a ceasefire and lifting sanctions against Iraq in 1991 (Resolution 660, 1990; Resolution 661, 1990; Resolution 687, 1991). Should Iraq comply with its international obligations, the prohibitions against the import of commodities and products originating in Iraq and the prohibitions against financial transactions related thereto contained in Resolution 661 (1990) would have no further force or effect (Resolution 687, 1991, §22). In 2005, for the first time, the District Court of The Hague convicted one of its nationals of intentionally supplying Iraq with chemical materials and precursors intended for the production of chemical weapons. Although the products sold were not prohibited under international law, the Dutch court concluded that Frans van Anraat knew that they would be used to manufacture mustard gas and convicted him of complicity in war crimes (Public Prosecutor v. Frans Cornelis Adrianus van Anraat, 2005). This decision was subsequently upheld by the European Court of Human Rights in Van Anraat v. The Netherlands (2010).

Since 2013, the greatest threat has been posed by the Syrian conflict. Despite the Security Council's immediate adoption of Resolution 2118 (2013) – which aimed to eradicate Syria's chemical weapons programme definitively and as quickly as possible – the Syrian case proved to be much more complicated than that of Iraq a few years earlier. In the face of a Chinese and Russian veto, the Security Council was unable to adopt sanctions or genuinely binding measures against Syria (France Inter, 2013; Le Monde, 2017). Even with the EU's imposition of restrictive measures, such as asset freezes and travel bans on a vast number of Syrian officials, scientists, businessmen and entities for their role in the development and use of chemical weapons, Syria has yet to demonstrate a willingness to comply with its international obligations (General Secretariat of the Council, 2023; Council of the EU, 2022). Consequently, at the 5th Special Session of the Conference of the States Parties to Review the Operation of the Chemical Weapons Convention, it was resolved to suspend Syria's voting rights and privileges (General Secretariat of the Council, 2023).

On 1 May 2024, The United States accused Russia of using the chemical weapon chloropicrin against Ukrainian troops, thereby justifying the adoption of additional sanctions against Moscow (U.S. Department of State, 2024). Russia is also subject to European restrictive measures aimed at prohibiting the export of chemical products to Russia that could potentially be diverted to the manufacture of chemical weapons (General Secretariat of the Council, 2023). OPCW is currently monitoring the concerning situation on the Ukrainian territory, considering that both Russia and Ukraine have reported allegations of use of chemical weapons. However, the information provided to the Organisation is considered “insufficiently substantiated”. In addition, to conduct any activity of investigation, OPCW must be formally seized of a request by States Parties, which still did not happen (OPCW Spokesperson, 2024).

Conclusion

The use of chemical weapons still represents a significant global issue. The ratification of the CWC was a significant milestone in disarmament, as it was the first international convention prohibiting the development, production, stockpiling and use of chemical weapons and remains the most important international legal instrument when tackling the prohibition of chemical weapons, with currently 193 states-parties. For decades, the OPCW, greatly supported by the EU, has been playing a crucial role in preventing the use of said weapons and their re-emergence. Furthermore, the Rome Statute of the ICC represents an essential legal framework in order to criminalise the use of chemical weapons in armed conflicts, although enforcement remains an issue.

Nonetheless, the threat of chemical warfare is presently more imminent than at any other time in history. The Russian invasion in Ukraine is a stark and contemporary instance of the pivotal role of OPCW in armed conflicts. However, to strengthen the power of intervention of the Organisation, it would be necessary to grant enhanced inspection protocols, fostering international cooperation in the sector of information sharing, and promoting universal adherence to the CWC.

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