

## NOTE

### NEXT STEPS IN CHEMICAL WEAPONS CONTROL AND PROTECTING THE RIGHT TO PROTEST: IMPROVEMENTS TO THE LEGAL REGIME CONTROLLING TEAR GAS

*Casey Morin* \*

“If the right to gather, to speak out, is to mean anything, then we must also have the right to do so in air we can breathe.”

- Anna Feigenbaum<sup>1</sup>

#### ABSTRACT:

*At a pivotal moment in the relationship between law enforcement and the global public, this Note recalls the principle that impunity for excessive use of force by the police should never be tolerated.<sup>2</sup> Amid the growing calls for police reform and bans on the use of tear gas on protesters, this Note proposes a solution to balance the needs of law enforcement officers with the interests of the public to exercise the right to protest—an essential form of participation in public affairs. It analyzes current international approaches to regulating the use of riot control agents, including tear gas, and argues for the addition of an optional*

---

\* J.D. Candidate, 2021, Fordham University School of Law; M.A., 2015, University of Virginia; B.A., 2013, University of Pennsylvania; Senior Articles Editor, *Fordham International Law Journal*, Volume 44. I would like to express my profound gratitude to Professor Paolo Galizzi who has guided this Note and my development as a scholar and practitioner of international law with wisdom and enthusiasm. Thank you also to the editorial board and staff members of the *Fordham International Law Journal* for their invaluable assistance and to Professor Benedetta Audia for comments on earlier drafts of this work. I would especially like to thank Alexandre Morin and Jane Clayton for their support, and the late Matthew Clayton for inspiring me to use my talents in the service of others.

1. ANNA FEIGENBAUM, TEAR GAS: FROM THE BATTLEFIELDS OF WWI TO THE STREETS OF TODAY 182 (2017).

2. See Dunja Mijatović, *Shrinking Space for Freedom of Peaceful Assembly*, COUNCIL EUR. (Dec. 9, 2012), <https://www.coe.int/en/web/commissioner/-/shrinking-space-for-freedom-of-peaceful-assembly> [<https://perma.cc/MCT2-DQZH>].

*protocol to the Chemical Weapons Convention, the foremost arms control treaty, to effect this balance on a global scale. By following such an approach, the optional protocol will meet the needs of the many involved in protests and law enforcement and improve public discourse and safety.*

ABSTRACT:.....	1267
I. INTRODUCTION .....	1268
II. TEAR GAS USE ON PROTESTERS.....	1271
A. Development of Tear Gas .....	1272
B. Contemporary Use of Tear Gas .....	1275
1. Common Ways Tear Gas is Abused.....	1279
III. INTERNATIONAL LAW GOVERNING THE USE OF RIOT CONTROL AGENTS .....	1282
A. Treaties .....	1282
1. Precursors to the Chemical Weapons Convention.....	1283
2. The Chemical Weapons Convention .....	1284
B. UN Guidance .....	1287
1. Code of Conduct for Law Enforcement Officials .....	1288
2. Guidance on Less-Lethal Weapons in Law Enforcement .....	1290
C. European Court of Human Rights Case Law ...	1295
IV. SOLUTIONS .....	1298
1. Rejecting the Distinction Between Wartime and Peacetime Use of RCAs.....	1299
2. Regulation .....	1300
3. Optional Protocol to the CWC.....	1301
a. Features of the Optional Protocol to the CWC.....	1303
V. CONCLUSION .....	1306

### *I. INTRODUCTION*

In the United States and around the world, protests bear witness to scenes of repression, dispersal, and limitation of the exercise of the right to expression and to gather in dissent in the

public sphere.<sup>3</sup> According to some commentators, this repression is born from a government fear that citizen mobilization disrupts the public order and threatens the stability of democratic institutions.<sup>4</sup> In response, governments around the world deploy chemical weapons in the form of Riot Control Agents (“RCAs”), or tear gas,<sup>5</sup> against protesters, often to quell dissent.<sup>6</sup> Tear gas was designed to torment combatants, and it now turns public assemblies into toxic spaces, taking away what is often the last communication channel some individuals have left to express their needs.<sup>7</sup> In the early history of tear gas, countries reacted to the suffering that RCAs and other chemical weapons caused in war with a long and continuous process of limiting and delegitimizing their use in armed conflict.<sup>8</sup> The time has come to limit and delegitimize the use of these weapons of war in peace as well.

The world has seen substantial growth in the use of RCAs to disperse peaceful protesters.<sup>9</sup> Recent protest movements globally

---

3. In the United States, the amount of tear gas used against protesters correlates with the number of demonstrations happening in the country. Law enforcement deployed a significant amount during the labor movement protests of the 1920's and 30's, the Civil Rights era, and during protests against the Vietnam War. It has now reappeared as millions of people protest police brutality after the police killings of George Floyd and Breonna Taylor, among others. See Loren Grush, *Why Police Officers Embraced a Banned Weapon of War*, VERGE (Aug. 31, 2020, 9:10 AM), <https://www.theverge.com/21396099/tear-gas-protests-police-weapon-warfare-history-crowd-control> [<https://perma.cc/7MNT-PG9Y>].

4. See Edison Lanza (Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights), *Protest and Human Rights*, OEA/Ser.L/V/II CIDH/RELE/INF.22/19, at 1 (2019).

5. “Tear gas” is an umbrella term which refers to crowd control chemicals, either synthetic or derived from chili peppers, which cause excruciating pain and respiratory distress in people exposed to them. Law enforcement officials sometimes refer to the substances they use as “chemical irritants,” “chemical agents,” or “pepper balls,” however, these distinctions are irrelevant to those who study and monitor tear gas. These experts consider all such compounds as tear gas. See K.K. Rebecca Lai et al., *Here Are the 100 U.S. Cities Where Protesters Were Tear-Gassed*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/interactive/2020/06/16/us/george-floyd-protests-police-tear-gas.html> [<https://perma.cc/R68P-YTBB>].

6. See Micol Seigel, *On the Critique of Paramilitarism*, 12 GLOB. S. 166, 168 (2018).

7. FEIGENBAUM, *supra* note 1, at 182.

8. See Sean P. Giovanello, *Riot Control Agents and Chemical Weapons Arms Control in the United States*, 5 J. STRATEGIC SEC. 1, 5 (2012).

9. See Ariela Levy & Patrick Wilcken, *End the Abuse of Tear Gas for the Sake of Peaceful Protesters*, AMNESTY INT'L (June 12, 2020), <https://www.amnesty.org/en/latest/news/2020/06/end-the-abuse-of-tear-gas-for-the->

have had unprecedented stamina, including racial justice protests in the United States,<sup>10</sup> yellow vest protests in France,<sup>11</sup> and protests in Hong Kong over extradition to mainland China.<sup>12</sup> Protests, largely peaceful,<sup>13</sup> have become international in nature, with messages and tactics spreading among protest movements and among the law enforcement agents they encounter.<sup>14</sup> Through these protests, people are repeatedly exposed to RCAs, which are considered chemical weapons under international law.<sup>15</sup> Although the use of these chemical weapons by law enforcement is legal under the Chemical Weapons Convention,<sup>16</sup> recent protests demonstrate that the distinction between the legal use of RCAs in peacetime and their outlawed use in armed conflicts is no longer justified.

This Note advocates for the end of the use of tear gas against peaceful protesters. It argues that although RCAs can serve a necessary purpose in law enforcement, their use should be so

sake-of-peaceful-protesters-in-hong-kong-the-usa-and-everywhere-else/  
[<https://perma.cc/4U28-W9ZJ>].

10. See Adam Serwer, *What Black Lives Matters Has Accomplished*, ATLANTIC (Oct. 2020), <https://www.theatlantic.com/magazine/archive/2020/10/the-next-reconstruction/615475/> [<https://perma.cc/G2A6-4MTF>].

11. See Reuters in Paris, *French Police Use Teargas at Gilets Jaunes Protest in Paris*, GUARDIAN (Sept. 12, 2020), <https://www.theguardian.com/world/2020/sep/12/french-police-use-teargas-at-gilet-jaunes-protest-in-paris> [<https://perma.cc/8E9G-PRGL>].

12. See K.K. Rebecca Lai & Austin Ramzy, *1,800 Rounds of Tear Gas: Was the Hong Kong Police Response Appropriate?*, N.Y. TIMES (Aug. 18, 2019), <https://www.nytimes.com/interactive/2019/08/18/world/asia/hong-kong-tear-gas.html> [<https://perma.cc/9PTW-A5S5>].

13. See, e.g., ARMED CONFLICT LOCATION & EVENT DATA PROJECT, DEMONSTRATIONS & POLITICAL VIOLENCE IN AMERICA: NEW DATA FOR SUMMER 2020 5 (2020), [https://acleddata.com/acleddatanew/wp-content/uploads/2020/09/ACLED\\_USDataReview\\_Sum2020\\_SeptWebPDF\\_HiRes.pdf](https://acleddata.com/acleddatanew/wp-content/uploads/2020/09/ACLED_USDataReview_Sum2020_SeptWebPDF_HiRes.pdf) [<https://perma.cc/RPV9-KZ5K>].

14. See Mary Hui, *Hong Kong is Exporting its Protest Techniques Around the World*, QUARTZ (Oct. 16, 2019), <https://qz.com/1728078/be-water-catalonia-protesters-learn-from-hong-kong/> [<https://perma.cc/ADW5-RUC4>]; see also Fan Lingzhi & Liu Caiyu, *HK Rioters Share Protest Tips Amid US Protest*, GLOB. TIMES (June 1, 2020), <https://www.globaltimes.cn/content/1190144.shtml> [<https://perma.cc/6KF2-5QEV>].

15. See Lai et al., *supra* note 5.

16. See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction art. 2, ¶ 9(d), Sept. 3, 1992, T.I.A.S. 97-525, [hereinafter Chemical Weapons Convention]. The convention broadly controls the use of RCAs, among other chemical weapons, in warfare, but it allows for RCA use in law enforcement against civilians. The Convention has 193 state parties. *Id.*

limited and so regulated that they would be used rarely, if at all. The United States and the global community should act in accordance with overwhelming and growing public opinion again and curtail the use of RCAs, this time against protesters. Part II discusses the development of RCAs and their contemporary use and abuse. Armed forces initially developed RCAs for combat, but once public opinion had turned against their use in war,<sup>17</sup> government proponents in the United States pushed for their use on civilians in part to keep their jobs and in part to suppress public dissent. Part III discusses the international law governing the use of RCAs. While there are some measures that control the use of RCAs, they are largely ineffective against the widespread and growing use of RCAs around the world. Part IV discusses and proposes changes to the legal regime controlling RCAs to improve their use. An improved legal regime acknowledges the importance of RCAs to legitimate law enforcement uses while insisting on a better way forward.

## II. TEAR GAS USE ON PROTESTERS

Tear gas forces people to flee from the area where gas was dispersed. For most people, the gas irritates eyes, skin, and lungs without causing serious, long-term injuries.<sup>18</sup> Tear gas allows law enforcement to maintain order without causing lasting harm, and commercial tear gas promoters advertise it as a “more humane way to disperse unruly crowds” because encounters with the gas are typically non-lethal.<sup>19</sup> Given this comparatively minimal lethality, protesters who encounter tear gas are meant to be thankful that they are not being shot with live ammunition instead.<sup>20</sup>

Proponents recommend tear gas for defensive use against crowds, but the vast majority of tear gas use is offensive, with users dispersing it to move protesters out of an area by deploying the gas in bulk.<sup>21</sup> Such use can have grave and unacceptable consequences. When law enforcement misuses tear gas, it can

---

17. Daniel P. Jones, *From Military to Civilian Technology: The Introduction of Tear Gas for Civil Riot Control*, 19 *TECH. & CULTURE* 151, 164 (1978).

18. Lai et al., *supra* note 5.

19. Grush, *supra* note 3.

20. *Id.*

21. *Id.*

cause debilitating injuries.<sup>22</sup> Prolonged exposure or high doses can lead to permanent vision damage, asthma, and other long-term injuries, and improper deployment can cause canister strikes which injure victims.<sup>23</sup> Research shows that tear gas and other purportedly non-lethal weapons that law enforcement use can sometimes lead to serious injury and death.<sup>24</sup> Additionally, because tear gas by its very nature is indiscriminate, it is hard for law enforcement to limit its impact to the intended target.<sup>25</sup> Some experts assert that the use of escalated force by law enforcement, including tear gas, serves to increase violence and injuries.<sup>26</sup>

#### *A. Development of Tear Gas*

The practice of using tear gas to impair opponents, military and later civilian, developed internationally.<sup>27</sup> Although the chemical agent's tear-producing properties had been noticed for several decades prior to World War I ("WWI"), its use is commonly associated with the chemical warfare of that period.<sup>28</sup> A systematic study of tear-producing agents occurred during WWI, and forces on both sides of the conflict developed effective means of dispersing the agent, as well as other more toxic gases.<sup>29</sup> Tear gas and toxic gases, including mustard and chlorine gases, accompanied most land operations in WWI.<sup>30</sup>

The important role of tear gas in WWI stems in part from the fact that it was the first gas used in the armed conflict. Tear gas

---

22. Lai et al., *supra* note 5.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*; see Mike Baker, *Corrosive Effects of Tear Gas Could Intensify Coronavirus Pandemic*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/03/us/tear-gas-risks-protests-coronavirus.html> [ <https://perma.cc/EUB2-64SU>].

27. See Jones, *supra* note 17, at 151-54. The Americans, French, and Germans all experimented with poisonous gases during WWI and developed tear gas as a way to force opponents out of their trenches and into open fields where they could be killed. Grush, *supra* note 3.

28. See Jones, *supra* note 17, at 152. Available evidence suggests that the French military introduced tear gas into WWI. Paris law enforcement used cartridges containing a tear-producing agent even before the war, and the French military used similar dispersal means as early as August 1914, which was before the first chlorine gas attack of WWI.

29. *Id.*

30. Vladimír Pitchmann, *Overall View of Chemical and Biochemical Weapons*, 6 TOXINS 1761, 1763 (2014).

also played a tactical role in forcing opposing armies to wear gas masks, which was known to diminish soldiers' efficacy.<sup>31</sup> The end of WWI saw intense public backlash against the use of chemical weapons, particularly against toxic weapons. Chemical weapons sidelined about one million soldiers, of which about ten percent died.<sup>32</sup> The public saw these weapons as inhumane. Not only did they kill troops, the weapons worsened troops' privations, amplified the lethality of conventional weapons, and caused severe psychological ailments.<sup>33</sup>

Following the backlash against chemical warfare, interested parties in the US Army Bureau of Mines and Research Division of the Chemical Warfare Service ("CWS"), the agency that first developed tear gas for the United States, were responsible for its repurposing for law enforcement uses.<sup>34</sup> Some CWS employees, facing the closing of their department, started tear gas companies.<sup>35</sup> Others worked as intermediaries to transfer the gas to private companies, as the CWS could no longer sell the gas legally.<sup>36</sup> To survive in the post-war environment, the CWS needed to prove its usefulness in peacetime. It did this through its expertise in tear gas.<sup>37</sup> After the violent mobs and strikes of 1919-1921 required federal troops to restore order, the CWS received inquiries from police departments on the efficacy of tear gas.<sup>38</sup> The director of the CWS wrote at the time that he believed tear gas would prove very useful for dispersing mobs, even though the CWS had yet to complete the development of a product that would not cause injury.<sup>39</sup>

For the CWS, the ability to use tear gas to control civil disorder presented an opportunity to demonstrate the value of their tear gas research program, gain a new function of training law enforcement to use tear gas, and dispel the public's fear of

---

31. Jones, *supra* note 17, at 152. Tear gases were effective in lower concentrations than toxic gases, so they were more economical in forcing adversaries to keep their gas masks on and consequently more widely used.

32. Pitchmann, *supra* note 30, at 1763.

33. *Id.* It was this backlash that led to the ban of chemical weapons in warfare under the Geneva Gas Protocol of 1925. *See infra* notes 122-29.

34. Jones, *supra* note 17, at 159-68.

35. *Id.*

36. *Id.*

37. *Id.* at 158-59.

38. *Id.* at 152-54.

39. *Id.*

and revulsion to gas warfare.<sup>40</sup> Accordingly, the CWS campaigned to police departments across the United States on the utility of tear gas to control crowds.<sup>41</sup> To encourage the adoption of tear gas, the CWS aided in the establishment of manufacturing firms.<sup>42</sup> In fact, most manufacturers of tear gas established between 1920 and 1930 were organized by former CWS officers.<sup>43</sup>

With this history of the broadening uses of tear gas, private interests continue to influence its use on civilians internationally.<sup>44</sup> Due to loose regulations, dubious definitions calling tear gas non-lethal, and the failure of governments to hold law enforcement or corporate manufacturers accountable for human rights violations, businesses are able to profit from protest and social unrest.<sup>45</sup> From the early days of tear gas, private companies have touted the product's unregulated status, effectiveness, and so-called harmlessness in advertisements.<sup>46</sup> This supposed harmlessness meant that "tear gas could be applied without qualms 'the moment the mob appears and begins to form.'"<sup>47</sup> As recently as 2015, Condor Non-lethal Technologies ("Condor"), a Brazilian company and world leader in militarized policing supplies, made claims about the respect for human rights evinced by their product.<sup>48</sup> Condor promises to be a "pioneer in the dissemination of the 'Non-lethal' concept in Brazil . . . through the controlled use of the escalation of force, without any harm to human rights."<sup>49</sup> Such a claim is shocking when

---

40. *Id.* at 159.

41. Grush, *supra* note 3.

42. Jones, *supra* note 17, at 165.

43. *Id.* at 166. These firms received support from the CWS in the form of supplies for demonstrations, referrals of requests for tear gas, samples and supplies for production, and training for law enforcement. *Id.* at 166-68.

44. See FEIGENBAUM, *supra* note 1, at 102; see also *Global Use of Tear Gas Fuels Police Abuses*, AMNESTY INT'L (June 11, 2020), <https://www.amnestyusa.org/press-releases/toxic-trade-in-tear-gas-fuels-police-abuses/> [https://perma.cc/P2SP-MDT] (Amnesty International tracked the following manufacturers of tear gas and related launchers: Cavim, Condor Non-Lethal Technologies, DJI, Falken, PepperBall, the Safariland Group, and Tippmann Sports LLC).

45. *Id.*; FEIGENBAUM, *supra* note 1, at 102.

46. *Id.* at 108 (noting that one advertisement promoted tear gas by describing it as "innocuous and efficacious as the family slipper.").

47. *Id.* (quoting Theo M. Knappen, *War Gases for Dispersing Mobs*, 48 *GAS AGE REC.* 701, 702-03 (1921)).

48. *Id.* at 104.

49. *Id.*



considering the vast number of human rights violations committed with Condor's products, including allegedly systematic torture carried out by security forces in Bahrain and Egypt.<sup>50</sup>

### *B. Contemporary Use of Tear Gas*

The use of tear gas on civilians is an international problem given the prominent use of tear gas in countries all over the world.<sup>51</sup> Proponents of using tear gas against civilians have long compared its safety claims to the alternative of live ammunition.<sup>52</sup> This comparison, however, overlooks both the frequent deaths caused by law enforcement's use of tear gas and the availability of even safer crowd control methods, such as redirecting the flow of traffic.<sup>53</sup> Around the world, people have experienced both lethal toxic injury and severe traumatic injuries from exploding tear gas bombs.<sup>54</sup> In Waco, Texas in 1993, the US Federal Bureau of Investigation sprayed tear gas into a large compound housing a religious sect.<sup>55</sup> The compound eventually caught fire, killing more than seventy-five people who were unable to escape.<sup>56</sup> More recently in the United States, law enforcement officers killed a belligerent prisoner with pepper spray, a form of tear gas frequently used by law enforcement.<sup>57</sup> In 2011 in Palestine, on

---

50. See *id.* at 103-04; see also *Egypt: Systematic Failure to Rein in Security Forces*, AMNESTY INT'L (Feb. 12, 2012), <https://www.amnesty.org/en/latest/news/2012/02/egypt-systematic-failure-rein-security-forces/> [<https://perma.cc/WKU9-RDLY>]; see also *Weaponizing Tear Gas: Bahrain's Unprecedented Use of Toxic Chemical Agents Against Civilians*, PHYSICIANS FOR HUM. RTS. 7 (2012), [https://s3.amazonaws.com/PHR\\_Reports/Bahrain-TearGas-Aug2012-small.pdf](https://s3.amazonaws.com/PHR_Reports/Bahrain-TearGas-Aug2012-small.pdf) [<https://perma.cc/J94M-28GV>].

51. Terrence McCoy, *Tear Gas is a Chemical Weapon Banned in War. But Ferguson Police Shoot It at Protesters.*, WASH. POST (Aug. 14, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/08/14/tear-gas-is-a-chemical-weapon-banned-in-war-but-ferguson-police-shoot-it-at-protesters/> [<https://perma.cc/Z7DU-2ZRJ>].

52. See, e.g., Jones, *supra* note 17, at 156.

53. See JOHN M. KENNY ET AL., INST. FOR NON-LETHAL DEF. TECH., HUMAN EFFECTS ADVISORY PANEL REPORT OF FINDINGS, CROWD BEHAVIOR, CROWD CONTROL, AND THE USE OF NON-LETHAL WEAPONS 25 (Jan. 1, 2001).

54. McCoy, *supra* note 51.

55. *Id.*

56. *Id.*

57. Lisa Song, *Tear Gas Is Way More Dangerous Than Police Let on — Especially During the Coronavirus Pandemic*, PROPUBLICA (June 4, 2020),

three separate occasions, tear gas use caused three deaths: one from a canister hitting the victim's head at close range and two from tear gas inhalation.<sup>58</sup> In 2013 in Egypt, thirty-seven people suffocated to death when law enforcement deployed tear gas in the back of a vehicle carrying supporters of the ousted President Morsi to prison.<sup>59</sup> Tear gas has caused deaths in Bahrain and Nepal, and permanent injuries and disabilities in many other contexts.<sup>60</sup>

Despite these events, leading Western powers have continued to tolerate, use, and even promote tear gas, enabling other countries to use it to suppress protests without facing significant international scrutiny.<sup>61</sup> This orientation is problematic for many reasons, but particularly because tear gas is not chemically the same around the world, and while a cloud of gas might look the same in pictures, there are gradations of danger and toxicity between different RCAs. For instance, the levels of toxicity of tear gas manufactured in the Middle East are generally higher than those used in the United States.<sup>62</sup> Researchers have also found Chinese tear gas to be more

---

<https://www.propublica.org/article/tear-gas-is-way-more-dangerous-than-police-let-on-especially-during-the-coronavirus-pandemic> [<https://perma.cc/D9AS-NDQF>]; Craig Bettenhausen, *Tear Gas and Pepper Spray: What Protesters Need to Know*, CHEMICAL & ENGINEERING NEWS (June 18, 2020), <https://cen.acs.org/policy/chemical-weapons/Tear-gas-and-pepper-spray-What-protesters-need-to-know/98/web/2020/06> [<https://perma.cc/898P-CYDY>] (explaining that pepper spray is similar to tear gas in the effects it causes—though the delivery devices can vary, the primary difference between the substances is that pepper spray is made from peppers, while tear gas can refer both to chemical and to natural compounds).

58. McCoy, *supra* note 51.

59. *Id.*

60. Rohini J. Haar et al., *Health Impacts of Chemical Irritants Used for Crowd Control: A Systematic Review of the Injuries and Deaths Caused by Tear Gas and Pepper Spray*, 17 *BCM PUB. HEALTH* 1, 8-9 (2017), [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5649076/pdf/12889\\_2017\\_Article\\_4814.pdf](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5649076/pdf/12889_2017_Article_4814.pdf) [<https://perma.cc/DZV5-MA6B>].

61. FEIGENBAUM, *supra* note 1, at 109. Amnesty International tracked the abuse of tear gas in the following countries: Bolivia, Chile, Colombia, DRC, Ecuador, France, Guinea, Hong Kong, Honduras, Haiti, India (Indian-administered Kashmir), Iraq, Iran, Kenya, Lebanon, Nigeria, Israel-OPT, Sudan, Turkey, the United States, including the U.S./Mexican border, Venezuela, Zimbabwe. *Global Use of Tear Gas Fuels Police Abuses*, *supra* note 44.

62. McCoy, *supra* note 51.

dangerous than tear gas used in the West.<sup>63</sup> Even in the United States, the potency of these agents can vary, with the most potent pepper spray having forty times the amount of active ingredient as a weaker pepper spray on the US market.<sup>64</sup>

Experts say that law enforcement should deploy tear gas canisters at a short distance and toward the edge of a crowd to minimize the number of people exposed and to avoid injuries from impact.<sup>65</sup> One instance of tear gas use in the United States provides a defensible model of the current guidance for the use of tear gas.<sup>66</sup> In June 2020 in Lewisville, Texas, protesters marched to express discontent about the recent police killings of Black people in the United States.<sup>67</sup> Although the march was planned in concert with local law enforcement who had arranged for buses to transport protesters back to their cars, some people returning from the march on foot left the sidewalk and spilled into a busy street.<sup>68</sup> One intoxicated person was darting among cars and knocked down a woman and her child, and when law enforcement officers arrived on the scene, the crowd began to throw objects at them.<sup>69</sup> Officers ordered the crowd to disperse multiple times, and when they did not, the officers rolled a canister of tear gas several feet away from the crowd into the street.<sup>70</sup> The crowd scattered but continued to block traffic, so the officers issued another warning and rolled a second canister of tear gas toward the crowd.<sup>71</sup> According to city officials, only those who did not leave the street were directly affected by the tear gas.<sup>72</sup> This instance of tear gas use illustrates the important elements of circumscribed, non-excessive use of tear gas: with

---

63. George Colclough, *Explainer: Why China-made Tear Gas is More Dangerous*, HONG KONG FREE PRESS (May 1, 2020), <https://hongkongfp.com/2020/05/01/explainer-why-china-made-tear-gas-is-more-dangerous/> [<https://perma.cc/SH26-N7ZL>].

64. MICHAEL CROWLEY, CHEMICAL CONTROL 46 (2016).

65. Lai et al., *supra* note 5.

66. See *After-Action Report: June 2, 2020 Demonstration*, CITY LEWISVILLE (June 3, 2020), <https://www.cityoflewisville.com/Home/Components/News/News/5197/710?backlist=%2f> [<https://perma.cc/3XVK-UUDC>].

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

multiple warnings, prompted by violence toward officers responding to a legitimate objective,<sup>73</sup> and affecting only people who refused to comply.

More common, however, is the inappropriate and dangerous overuse of tear gas on peaceful protesters.<sup>74</sup> This trend has been apparent around the world.<sup>75</sup> *The New York Times* reported on 100 cities in the United States where protesters were tear gassed over several weeks in the summer of 2020, ironically, during demonstrations against police violence.<sup>76</sup> That brief period saw some of the most widespread use of tear gas against protesters in the United States since the unrest of the late 1960s and early 1970s.<sup>77</sup> According to a race and policing expert interviewed for the report, thousands of people thought they were going to ordinary, peaceful protests and instead found themselves on the receiving end of aggressive law enforcement responses, intensifying anger on both sides.<sup>78</sup> Amnesty International tracks the overuse of tear gas on protesters internationally and provides an incident map, categorized by types of abuse.<sup>79</sup> The types of abuse they include are: direct fire, excessive quantities, susceptible people, confined spaces, and peaceful demonstrations.<sup>80</sup> These abuses occur on every continent.<sup>81</sup>

Recently in the United States, many incidents have demonstrated that law enforcement officers often do not use tactics consistent with the safest use of tear gas.<sup>82</sup> These inappropriate and dangerous uses of tear gas have resulted in a serious leg injury, the loss of an eye, and the confinements of protesters by tear gas deployed from both ends of a street and in

---

73. The police claimed that traffic was blocked to local hospitals. *Id.*

74. Lai et al., *supra* note 5.

75. *See id.*

76. *Id.*

77. *Id.*

78. *Id.* Worse still, the corrosive effects of tear gas may damage lungs and make people exposed more susceptible to respiratory illnesses such as the coronavirus which was spreading at that time. Baker, *supra* note 26.

79. *Tear Gas: An Investigation*, AMNESTY INT'L, <https://teargas.amnesty.org/#incident-map> [<https://perma.cc/34GY-VGPV>] (last visited Mar. 2, 2021).

80. *Id.*

81. *Id.*

82. Lai et al., *supra* note 5.

a sunken expressway, to name a few.<sup>83</sup> Some peaceful protesters have even reported that law enforcement did not warn them prior to using tear gas.<sup>84</sup>

Experts suggest that law enforcement officers deploy tear gas and other riot control agents without knowing their full effects.<sup>85</sup> Often, law enforcement officers receive training in how to deploy these agents directly from the manufacturers, which implies that the officers could be shown that agents are a primary means of crowd control, rather than an option for self-defense.<sup>86</sup> Also problematic is that there is little oversight of what police departments purchase and how they plan to deploy these chemical agents.<sup>87</sup> Without oversight, police departments are at greater liberty to use RCAs in ill-advised manners.<sup>88</sup> Together, these factors make law enforcement act as though tear gas were a first-line item to deploy against protesters instead of a last resort.<sup>89</sup>

### 1. Common Ways Tear Gas is Abused

Law enforcement use of tear gas against protesters has attracted much attention and scrutiny.<sup>90</sup> This Section outlines the common ways that law enforcement abuses tear gas: using it against peaceful demonstrators, in enclosed spaces, in excessive quantities, by direct fire, against vulnerable populations, and without regard for environmental impacts.<sup>91</sup> With the use of tear

---

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* See also Jones, *supra* note 17, at 166.

87. Lai et al., *supra* note 5.

88. One recent and disturbing incident occurred in Rochester, New York when police officers handcuffed and pepper sprayed a nine year old girl. The Rochester police department had already been under scrutiny for placing a hood over the head of a person in their custody before that person suffocated to death. Both people were Black. Nicole Hong, *Rochester Officers Suspended After Pepper-Spraying of 9-Year-Old Girl*, N.Y. TIMES (Jan. 31, 2021), <https://www.nytimes.com/2021/01/31/nyregion/rochester-police-pepper-spray-child.html?referringSource=articleShare> [<https://perma.cc/WFJ4-AJJU>].

89. Lai et al., *supra* note 5.

90. See, e.g., *Tear Gas: An Investigation*, *supra* note 79.

91. Natasha Williams et al., THE PROBLEMATIC LEGALITY OF TEAR GAS UNDER INTERNATIONAL HUMAN RIGHTS LAW 3-4 (2020), <https://ihrp.law.utoronto.ca/sites/default/files/media/Legality%20of%20Teargas%20-%20Aug25%20V2.pdf> [<https://perma.cc/AG6B-PFVS>]; see also Jason Wilson, *Teargas used on Portland Protestors Risks 'Grave Health Hazards,' Says Lawsuit*, GUARDIAN (Oct. 20, 2020), <https://www.theguardian.com/us-news/2020/oct/20/teargas-portland-protests>

gas on the rise in many countries around the world, recent examples of the abuse of tear gas are abundant.<sup>92</sup>

Law enforcement use of tear gas against peaceful protesters, in particular, has attracted significant attention.<sup>93</sup> Use of tear gas against peaceful protesters is problematic because it interferes with people exercising their right to peaceful assembly, especially in situations without any threat of violence or injury.<sup>94</sup> Such interference can be seen as law enforcement punishing protesters and intentionally repressing their rights.<sup>95</sup> While its use is routine in authoritarian countries like Bahrain and Iran,<sup>96</sup> law enforcement in the United States has also come under criticism for the overuse of tear gas.<sup>97</sup>

Additionally, use of tear gas in enclosed spaces, for example, inside of buildings, on dead-end streets, in underground stations, or where exit routes are otherwise blocked,<sup>98</sup> is especially dangerous because victims have no way of escaping its effects.<sup>99</sup> The gas' effects are exacerbated and can last longer than they

may-pose-grave-health-hazards-lawsuit?CMP=Share\_AndroidApp\_Other [https://perma.cc/DE6X-WZVN].

92. *Tear Gas: An Investigation*, *supra* note 79.

93. See, e.g., Jessica Moss, *Tear Gas and the Politics of Policing*, COUNCIL ON FOREIGN REL. (Aug. 26, 2020), <https://www.cfr.org/in-brief/tear-gas-and-politics-protest-policing> [https://perma.cc/3UY4-9ZVD]. Recently law enforcement in the United States received much criticism for its use of tear gas on protesters, with one particularly infamous use of tear gas to clear protesters from the path between Lafayette Park and nearby St. John's Church in Washington, D.C. for a presidential photo opportunity. See Lai et al., *supra* note 5; Katie Rogers, *Protesters Dispersed With Tear Gas So Trump Could Pose at Church*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/us/politics/trump-st-johns-church-bible.html> [https://perma.cc/PH34-AMB7]; Tom Gjelten, *Peaceful Protestors Tear-Gassed to Clear Way for Trump Church Photo-Op*, NAT'L PUB. RADIO (June 1, 2020), <https://www.npr.org/2020/06/01/867532070/trumps-unannounced-church-visits-angers-church-officials?t=1604067268084> [https://perma.cc/7QA6-AGXR].

94. See Williams et al., *supra* note 91, at 3.

95. See *id.*

96. See Moss, *supra* note 93.

97. See, e.g., Rogers, *supra* note 93; Gjelten, *supra* note 93.

98. See Justine McDaniel et al., *Philadelphia protestors gassed on I-676, leading to 'pandemonium' as they tried to flee*, PHILA. INQUIRER (June 1, 2020), <https://www.inquirer.com/news/george-floyd-protests-philadelphia-gas-police-vine-street-expressway-20200601.html> [https://perma.cc/RB75-J7P9]; *Protesters Return to Highway Where Tear Gas Was Used in June*, ASSOC. PRESS (July 5, 2020), <https://apnews.com/article/06a7934091d9542ac4dea445b2a11c84> [https://perma.cc/59CZ-6KT9].

99. See Williams et al., *supra* note 91, at 3.

typically do when used in open spaces.<sup>100</sup> Even when tear gas is used in open spaces, it is impossible to control once released because the gas can drift, resulting in injuries at nearby buildings, schools, and homes.<sup>101</sup> Furthermore, when law enforcement uses excessive quantities of tear gas, it increases the risk of serious harm to protesters.<sup>102</sup> “Excessive quantities” can mean repeated exposure over the course of a single event or through a series of protests, as is common in modern protest movements internationally.<sup>103</sup> Repeated exposure to excessive quantities of tear gas can further exacerbate severe respiratory problems.<sup>104</sup> Additionally, when law enforcement officers fire tear gas at individuals, they risk serious consequences from tear gas canisters and other delivery methods striking individuals.<sup>105</sup> Canisters are themselves dangerous projectiles and have caused serious injury<sup>106</sup> and even death.<sup>107</sup> Also of great consequence for the use of tear gas, research dating back to the 1960s shows that the use of RCAs often backfires, inciting more of the violence it aims to subdue.<sup>108</sup>

Using tear gas against vulnerable populations is particularly dangerous, and practically unavoidable in today’s protest situations around the world.<sup>109</sup> Children, the elderly, people with preexisting medical conditions, and pregnant women are

---

100. *Id.*

101. See James D. Fry, *Gas Smells Awful: U.N. Forces, Riot-Control Agents, and the Chemical Weapons Convention*, 31 MICH. J. INT’L L. 475, 491-92 (2010); Song, *supra* note 57; *71 Students Treated After Army’s Tear Gas Drifts Into School Yard*, ASSOC. PRESS (Feb. 10, 1995) <https://apnews.com/article/26eb0db7a1ef4e54859781c1dce03842>.

102. Williams et al., *supra* note 91, at 3.

103. Song, *supra* note 57.

104. *Id.*; Williams et al., *supra* note 91, at 3.

105. Williams et al., *supra* note 91, at 4.

106. See Jamie Duffy, *Indiana Tech Student Loses Eye During Saturday’s Protest*, J. GAZETTE (May 31, 2020), <https://www.journalgazette.net/news/local/police-fire/20200531/indiana-tech-student-loses-eye-during-saturdays-protest> [<https://perma.cc/AV4U-78C4>].

107. See, e.g., *Iraq: Protestors Killed by Teargas Canisters*, HUM. RTS. WATCH (Oct. 27, 2019), <https://www.hrw.org/news/2019/10/27/iraq-protesters-killed-teargas-canisters> [<https://perma.cc/HWD9-FACE>].

108. Ali Pattillo, *Tear Gas: Why 1,200 Health Experts Are Urging Experts to Stop Using a “Horrific Weapon”*, INVERSE (June 7, 2021), <https://www.inverse.com/mind-body/health-experts-call-for-a-ban-on-tear-gas> [<https://perma.cc/9AYM-KCM4>] (citing Clark McPhail et al., *Policing Protest in the United States: 1960-1995*, in POLICING PROTEST (Donatella della Porta & Herbert Reiter eds., 1998)).

109. See Baker, *supra* note 26.

particularly susceptible to severe effects of tear gas, including death.<sup>110</sup> Tear gas can cause even healthy adults to suffer chemical burns in the lungs, heart failure, and serious skin conditions, all of which can be fatal.<sup>111</sup> Because protests today include people from many different demographics, it may not be possible to use tear gas safely only against populations who are less vulnerable.

Finally, tear gas also poses grave risks of environmental damage by seeping into nearby homes, contaminating food, furniture, and surfaces.<sup>112</sup> Excessive use can result in substantial and visible munitions residue and sediment build up on streets and sidewalks, as well as in stormwater systems which convey the residue into nearby waterways.<sup>113</sup> Advocates call for the use of chemical weapons to be subject to environmental impact assessments.<sup>114</sup>

### *III. INTERNATIONAL LAW GOVERNING THE USE OF RIOT CONTROL AGENTS*

#### *A. Treaties*

Many treaties have taken aim at regulating the use of chemical weapons, most notably the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (“Chemical Weapons Convention,” or “CWC”). Early treaties avoided governing the use of tear gas and other toxic gases against civilians.<sup>115</sup> The CWC outlaws the use of all toxic gases which fit its definition of “chemical weapons” and the use of tear gas in armed conflict, but it allows for the use of tear gas by law enforcement.<sup>116</sup> This Section first discusses the precursors to the CWC, then the CWC itself.

---

110. Fry, *supra* note 101, at 538.

111. *Id.*

112. Song, *supra* note 57.

113. Wilson, *supra* note 91.

114. *Id.*

115. See Giovanello, *supra* note 8, at 3-5, 11. The greater focus was on the use of these agents in war. During negotiation of the CWC, negotiators left law enforcement uses of RCAs out of the coverage of the CWC to ensure greater ratification, including by the United States. *Id.* at 11.

116. Chemical Weapons Convention, *supra* note 16, art. I, 1, 5; art. II, 1, 7, 9(d).



### 1. Precursors to the Chemical Weapons Convention

Efforts to regulate the use of chemical weapons began shortly after the weapons were invented, even prior to WWI.<sup>117</sup> Before WWI, chemical weapons control focused on limiting or regulating the use of chemical weapons, rather than full bans on their use or development.<sup>118</sup> Drafters of agreements sought instead to codify the rules of armed conflict with respect to the weapons and limit the use of certain tactics and dispersal devices.<sup>119</sup> Pre-WWI agreements include the Saint Petersburg Declaration of 1868, the Brussels Declaration of 1874, and the documents produced by the Hague Conferences of 1899 and 1907.<sup>120</sup> The Saint Petersburg Declaration, ratified by the major powers of the time, set a floor for the size of projectiles that could contain “fulminating or inflammable substances” allowing for the use of larger scale artillery shells containing the substances.<sup>121</sup> The Brussels Declaration, which was not ratified, stated that weapons containing poisonous substances were “especially forbidden” under the rules and laws of war of the time.<sup>122</sup> The Hague Conference of 1899 led to a ban on the use of munitions which carried poisonous gases, but only in wars between contracting parties.<sup>123</sup> The Hague Conference of 1907 reaffirmed this principle, but unfortunately these prohibitions did not prevent states from developing chemical weapons or from using them on the battlefields of WWI.<sup>124</sup>

After the devastating use of chemical weapons in WWI, several international agreements sought to reduce the threat posed by chemical weapons.<sup>125</sup> These agreements include the Treaty of Versailles, the Washington Naval Treaties of 1921, and

---

117. *See id.* at 3.

118. *Id.*

119. *Id.*

120. *Id.* at 3-4.

121. *Id.*

122. *Id.* (quoting *Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874*, INT’L COMM. RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/135?OpenDocument> [<https://perma.cc/ZT5W-K2YU>] (last visited Dec. 16, 2020)).

123. *Id.*

124. *Id.*

125. *Id.*

the Geneva Protocol of 1925.<sup>126</sup> The Treaty of Versailles banned Germany from developing, possessing, or using chemical weapons of any kind, although it did not prevent the Allies or subsequent German regimes from building up their chemical weapons arsenals before World War II (“WWII”).<sup>127</sup> The Washington Naval Conference focused on limiting naval forces around the world, especially in the Pacific, and on regulating submarine warfare and the weaponization of gas.<sup>128</sup> The parties involved agreed that the gas provision would be effective, subject to unanimous acceptance. French opposition to the anti-submarine provisions, however, prevented the accord.<sup>129</sup> The Geneva Protocol, also known as the Geneva Gas Protocol, continued the process of limiting and delegitimizing the use of chemical weapons in war.<sup>130</sup> The Protocol, the world’s oldest multilateral arms control agreement still in effect, banned the wartime use, but not the possession, of all types of chemical weapons.<sup>131</sup> State parties consider the prohibition limited to conflicts involving other parties to the Protocol and to the first use of the weapons, rather than an overall ban on chemical weapons in warfare.<sup>132</sup> The decisions of powerful nations to refrain from using chemical weapons in WWII, however, appears to have come from the deterrent effect of opponents possessing the weapons rather than respect for the Geneva Protocol or international law.<sup>133</sup>

## 2. The Chemical Weapons Convention

During the Cold War, the United States and the Soviet Union stockpiled vast quantities of chemical weapons as part of their strategic arsenals.<sup>134</sup> Many other countries, including Israel,

---

126. *Id.*

127. *Id.* (citing Treaty of Versailles art. 171, June 28, 1919, 1919 U.S.T. 7).

128. *Id.*

129. *Id.* at 4-5.

130. *Id.* at 5.

131. *Id.*

132. *Id.* The protocol failed to prevent the use of chemical weapons during the 1930s in conflicts between Italy and Ethiopia and between Japan and China. In both cases, the respective opponents had no chemical weapons to respond in kind to a chemical weapon attack or deter an attack from taking place. *Id.*

133. *Id.*

134. *Id.*

India, Sudan, Egypt, North Korea, and Syria, also maintained chemical weapons arsenals.<sup>135</sup> Chemical weapons became a weapon of mass destruction with a reputation for accessibility, as they do not require the infrastructure and technology investments required for developing nuclear weapons.<sup>136</sup> The Cold War saw multilateral efforts on arms control that faced the challenge of earning the acceptance of both the great powers and the rest of the international community.<sup>137</sup>

The Chemical Weapons Convention came out of those efforts and became the most stringent, intrusive, and demanding arms control verification measure adopted in a multilateral arms control treaty.<sup>138</sup> It aims to eliminate an entire category of weapons of mass destruction.<sup>139</sup> Under the CWC, state parties undertake to “never[,] under any circumstances . . . develop, produce, otherwise acquire, stockpile or retain chemical weapons, or to transfer chemical weapons to anyone”; to “use chemical weapons”; to “engage in any military preparations to use chemical weapons”; and “to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.”<sup>140</sup> Additionally, each state party undertakes to destroy chemical weapons in its territory and any chemical weapons it abandoned in the territory of another state party, along with any chemical weapons production facilities under its control.<sup>141</sup> The final general obligation under the CWC is that each state party undertakes “not to use riot control agents as a method of warfare.”<sup>142</sup>

In its general obligations and implementation, the CWC distinguishes between chemical weapons and riot control agents (“RCAs”), including tear gas.<sup>143</sup> The CWC defines “chemical weapons” as:

---

135. JOSEPH CIRINCIONE ET AL., *DEADLY ARSENALS: TRACKING WEAPONS OF MASS DESTRUCTION* 13 (2d ed. 2005).

136. Giovanello, *supra* note 8, at 5-6.

137. *Id.* at 6.

138. *Id.*

139. *See* Chemical Weapons Convention, *supra* note 16, art. I.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* art. III.

(a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;

(b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;

(c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).<sup>144</sup>

The CWC defines “riot control agent” as “[a]ny chemical . . . which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.”<sup>145</sup> As mentioned above, the use of RCAs as a method of warfare is prohibited, however, the use of RCAs in civilian life is specifically permitted under the definition of “Purposes Not Prohibited Under this Convention,” which allows use for “law enforcement including domestic riot control purposes.”<sup>146</sup>

The term “law enforcement purposes” has been subject to different interpretations of what constitutes “law enforcement.” The Clinton administration, for instance, interpreted the CWC’s ban on the use of RCAs to apply only to international or internal armed conflict, while other peacetime uses of RCAs fall outside its purview.<sup>147</sup> Such peacetime uses of RCAs included normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and noncombatant rescue operations

144. *Id.* art. II.

145. *Id.*

146. *Id.* Other permitted purposes include industrial, agricultural, research, medical, pharmaceutical, or other peaceful purposes; protective purposes; and military purposes “not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare.” *Id.*

147. Giovanello, *supra* note 8, at 3, 11 (citing William J. Clinton, *Message to the Senate on the Impact of the Chemical Weapons Convention on the Use of Riot Control Agents*, AM. PRESIDENCY PROJECT (June 23, 1994), <https://www.presidency.ucsb.edu/documents/message-the-senate-the-impact-the-chemical-weapons-convention-the-use-riot-control-agents> [https://perma.cc/5YXZ-YU5Z]).

conducted outside armed conflicts.<sup>148</sup> Such interpretation is not limited to the Clinton administration, and, as a result, scholars have concluded that the term “law enforcement” is overly vague.<sup>149</sup>

In interpreting the CWC, modern scholarship overlooks the term “riot control agent” and does not give it sufficient weight. While “riot control agent” is the name of a class of chemical compounds, the name also provides what the agents are meant to control, namely “riots.” This provision lacks parameters and is thus subject to abuse by law enforcement officers around the world. Additionally, the CWC explicitly requires the quantities of permissible toxic chemicals and their precursors to be consistent with purposes not prohibited under the convention.<sup>150</sup> Typically, these quantities refer to the possession of chemical weapons for research purposes, requiring relatively small amounts.<sup>151</sup> This Author, however, finds it would be reasonable to extend the interpretation of “quantities . . . consistent with such purposes” to limit law enforcement use of RCAs to what is strictly necessary for defense and outlaw use for mere convenience, or, worse, for political suppression.

### B. UN Guidance

The United Nations offers soft law guidance<sup>152</sup> to law enforcement in the form of a Code of Conduct for Law Enforcement Officials (“Code of Conduct”)<sup>153</sup> and Guidance on Less-Lethal Weapons in Law Enforcement (“Guidance”).<sup>154</sup> The Code of Conduct dates from 1979 and offers eight articles controlling the duties and responsibilities of law enforcement

---

148. *Id.* at 12. Use of RCAs in such situations has recently received criticism as well. See Fry, *supra* note 101, at 477.

149. See generally Fry, *supra* note 101, at 502-19.

150. *What is a Chemical Weapon*, OPCW, <https://www.opcw.org/our-work/what-chemical-weapon> [<https://perma.cc/6N4X-T7XP>] (last visited Feb. 5, 2021).

151. See *id.*

152. Soft law is distinguished from “hard law” by its legally non-binding nature. Unlike hard law, soft law does not create a right of action which can be legally enforced before a court. Soft law expresses important principles of international law and can eventually develop into hard law by treaty or customary international law.

153. G.A. Res. 34/169 (Dec. 17, 1979).

154. Office of the United Nations High Comm’r for Human Rights, *Guidance on Less-Lethal Weapons in Law Enforcement*, U.N. DOC. HR/PUB/20/1 (June 2020).

officials.<sup>155</sup> The Guidance dates from 2020 and offers general principles on the use of force and accountability, general considerations pertaining to less-lethal weapons and related equipment, unlawful weapons, the use of force in specific situations, and the use of specific less-lethal weapons, as well as dissemination, review, and implementation of the use of force.<sup>156</sup> This Section considers first the articles of the Code of Conduct relevant to the use of tear gas on protesters, then the relevant sections of the Guidance.

### 1. Code of Conduct for Law Enforcement Officials

The Code of Conduct emphasizes law enforcement officials' great responsibility to protect their communities. Article 1 states officials "shall at all times fulfil the duty imposed upon them by law, by serving the *community* and by protecting all *persons* against illegal acts, consistent with the high degree of responsibility required by their profession."<sup>157</sup> This Article places the duties to serve the community and to protect people from illegal acts on equal footing. It also emphasizes the high degree of responsibility that both their profession and their role in their respective communities require. The mention of *illegal* acts underlines the importance of the rule of law in officers' duties and avoids a presumption on the legality of officers' acts. Regarding the abusive use of tear gas on peaceful protesters, it is hard to see how such use serves the community or protects people, and how such use of tear gas is acceptable.

Article 2 of the Code of Conduct calls on law enforcement explicitly to "respect and protect human dignity and maintain and uphold the human rights of all persons" in the performance of their duty.<sup>158</sup> The commentary to Article 2 states that human rights are protected by domestic and international law and lists the major international instruments protecting human rights including the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political

---

155. Commentary to Article 1 states, "[l]aw enforcement officials" includes "all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention." G.A. Res. 34/169, *supra* note 153, art. 1.

156. See generally *Guidance on Less-Lethal Weapons in Law Enforcement*, *supra* note 154.

157. G.A. Res. 34/169, *supra* note 153, art. 1 (emphasis added).

158. G.A. Res. 34/169, *supra* note 153, art. 2.

Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Declaration on the Protection of All Persons”).<sup>159</sup> The Article emphasizes the duty of law enforcement to respect and protect human dignity. The use of tear gas on protesters is in direct contradiction with these duties in many frequently observed situations.<sup>160</sup>

Article 3 of the Code of Conduct governs the use of force by law enforcement, limiting it to situations when “strictly necessary” and “to the extent required for the performance of their duty.”<sup>161</sup> The commentary to Article 3 emphasizes that the use of force by law enforcement officials should be exceptional.<sup>162</sup> Although the Code of Conduct permits the use of force, such use is limited to what is “reasonably necessary under the circumstances” for the prevention of crime or the lawful arrest of offenders or suspected offenders.<sup>163</sup> As applied to the use of tear gas on protesters, the principles of necessity and proportionality would severely curtail the sometimes indiscriminate use of tear gas on protesters, many instances of which harm peaceful protesters as much as their violent counterparts.<sup>164</sup>

The final relevant article is Article 5, which states:

[n]o law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances

---

159. This declaration dates from G.A. Res. 3452 (Dec. 9, 1975) which the G.A. adopted after the Code of Conduct. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment dates from G.A. Res. 39/46 (Dec. 10, 1984) which entered into force June 26, 1987, seven years after the Code of Conduct.

160. *See supra* Section II.B.

161. G.A. Res. 34/169, *supra* note 153, art. 3.

162. *Id.*

163. This limitation brings up the principle of proportionality, which also exists in the laws of armed conflict or international humanitarian law. Another principle from the Laws of Armed Conflict which should be considered in the use of tear gas on protesters is the principle of discrimination. This principle requires that the use of force must be able to discriminate between combatants and non-combatants, as the use of force on protesters should be able to discriminate between people behaving violently and people behaving peacefully.

164. *See supra* Section II.B.1.

such as . . . internal political instability or any other public emergency as a justification.<sup>165</sup>

Although it may seem severe or alarmist to compare the overuse of tear gas on protesters to the use of torture or other inappropriate treatment, a closer inspection of these treatments reveals that the abuse of tear gas by law enforcement does not merely parallel what the Declaration on the Protection of All Persons and later Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”) explicitly prohibits. In language similar to the Convention Against Torture, the first article of the Declaration on the Protection of All Persons defines torture as:

any act by which *severe pain* or suffering . . . is *intentionally inflicted* on a person for such purposes as . . . *punishing* him for an act he . . . has committed or is suspected of having committed, or *intimidating* or coercing him . . . , when such pain or suffering is inflicted by . . . a public official.<sup>166</sup>

When tear gas is used against protesters for suppression, as has frequently been asserted recently,<sup>167</sup> it constitutes severe pain intentionally inflicted for the purpose of intimidation, in direct violation of the Convention Against Torture and other international protections of human rights.

## 2. Guidance on Less-Lethal Weapons in Law Enforcement

The United Nations released the Guidance in 2020, so it is not yet certain how law enforcement practices will change in response. An important feature to keep in mind, however, is the fact that overall, the Guidance remains non-binding soft law. While it does draw in some instances from binding precedent, much of what it states regarding the use of tear gas is recommendation.

The Guidance imports general principles for the use of force by law enforcement from international humanitarian law. The Guidance states “any use of force by law enforcement officials shall comply with the principles of legality, precaution, necessity,

---

165. G.A. Res. 34/169, *supra* note 153, art. 5.

166. G.A. Res. 3452, *supra* note 159, art. I (emphasis added).

167. *See generally* Moss, *supra* note 93.



proportionality, non-discrimination and accountability.”<sup>168</sup> Law enforcement may use force “only if other means appear ineffective or without *any* promise of achieving the intended result” (emphasis added).<sup>169</sup>

The principle of legality requires the use of force to be regulated by domestic law and regulations to be in accordance with international law.<sup>170</sup> The use of force can be justified only when used “with the aim of achieving a legitimate law enforcement objective.”<sup>171</sup> Only weapons and weapons systems authorized by the proper domestic authority may be used in law enforcement.<sup>172</sup> Importantly, the use of force in law enforcement “shall never be used punitively,”<sup>173</sup> a proposition which is uncertain in today’s climates of repression of dissent around the globe.

The principle of precaution requires that law enforcement operations and actions “be planned and conducted while taking *all* necessary precautions to prevent . . . the risk of recourse to force by law enforcement officials and members of the public, and to minimize the severity of any injury that may be caused” (emphasis added).<sup>174</sup> Law enforcement officials should delay direct contact with the public if that tactic would reduce the need for the use of force without endangering the public or officers.<sup>175</sup> Adequate training and protective equipment should be provided to further reduce the need for the use of force.<sup>176</sup> Importantly, law enforcement must give special consideration to people particularly vulnerable to the use of force and the effects of specific less-lethal weapons, such as RCAs and rubber bullets.<sup>177</sup>

---

168. *Guidance on Less-Lethal Weapons in Law Enforcement*, *supra* note 154, at 4.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 5.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* Protective equipment like helmet, shields, stab-resistant gloves and vests and bullet-resistant vests may decrease the need for law enforcement officials to use weapons of any kind. Human Rights Council Res. 38/11, U.N. DOC. A/HRC/RES/38/11 ¶ 15 (July 6, 2018).

177. *Guidance on Less-Lethal Weapons in Law Enforcement*, *supra* note 154, at 6. The Guidance considers vulnerable people to include children, pregnant women, the elderly,

In the context of today's organized protests attended by wide swaths of the general population, preventing the unnecessary use of force and giving special consideration to those most vulnerable to the effects of tear gas takes on added importance.

The principle of necessity requires strict and absolute necessity of the use of force and that it only be used to the extent required for the performance of law enforcement officers' duties.<sup>178</sup> This principle requires that no reasonable alternative appear available at the moment when force is deployed and that officers seek to de-escalate situations whenever possible.<sup>179</sup> The use of force must be minimized in both degree and duration relevant to the objective to be achieved.<sup>180</sup>

The principle of proportionality requires the "type and level of the force used and the harm that may reasonably be expected to result from it" be proportionate to "the threat posed by an individual or group of individuals or to the offence that an individual or group is committing or is about to commit."<sup>181</sup> The use of force should never be excessive in relation to the legitimate objective to be achieved.<sup>182</sup> Additionally, law enforcement officers should consider and minimize at all times the possible incidental impact of their use of force on bystanders, passers-by, medical personnel, and journalists.<sup>183</sup> Officers must not direct force against such persons, and any incidental impact must be strictly proportionate to the legitimate objective to be achieved.<sup>184</sup>

The principle of non-discrimination requires law enforcement officials not to discriminate against anyone on the basis of race, ethnicity, color, sex, sexual orientation, language, religion, political or other opinion, national or social origin, disability, property or birth, or other similar criteria.<sup>185</sup> The Guidance requires "a heightened level of care and precaution" with respect to people who are known or are likely to be

---

persons with disabilities, person with mental health problems, and persons under the influence of drugs or alcohol. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 6-7.

182. *Id.* at 7.

183. *Id.*

184. *Id.*

185. *Id.*

vulnerable to the effects of a particular weapon.<sup>186</sup> This requirement is particularly relevant to the use of tear gas on protesters, and even more so during the COVID-19 pandemic when those with respiratory difficulties are at increased risk of complications from the disease.<sup>187</sup>

Following the general principles on the use of force, the Guidance mandates government accountability for the use of force and provides general considerations pertaining to less-lethal weapons and related equipment. The general considerations relate to design and production, legal review, testing and procurement, monitoring, transparency, training, medical assistance, transfer, and international cooperation and assistance.<sup>188</sup> The Guidance then provides limitations on unlawful weapons and related equipment and the use of force in specific situations, such as during arrests and in custodial settings.<sup>189</sup>

Of the situations the Guidance discusses, the most relevant to the use of tear gas is public assemblies. The Guidance requires that fundamental human rights of participants in assemblies be respected and protected, even if an assembly is considered unlawful by the authorities.<sup>190</sup> Law enforcement officials should use appropriate de-escalation techniques to minimize the risk of violence and recall that heavy reliance on even less-lethal equipment may escalate tensions.<sup>191</sup> If there are some violent individuals, law enforcement officials have a duty to distinguish between violent and nonviolent participants and to protect the rights to peaceful assembly of the nonviolent.<sup>192</sup> The use of less-lethal weapons to disperse an assembly should be a last resort, so law enforcement officers should seek to identify and isolate violent individuals before resorting to less-lethal weapons, allowing the assembly to continue. When it is not possible to avoid using less-lethal weapons, officers must provide appropriate

---

186. *Id.*

187. *See supra* notes 106-108 and accompanying text. For some people, COVID-19 caused extreme respiratory symptoms sometimes requiring breathing assistance from a ventilator and resulting in death.

188. *See generally* *Guidance on Less-Lethal Weapons in Law Enforcement*, *supra* note 154, at 13-19.

189. *See id.* at 20-23.

190. *Id.* at 23.

191. *Id.*

192. *Id.* at 23-24.

warning, adequate time to comply, and a safe route to disperse.<sup>193</sup> Tear gas should be targeted at only groups of violent individuals, unless it is lawful under the circumstances to disperse the entire assembly.<sup>194</sup> It is clear from the discussion above that law enforcement professionals around the globe have historically not uniformly complied with this point in the Guidance. Due to the strength of this trend, this Author believes it unlikely that law enforcement officials will change their practices to comply with soft law.

The Guidance also provides specific advice for the use of hand-held chemical irritants, including pepper spray, and for chemical irritants launched at a distance, including tear gas. The recommendations relate to the utility and design of the agents and their delivery methods, the specific risks of the agents, and circumstances of potentially unlawful use. The use of pepper spray is potentially lawful when its deployment is accurate and law enforcement has reason to believe there is an imminent threat of injury to themselves or others.<sup>195</sup> Law enforcement should not use irritants that contain carcinogenic substances or hazardous levels of active agents.<sup>196</sup> Repeated or prolonged exposure should be avoided, and chemical irritants should never be used in situations of exclusively passive resistance.<sup>197</sup> Tear gas poses a specific risk of indiscriminate effects in open areas because of changes in wind direction.<sup>198</sup> Additionally, the Guidance warns, in certain cases tear gas can be lethal, such as when used in confined spaces or in high concentrations.<sup>199</sup> The Guidance also warns that the deployment of tear gas behind a group of violent individuals may prompt the group to move toward law enforcement officials, thereby increasing the risk of a violent confrontation.<sup>200</sup>

It remains to be seen whether the Guidance will be successful in changing engrained law enforcement practices. Although the United Nations General Assembly adopted the Guidance in 2020, drafts were circulated in 2019 among experts and were made

---

193. *Id.* at 24.

194. *Id.*

195. *Id.* at 27.

196. *Id.* at 28.

197. *Id.*

198. *Id.* at 29.

199. *Id.* at 29-30.

200. *Id.* at 30.

available to the public well before many of the situations of tear gas overuse referenced earlier in this Note.<sup>201</sup> One particular development from the Code of Conduct to the Guidance is the prominence of the above-described principles which come from international humanitarian law, also known as the law of armed conflict. While on one hand, it makes sense to encourage the application of principles designed with physical safety in mind to law enforcement's use of less-lethal weapons. On the other hand, the surprising incongruity of contemplating the application of the rules of armed conflict to policing peaceful protesters should not go unnoticed. One defense for such application is that the constraints perhaps are more relevant to the objects themselves than the role of the people using them, whether combatants or law enforcement officers. This Author sees it instead as a step made inevitable by the militarization of police forces,<sup>202</sup> yet questions whether conceiving of officers as one conceives of combatants does not rather undermine the efficacy of their crowd control. The armed personnel in war and in law enforcement are completely and essentially different, despite the fact that their weapons may have some resemblance. It seems misplaced to allow the similarities in weapon techniques to overshadow the enormous differences in the relationships between the armed and unarmed.

### *C. European Court of Human Rights Case Law*

The European Court of Human Rights ("ECtHR") is a regional court grounded in both regional and universal interpretations of the European Convention on Human Rights ("Convention").<sup>203</sup> The Convention, although regional, has universal importance, as is underlined in its preamble's reference to the Universal Declaration of Human Rights.<sup>204</sup> The ECtHR has

---

201. See *New Human Rights Guidance on the Use of Less-Lethal Weapons*, GENEVA ACADEMY (Oct. 15, 2019), <https://www.geneva-academy.ch/news/detail/269-new-human-rights-guidance-on-the-use-of-less-lethal-weapons> [https://perma.cc/D43Y-Y5FG] (circulating advance unedited version of the U.N. Guidance).

202. See Edward Lawson Jr., *TRENDS: Police Militarization and the Use of Lethal Force*, 72 POL. RES. Q. 177, 177-89 (2019).

203. Jukka Viljanen, *The Role of the European Court of Human Rights as a Developer of International Human Rights Law*, 1 CUADERNOS CONSTITUCIONALES DE LA CÁTEDRA FABRIQUE 249, 249 (2008).

204. *Id.*

been in the avant-garde of human rights law, and its precedent has been followed by other human rights supervisory organs at the international level.<sup>205</sup> ECtHR case law on the use of tear gas is informative for the international community and binding for the European community.<sup>206</sup> This Section continues with a discussion of the ECtHR's guidance on the use of tear gas on protesters.

A case study of the dispersal of an illegal gathering provides general principles on the use of force in law enforcement. After refusing to give permission for a protest in Usukhchay, Russia, law enforcement officers broke up a peaceful meeting of demonstrators with tear gas, smoke bombs, and stun grenades.<sup>207</sup> The protesters dispersed, and officers followed, beating them with rubber truncheons and rifle butts. The incident resulted in one person shot dead, five people severely injured, and several dozen injured by the shells of the tear gas bombs which had exploded in the crowd.<sup>208</sup> In considering whether there was a violation of the rights to freedom of expression and freedom of assembly, the ECtHR recalled that "since States have the right to require authorization [for demonstrations], they must be able to apply sanctions to those who participate in demonstrations that do not comply with the requirement."<sup>209</sup> The question before the court was how far sanctions may go and whether the dispersal could be reasonably justified by the original unlawfulness of the demonstration. Ultimately, it found that an unlawful situation does not justify an infringement of freedom of assembly.<sup>210</sup> The court emphasized that while rules governing public assemblies, such as systems of prior notification, are essential for the smooth conduct of public events, their enforcement cannot become an end in itself.<sup>211</sup>

---

205. *Id.* at 249-50.

206. *Guide on Article 46 of the European Convention on Human Rights*, Eur. Ct. H.R. 7 (2020).

207. *Primov v. Russia*, App. No. 17391/06, Eur. Ct. H.R. ¶ 18 (June 12, 2014).

208. *Id.*

209. *Id.* ¶ 118 (citing *Ziliberberg v. Moldova*, App. No. 61821/00, Eur. Ct. H.R. (May 4, 2004), <http://hudoc.echr.coe.int/eng?i=001-23889> [<https://perma.cc/7JLD-FRJA>]).

210. *Id.* (citing *Karabulut v. Turkey*, App. No. 16999/04 ¶ 35 (July 27, 2009), <http://hudoc.echr.coe.int/eng?i=001-90933> [<https://perma.cc/XYR3-883P>]).

211. *Id.*

A separate ECtHR opinion recognized a continuum of force for law enforcement.<sup>212</sup> The opinion provides that when confronted with an aggressive demonstration, police action must be targeted to those demonstrators who act violently, recalling the principle of discrimination in the law of armed conflict:

Police must only use more dangerous means of response when less dangerous ones have proved ineffective, following a scale continuum of force that must be set out in the law and include verbal commands, use of hands and bodily force, water cannon, tear gas and other chemical agents, batons or other impact weapons, dogs, plastic or rubber bullets and other non-lethal projectiles, and finally deadly force.<sup>213</sup>

Furthermore, especially dangerous means such as gas grenades, “must be used in strict accordance with the applicable technical instructions to avoid unnecessary harm, and in particular must not be fired ‘directly at humans.’”<sup>214</sup>

Anna Feigenbaum, a foremost tear gas scholar, has noted that while the ECtHR tear gas trials bring visibility and humanitarian weight to tear gas crimes, international law does not have enforcement mechanisms in place, so these rulings can represent symbolic successes rather than triumphs of justice.<sup>215</sup> Going through high courts is a slow process that can take as long as ten years to address an instance of misuse, meanwhile struggles with tear gas continue and are not impacted by rulings against offending states.<sup>216</sup>

---

212. *Id.* annex b ¶ 13 (Albuquerque, J., concurring and dissenting).

213. *Id.*

214. *Id.* A case in which the ECtHR found no violation of the Convention is also informative, although its subject is the use of a narcotic gas instead of tear gas. The case resulted from the use of narcotic gas to end a hostage situation which had a high fatality rate. After terrorists held hostages at a theater in Moscow for three days, Russian security forces pumped the narcotic gas into the theater through its ventilation system. The operation resulted in over seven hundred hostages being released, although around one hundred died during the incident, including from the use of the gas. The court determined that the use of force was justified and that the use of the gas was not a disproportionate measure. *Finogenov v. Russia*, App. Nos. 18299/03 and 27311/03, Eur. Ct. H.R. ¶ 8-22, 24, 226, 236 (June 4, 2012), <http://hudoc.echr.coe.int/eng?i=001-108231> [<https://perma.cc/EZK6-FL2H>].

215. See generally FEIGENBAUM, *supra* note 1, ch. 8.

216. *Id.*

*IV. SOLUTIONS*

Many authorities around the world are advancing the position that use of tear gas should be banned against protesters, both domestically and internationally.<sup>217</sup> Proponents of this position criticize the legitimacy of tear gas use in peacetime, calling to mind the International Court of Justice's position in 1949 that "elementary considerations of humanity" are "even more exacting in peace than in war."<sup>218</sup> In contrast, proponents of the opposing view have taken this reasoning to its opposite end: tear gas cannot be a combat gas since it is recognized as a weapon used by law enforcement throughout the world for riot control.<sup>219</sup>

Jamil Dakwar, the director of the American Civil Liberties Union Human Rights Project, commented on the reports of tear gas use on peaceful protesters outside the White House in May 2020:

this appears to be a grossly unjustified use of a dangerous chemical weapon on protesters and raises serious human rights concerns under international law. Health experts warned that the use of tear gas can have long-term effects on respiratory function. Elected officials, including Congress, must investigate this politically-motivated and life-threatening use of indiscriminate weapons.<sup>220</sup>

Nevertheless, RCAs can be useful and even necessary to protect law enforcement in certain defensive situations. This Part discusses solutions to improve the use of RCAs. It recommends rejecting the distinction between wartime and peacetime use, improving regulation in the trade and production of RCAs, and

217. See, e.g., Diane Bernabei, *It's Time to Stop the Use of Tear Gas Against Civilians*, JUST SEC. (July 1, 2020), <https://www.justsecurity.org/71062/its-time-to-stop-the-use-of-tear-gas-against-civilians/> [<https://perma.cc/3B5A-UUAS>]. In Portland, Oregon, a judge placed temporary restrictions on the use of tear gas after it was used to disperse peaceful protesters. Lawmakers have called for a ban in the use of tear gas in Massachusetts and New Orleans. The bans on law enforcement using tear gas enacted in some U.S. cities, including Denver, Seattle, Portland, and Dallas, were only temporary. See Lai et al., *supra* note 5.

218. *Corfu Channel Case (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 4, 22 (Apr. 9).

219. See, e.g., Samuel Longuet, *Permitted for Law Enforcement Purposes But Prohibited in the Conduct of Hostilities: The Case of Riot Control Agents and Expanding Bullets*, 98 INT'L REV. RED CROSS 249 (2016).

220. Press Release, ACLU, Comment on Tear Gas Outside the White House (June 1, 2020), <https://www.aclu.org/press-releases/aclu-comment-tear-gas-use-outside-white-house> [<https://perma.cc/5VZW-NR57>].



enacting an optional protocol to the CWC which would provide for binding limitations on its use as well as public reporting to improve transparency and compliance.

### 1. Rejecting the Distinction Between Wartime and Peacetime Use of RCAs

Samuel Longuet, a scholar at the Fonds National de la Recherche Scientifique, has argued in the *International Review of the Red Cross* that there is no contradiction between the ban on the use of tear gas in armed conflict and the widespread legal use by law enforcement.<sup>221</sup> Indeed, according to him, the difference is justified.<sup>222</sup> The argument relies on the supposed different impacts on the human body and lack of risk for escalation in a peacetime context as opposed to in armed conflict.<sup>223</sup> Tear gas can be lethal in high doses.<sup>224</sup> The conditions of armed conflict can cause the toxic agents in tear gases to accumulate in the body, either through high doses in enclosed spaces or through repeated exposure, leading to more incidences of lethal doses.<sup>225</sup> Using tear gas in armed conflict risks escalation to more dangerous chemical weapons or masking the use thereof.<sup>226</sup> Longuet considers tear gas to be a “threshold weapon” potentially leading to the use of more toxic chemical weapons and claims the risk of escalation is even greater when RCAs have caused enemy deaths, erasing the distinction between non-lethal and lethal chemical weapons.<sup>227</sup>

The reasoning underlying the distinction, if it was at one time applicable, no longer holds true in modern sustained protest contexts. As modern protest movements have lasted long periods of time,<sup>228</sup> protesters are repeatedly exposed to tear gas, as in contexts of armed conflict. The same protesters repeatedly confront the same law enforcement officers,<sup>229</sup> risking cumulative exposure to toxic levels of gas. Additionally, although protesters

---

221. See Longuet, *supra* note 217, at 253.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 263.

227. *Id.*

228. See *supra* notes 10-15 and accompanying text.

229. See *supra* notes 10-15 and accompanying text.

do not have their own chemical weapons with which to escalate tensions and use against law enforcement officers, protesters have developed techniques to return fired tear gas behind law enforcement lines.<sup>230</sup> Tensions escalate with violence on both sides. Ultimately, using tear gas has in fact been shown to risk escalating violence.<sup>231</sup> By rejecting the distinction between armed conflict and peacetime protests, flaws in policing protests can be more easily addressed. Recognizing the similarities in situations of intense tensions on either side of a protest line and those in armed conflict could make law enforcement more amenable to the adoption of more successful crowd control practices than the overuse of RCAs. Finally, regulation on RCA use can focus on the properties of the agents and devices themselves, thereby increasing the regulations' efficacy instead of incentivizing their evasion by relying on potentially faulty categorization.<sup>232</sup>

## 2. Regulation

Scholars have recommended improving regulation of RCAs, as the agents are currently unregulated.<sup>233</sup> Manufacturers provide training and instructions for tear gas use, but law enforcement officers typically use much more than what is recommended.<sup>234</sup> Additionally, there is a lack of accountability for officers using tear gas because, unlike bullets and lethal weapons, there is no

---

230. See Tracy Ma et al., *Why Protest Tactics Spread Like Memes*, N.Y. TIMES (July 31, 2020), <https://www.nytimes.com/2020/07/31/style/viral-protest-videos.html> [https://perma.cc/FJV8-CDRZ].

231. *Guidance on Less-Lethal Weapons in Law Enforcement*, *supra* note 154, at 30.

232. See generally Esther Ness, *Moving Beyond Thoughts and Prayers: A New and Improved Federal Assault Weapons Ban*, 44 *FORDHAM INT'L L.J.* 1087 (2021).

233. See CROWLEY, *supra* note 64; Grush, *supra* note 3; FEIGENBAUM, *supra* note 1. NGOs have also called for improved tear gas use practices, among other improvements in the use of force against protesters. See generally Levy & Wilcken, *supra* note 9; *Statement by International NGOs on Pro-Democracy Protests on November 17 and 25, 2020*, HUM. RTS. WATCH (Nov. 25, 2020), <https://www.hrw.org/node/377141/printable/print> [https://perma.cc/88T6-NL8Q] [hereinafter *Pro-Democracy Protests Statements*] (condemning the Thai police's use of excessive force against protesters; signed by Amnesty International, Article 19, ASEAN Parliamentarians for Human Rights, Asia Democracy Network, Asian Forum for Human Rights and Development (FORUM-ASIA), Asian Network for Free Elections (ANFREL), CIVICUS: World Alliance for Citizen Participation, Civil Rights Defenders, FIDH - International Federation for Human Rights, Fortify Rights, Human Rights Watch, International Commission of Jurists, and Manushya Foundation).

234. *Pro-Democracy Protests Statements*, *supra* note 231.

way to trace the use of non-lethal weapons back to the individual officers who deployed them.<sup>235</sup>

Furthermore, trade in less-lethal munitions does not have the same kind of tracking procedures as trade in firearms, so they can be moved between storage facilities with little or no publicly accessible documentation.<sup>236</sup> This lack of regulation allows tear gas to end up in countries with known humanitarian criticisms of its overuse while manufacturers and their domestic governments claim they do not ship their products to such regions and continue to profit.<sup>237</sup> Additionally, expired tear gas, which no longer meets criteria for safe use yet remains in circulation upon expiration, is also found at the site of human rights violations.<sup>238</sup> With improved tracking and regulation, these problems could be prevented.

### 3. Optional Protocol to the CWC

This Note proposes the limitation and regulation of RCAs through the adoption of an optional protocol to the Chemical Weapons Convention. The unique suggestion of an optional protocol consolidates the recommendations of advocates for the limitation of the use of tear gas on protesters<sup>239</sup> and for the extensive regulation of RCAs.<sup>240</sup> It is a pragmatic approach that builds on an existing framework and would both take advantage of the strengths of the Organisation for the Prohibition of Chemical Weapons (“OPCW”), namely its chemical weapons tracking, overseeing, and monitoring capabilities, and expand

---

235. *Id.*

236. FEIGENBAUM, *supra* note 1, at 104.

237. *See id.* at 103.

238. *See id.* at 104. Expired tear gas is particularly dangerous for a number of reasons. Its delivery mechanism can be faulty, leading to greater risk of injury using the device. The chemical compound may no longer be approved according to safety tests and certificates. Finally, it can be even more difficult to trace expired gas canisters to their point of sale. Expired tear gas is meant to be taken out of circulation and destroyed in compliance with careful environmental protocols.

239. *See* Levy & Wilcken, *supra* note 9; Williams et al., *supra* note 91, at 18.

240. FEIGENBAUM, *supra* note 1, at 101. Anna Feigenbaum, *Riot Control Agents: The Case for Regulation*, 112 SUR FILE ON ARMS AND HUM. RTS. 101 (Dec. 2015), [https://sur.conectas.org/wp-content/uploads/2015/12/07\\_SUR-22\\_ENGLISH\\_ANNA-FEIGENBAUM.pdf](https://sur.conectas.org/wp-content/uploads/2015/12/07_SUR-22_ENGLISH_ANNA-FEIGENBAUM.pdf) [<https://perma.cc/CKA8-YK2J>].

the organization's scope.<sup>241</sup> An optional protocol to limit the use of RCAs would also strengthen the OPCW by broadening its subject matter jurisdiction and conforming the CWC to human rights standards by replacing its broad grants of permission to law enforcement for RCA use with a more limited approach. As an optional protocol is itself a new treaty, future state parties would shape the regulation of RCAs and be bound by their consent. The optional protocol would lend the flexibility necessary to maintain the strength of the CWC, the strongest international weapons control agreement in existence, while avoiding the withdrawals from the CWC which could come with amending the agreement's control of RCAs directly.

Additionally, an optional protocol would be stronger than the UN soft law guidance as it would create binding obligations on signatories.<sup>242</sup> These obligations would also put pressure on non-signatory states to improve their practices of RCA use on civilians, to follow in the footsteps of signatory states. This pressure has been building as a result of advocacy campaigns by NGOs including Amnesty International<sup>243</sup> and Omega Research Foundation.<sup>244</sup> With binding law in place, an optional protocol could effectively address a problem of international importance.

---

241. The OPCW has several relevant program aims which include (i) to ensure a credible and transparent regime for verifying the destruction of chemical weapons and preventing their re-emergence while protecting legitimate national security and proprietary interests; (ii) "[t]o provide protection and assistance against chemical weapons;" and (iii) "to encourage international cooperation in peaceful uses of chemistry." *Mission*, OPCW, <https://www.opcw.org/about/mission> [<https://perma.cc/67KJ-96XU>] (last visited Dec. 29, 2020). The OPCW website provides that "all toxic chemicals and their precursors, except when used for purposes permitted by the [CWC] - *in quantities consistent with such a purpose*," are chemical weapons. *What is a Chemical Weapon?*, OPCW, <https://www.opcw.org/work/what-chemical-weapon> [<https://perma.cc/RV4X-6S8B>] (last visited Dec. 29, 2020) (emphasis added). As discussed above, the use of RCAs for law enforcement purposes is permitted, however, the quantities used recently have attracted international attention and merit close scrutiny for exceeding permissible law enforcement purposes. See *Tear Gas: An Investigation*, *supra* note 79; *supra* notes 143-50 and accompanying text.

242. Only current state parties to the CWC could join the optional protocol. However, the CWC is one of the most widely adopted conventions with 193 state parties. *Conference of the State Parties*, OPCW, <https://www.opcw.org/about/conference-states-parties> [<https://perma.cc/GA98-TM46>] (last visited Dec. 18, 2020).

243. *Tear Gas: An Investigation*, *supra* note 79.

244. *Submission to OHCHR on the Use of Less Lethal Weapons During Assemblies*, OMEGA RES. FOUND., <https://omegaresearchfoundation.org/publications/submission-ohchr->

Such an optional protocol may receive few ratifications, as the use of RCAs by law enforcement is a widespread practice and has previously been the subject of CWC negotiations.<sup>245</sup> However, as the issues raised by the abuse of RCAs have been in the spotlight for some time now, public opinion can once again impact the acceptability of RCAs around the world. One issue that could preclude a successful ratification is the ubiquity of RCA use. Many countries rely on the agents in their regular law enforcement practices. Still, as widespread police violence is under close scrutiny, law enforcement officials have a strong incentive to improve their practices overall, including a reduction in the use of RCAs. With public opinion against the use of RCAs on peaceful protesters, it is likely that the public would also support the domestic law that would be needed to bring international law into force.

a. Features of the Optional Protocol to the CWC

The optional protocol regulating the use of RCAs in law enforcement should place clear limitations on their use. It should specify permissible purposes, amounts, types, targets, and require alternative measures to be sought before RCA use and track compliance with these limitations. Further, the OPCW should track the regulation of RCAs to ensure production in line with international quality standards and distribution in compliance with the use standards of the optional protocol.<sup>246</sup>

There should be a provision imposing a duty on law enforcement officers to exercise reasonable care to ensure no unnecessary suffering is caused to civilians by the use of RCAs.<sup>247</sup> Such a duty would guide limitations on contexts of acceptable use. For instance, the duty would require RCAs be used only in

---

use-less-lethal-weapons-during-assemblies [https://perma.cc/XQA6-FVLA] (last visited Dec. 18, 2020).

245. See Benjamin Kastan, *The Chemical Weapons Convention and Riot Control Agents: Advantages of a "Methods" Approach to Arms Control*, 22 DUKE J. COMP. & INT'L L. 267, 271-72 (2012) (citing Ernest Harper, *A Call for a Definition of Method of Warfare in Relation to the Chemical Weapons Convention*, 48 NAVAL L. REV. 132, 136-37 (2001)).

246. See *supra* notes 208-10 and accompanying text.

247. See Fry, *supra* note 101, at 542; see *supra* Section III.B.1-2 (discussing the soft-law application of principles of armed conflict to the use of RCAs on civilians).

defense of life, not property.<sup>248</sup> When RCAs are used, no persons from vulnerable populations should be present or nearby, including children, the elderly, and pregnant women.<sup>249</sup> Although one could pose several hypothetical counterarguments to this duty of reasonable care, most law enforcement officers likely adhere to such a duty already.

There should be a provision imposing a duty on law enforcement officers to minimize the harm RCA use causes.<sup>250</sup> Such a duty would require coordination among all law enforcement personnel responding to a riot.<sup>251</sup> Personnel should never use RCAs from multiple directions, which risks trapping people trying to avoid the gas and prolonging their exposure. Further, RCAs should never be used in enclosed spaces. The lowest possible dosage intensity of RCAs must be the only intensity used to prevent more severe reactions to the gas. Finally, RCA use should never occur in combination with other uses of force, such as physical hitting in baton charges, firing of weapons such as rubber, plastic or metal bullets, or riding horses or vehicles into crowds.<sup>252</sup>

Finally, there should be a duty to take precautions to ensure a successful protest.<sup>253</sup> Precautions include negotiation with protesters before a protest to consider their goals as well as those of law enforcement officers.<sup>254</sup> That way protesters remain unharmed and their freedom of movement remains relatively

248. *See supra* notes 161-63, 178-80 and accompanying text (discussing the principles of necessity and proportionality). Some domestic laws require this measure already, however, it has not shown to be enough to prevent problematic use of tear gas. In order to harden this requirement, international reporting of the use of tear gas would force law enforcement officers to defend their use of tear gas. *See, e.g.*, Code de la Sécurité Intérieure [C. de la Séc. Int.] [Internal Security Code] art. L-211-9; (Fr.); Code Pénal [C. Pén.] [Penal Code] art. 431-3 (Fr.) (permitting the dispersion of crowds by force, although there is no specific mention of tear gas).

249. *See Fry, supra* note 101, at 540.

250. *See id.*

251. *See supra* notes 173-76 and accompanying text.

252. *See* Alicia A. D'Addario, *Policing Protest: Protecting Dissent and Preventing Violence Through First and Fourth Amendment Law*, 31 N.Y.U. REV. L. & SOC. CHANGE 97, 108 (2006).

253. *See id.* at 98-99, nn.8-12.

254. Negotiated management is advantageous for both demonstrators and police. Ahead of a successful anti-war protest in New York in 2004, police negotiated with protesters beforehand and ensured that protesters' freedom of movement was relatively unrestricted. The protest ended with a total of only four arrests. *Id.* at 124.

unrestricted. As many jurisdictions require a permit for large protests, part of the permitting process could involve protest leaders meeting with law enforcement leaders to discuss a plan, a strategy which was successfully implemented in New York City ahead of an anti-war protest in 2004.<sup>255</sup> Officers should also allow for minor violations of the law.<sup>256</sup> For instance, officers could choose to ignore instances of graffiti, littering, relatively harmless objects thrown in their direction, or yelling at officers, and choose to de-escalate tensions rather than inadvertently triggering or escalating tensions further. US Department of Justice research has shown that when police rely on “ineffective and inappropriate strategies and tactics” they have had the “unintended consequence of escalating rather than diminishing tensions.”<sup>257</sup> By focusing on de-escalation, law enforcement would find less need to use RCAs at all.<sup>258</sup>

Placing such limits on law enforcement officers can make it harder for them to do their jobs, thereby jeopardizing public safety. However, as mentioned above, law enforcement officers likely adhere to these duties already. Additionally, with solutions already existing to improve law enforcement protest policing, such limitations would likely speed the adoption of better practices, thereby aiding law enforcement to meet its responsibilities rather than putting officers and their goals at risk.

Under the optional protocol, state parties would report all uses of RCAs, as well as their quality, procurement, storage, and disposal upon expiration. Parties would provide a yearly, publicly available record of RCA use to the OPCW, specifying aggregate quantity, frequency of use, type of weapons deployed, and most importantly, a defense of the circumstances necessitating the use

---

255. *See id.* at 99.

256. *See id.* at 124.

257. Edward R. Maguire, *New Directions in Protest Policing*, 35 ST. LOUIS U. PUB. L. REV. 67, 67 (2015) (quoting INST. FOR INTERGOVERNMENTAL RESEARCH, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP'T OF JUSTICE, AFTER-ACTION ASSESSMENT OF THE POLICE RESPONSE TO THE AUGUST 2014 DEMONSTRATIONS IN FERGUSON, MISSOURI xiv (2015)).

258. *See* INST. FOR INTERGOVERNMENTAL RESEARCH, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, U. S. DEP'T OF JUSTICE, AFTER-ACTION ASSESSMENT OF THE POLICE RESPONSE TO THE AUGUST 2014 DEMONSTRATIONS IN FERGUSON, MISSOURI 92 (2015).

of tear gas.<sup>259</sup> Such measures will ensure a uniform and safe approach. This is particularly important considering the variation in the intensity of tear gas means that some states use tear gas that is more dangerous than others.<sup>260</sup> As the history of RCA and chemical weapon use has been largely one of imitation, greater transparency would likely lead to greater uniformity.<sup>261</sup> With greater uniformity would come greater safety.

### V. CONCLUSION

As one advocates for the end of a prominent practice, the question arises of what should come in its place. The answer exists already: better, safer law enforcement practices<sup>262</sup> to offset the increasing militarization<sup>263</sup> of police forces. How to best scale up these practices to meet the needs of the international community would be the next question, and although the OCPW has a strong, multifaceted capacity building program,<sup>264</sup> perhaps a joint capacity building operation with the International Criminal Police Organization would better accomplish these goals.<sup>265</sup> Above all, we should not forget the principle that impunity for excessive use of force by the police should never be tolerated, as the principle is crucial to strengthen or restore the global population's trust in law enforcement.<sup>266</sup>

---

259. Such reporting has precedent CWC Article III on declarations which requires state parties to declare to the OPCW no later than 30 days after the CWC enters into force for that state party information on chemical weapons, old and abandoned chemical weapons, chemicals weapons production facilities, chemical weapons research and development facilities or establishments, and RCAs. Chemical Weapons Convention, *supra* note 16, art. III.

260. See notes 62-64 and accompanying text.

261. See FEIGENBAUM, *supra* note 1, at 18.

262. See, e.g., Maguire, *supra* note 255, at 67-108; Maggie Koerth & Jamiles Lartey, *De-escalation Keeps Protesters and Police Safer. Departments Respond With Force Anyway*, FIVETHIRTYEIGHT (June 1, 2020), <https://fivethirtyeight.com/features/de-escalation-keeps-protesters-and-police-safer-heres-why-departments-respond-with-force-anyway/> [<https://perma.cc/JYA8-QXQN>].

263. See Lawson, *supra* note 200, at 178.

264. See *Capacity Building*, OPCW, <https://www.opcw.org/resources/capacity-building> [<https://perma.cc/9PTR-KXMM>] (last visited Jan. 28, 2021).

265. See *Capacity Building Projects*, INTERPOL, <https://www.interpol.int/en/How-we-work/Capacity-building/Capacity-building-projects> [<https://perma.cc/CMT5-5HSW>] (last visited Jan. 28, 2021).

266. See Mijatović, *supra* note 2.



This Note advocates for greater regulation of use of tear gas through an optional protocol to the CWC. Although RCAs can serve a necessary purpose in law enforcement, their abuse is currently rampant and unacceptable. The United States and other states should act in accordance with overwhelming and growing public opinion, strongly limit the use of RCAs, and cease using RCAs against protesters. An optional protocol would be the best manner to accomplish this important goal to create binding international standards for the use of RCAs, report on the uses of RCAs to ensure compliance with standards, and to put pressure on other states to improve their use of RCAs as well.

