Gas Smalls Awful: U.N. Forces, Riot-Control Agents, and the Chemical Weapons Convention

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INTRODUCTION

To begin with a brief overview, this Article takes a comprehensive look at the use of riot-control agents (RCAs) by U.N. forces and the legal issues that arise as a result. This Article is the first to look at these legal issues from a practical perspective, not merely a theoretical one, because prior publications have questioned what would happen if U.N. forces used these weapons, whereas this Article analyzes forty instances of actual use. This Article is designed to spark debate within the areas of peacekeeping law, collective security law, the responsibility of international organizations, and arms control law relating to RCAs, and provides compelling legal and policy arguments for why U.N. forces should refrain from using them. This Article is particularly timely, given that some key states, such as the United States, recently have shown a willingness to reconsider their interpretation of disabling chemicals under the Chemical Weapons Convention and support the ICRC's efforts in this realm. Moreover, as this Article was going to press, numerous news reports described how U.N. forces in Haiti heavily relied on RCAs in subduing victims of the January 12 earthquake who aggressively were demanding food from relief workers. These particular instances in Haiti are not included in the forty instances analyzed in Part II due to time constraints, although they are entirely relevant to this Article. With this overview in mind, the remainder of this Introduction sets out the thesis and the structure for defending that thesis throughout this Article.

The 2004 High-Level Panel on Threats, Challenges and Change identified chemical weapons as a "growing threat," with then United Nations (U.N.) Secretary-General Kofi Annan following up with a call for recommitment from all states to their total elimination. Moreover, at the Millennium Summit in 2000, Secretary-General Annan included the Convention on the Prohibition of the Development, Production, Stock-
piling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention, or CWC) among the twenty-five core treaties states ought to join and respect since they are the "most central to the spirit and goals of the Charter of the United Nations." Yet the United Nations has not recognized that U.N. forces may be contributing to the problem of chemical weapons by using RCAs in their operations, with at least forty instances of such RCA use to date. RCAs are banned chemical agents under the CWC, except when used in law-enforcement situations. Since the United Nations is not a member of the Chemical Weapons Convention, the CWC does not apply to the United Nations per se, regardless of whether its operations can be classified as law enforcement. Moreover, it is difficult to argue that the substance of the CWC's RCA prohibition applies as customary international law, given the intense debate over the applicability of these particular provisions of the CWC to activities in which U.N. forces typically participate. These points notwithstanding, U.N. forces might be bound by the CWC's RCA prohibition through the troop-contributing countries that are parties to the CWC—presuming that the United Nations assumes the obligations of its member states indirectly as their alter ego, or through similar types of argumentation. Further, there might be valid reasons other than clear legal obligations, such as moral and tactical considerations, for the United Nations to abide by the norms in the CWC relating to RCAs. To borrow a climber's saying, "One who is poised on the edge of a cliff is wise to define progress as a step backward." This is not to say that U.N. forces never can use less-lethal weapons. On the contrary, they certainly should try less-lethal weapons before using more-lethal ones. The point here is that they should use varieties of less-lethal weapons other than legally controversial, toxic RCAs.

In making this point and in defending this Article's thesis, a few preliminary definitions and delimitations are in order. The term "U.N. forces" comprises three types of military operations falling under the auspices of the United Nations: U.N.-controlled peacekeeping operations, U.N.-controlled enforcement operations, and U.N.-authorized enforcement operations. According to this definition, forces such as the Kosovo Force (KFOR) and the Stabilisation Force (SFOR) in Bosnia and

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Herzegovina are included among U.N. forces because the Security Council created them. This is the case even though critics might disagree on account of the fact that they were led by an entity other than the United Nations. Including these forces within the definition of U.N. forces makes sense inasmuch as the U.N. Security Council exercises a measure of control over them by creating their mandates. This control continues on after that initial act with the continuing validity of those mandates for those particular forces. For simplicity's sake, this Article tends not to distinguish between the different types of U.N. forces. Ultimately the difference in U.N. responsibility for the actions of the different types of U.N. forces will depend on the degree of control that the United Nations exercises over those forces. The degree of U.N. control can vary between operations even within the same type of U.N. force, and so distinguishing between the different types of forces throughout the Article would overly complicate matters and frustrate the effort to reach some general conclusions and recommendations. Inasmuch as the United Nations exercises a measure of control over each type of force, this Article's general conclusions and recommendations apply to all three types. Certainly the responsibility of other entities for RCA reliance during peace support operations is a valid topic that should be explored, such as the responsibility of the North Atlantic Treaty Organization (NATO) for RCA use in KFOR and SFOR or the responsibility of troop-contributing countries. Nevertheless, this Article is delimited to looking specifically at the United Nations and U.N. forces as defined above.

This Article is divided into five parts. Part I provides a brief history and portrayal of RCAs in order to define the subject matter of this Article. Part II describes the forty instances of RCA use by U.N. forces. This Part is particularly important because most prior commentaries on RCA use by U.N. forces have assumed that such use will be possible in the future without acknowledging that such weapons already have been used by these forces, thus this Article shifts the focus of this area of peace-


7. See Gergely Tőth, So-Called “Non-Lethal” Weapons in Peace Support Operations, in Practice and Policies of Modern Peace Support Operations Under International Law 157, 157 (Roberta Arnold & Geert-Jan Alexander Knoops eds., 2006) (“Given the fact that these very same nations [that have RCAs in their arsenals] are engaged in various peace support operations (PSO), there is a high probability of them being used in these circumstances too.”); id. at 179 (“There is a great chance that developed nations [in their involvement in peacekeeping] ... will resort to such [NLW] systems in their conflicts with less developed adversaries ... .”); see also David A. Koplow, Non-Lethal Weapons: The Law and Policy of Revolutionary Technologies for the Military and Law En-
keeping law and collective security law from the theoretical to the practical. Part III explains how the CWC prohibits RCAs and explores whether this prohibition applies directly to U.N. forces. It is important to note that troop-contributing countries and states acting in an enforcement capacity under a U.N. authorization likely have legal obligations in this context through their ratification of the CWC. However, this Article focuses exclusively on the legal obligations and interests of the United Nations concerning RCA use by U.N. forces. Part IV describes the myriad dangers that U.N. forces face when using RCAs, which serves as the basis for arguing why the United Nations should take steps to ensure that U.N. forces do not use RCAs even if the CWC's legal obligations do not apply directly to the United Nations. While the dangers identified in Part IV could act as the basis for a total prohibition of RCAs in all scenarios, both for U.N. forces and all military forces, this Article is limited to looking only at U.N. forces and takes as a given that RCAs can be used lawfully for domestic law enforcement, as the CWC allows. The case of RCA reliance by U.N. forces is particularly interesting because of the difficulty in characterizing their activities. Critics might be quick to assert that such a delimitation, which assumes the acceptability of RCA use for domestic law-enforcement purposes, encourages U.N. forces to keep their hands clean of RCAs while the local-police component of a coordinated peacekeeping force is left to do all of the dirty work. In response, this Article encourages this type of arrangement no more than the CWC encourages it, inasmuch as this Article bases its arguments on the limitations established by the CWC. As explained in Part III below, the CWC clearly allows RCAs for domestic law-enforcement purposes and is unclear, at best, for many other situations. Finally, Part V suggests ways for the United Nations and concerned states to ensure that U.N. forces do not rely on RCAs in the future, thereby avoiding many of the dangers associated with RCA use in a non-law-enforcement setting. To be perfectly clear, the thesis of this Article is that RCA use by U.N. forces is potentially illegal and certainly bad policy. As Dorothy Parker

FORCEMENT 80–87 (2006) (discussing "what might have been" had U.N. forces used non-lethal weapons and RCAs to stop the genocide in Rwanda in 1994). In reality U.N. forces used RCAs on at least two occasions there, as explained in Part II.C, infra. But see Jean Pascal Zanders, Peacekeeping Operations, Law Enforcement, and the Use of RCAs: Two Examples, at 1 (unpublished discussion paper, 19th Workshop of the Pugwash Study Group on the Implementation of the Chemical and Biological Weapons Conventions, Apr. 26–27, 2003) (on file with author).

8. For information on the obligation under Article 36 of the First Additional Protocol to the Geneva Conventions to conduct contextualized legal reviews of the methods and means of warfare in light of such treaties as the CWC, see generally James D. Fry, Contextualized Legal Reviews for the Methods and Means of Warfare: Cave Combat and International Humanitarian Law, 44 COLUM. J. TRANSNAT'L L. 453 (2006).
concluded in her poem Résumé, "Gas smells awful; You might as well live."9

I. A BRIEF HISTORY OF RIOT-CONTROL AGENTS

RCAs are a class of less-lethal weapons that include tear gas, pepper spray, and other irritants, lacrimators (or tear producers), and sternutators (or cough and sneeze producers).10 Although there are numerous types of RCAs, each with its own distinctive set of attributes,11 RCAs all tend to cause pain to any individual with uncovered or unprotected eyes, skin, and respiratory areas in an effort to control the individual's activities.12 Tear-gas weapons and other RCAs were in the early stages of development at the time of the Hague Convention of 1899, which adopted the Hague Gas Declaration.13 It was not until after the First World War that the term "riot control agent" was coined, after they were used against rioters in Pittsburgh.14 Although the United States and Europe were reluctant to join the Declaration in 1899, this reluctance had dissipated by the 1907 Hague Convention once they acknowledged the rapid rate of weaponization of such gases as hydrogen cyanide and tear gas, fearing that these gases would revolutionize warfare.15 Articles 22 and 23 of the Hague Gas Declaration provided that the "right of belligerents to adopt

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9. DOROTHY PARKER, Résumé, in ENOUGH ROPE 61 (1926).
10. See Frederick R. Sidell, Agent of the Month: Riot Control Agents (Oct. 14, 1999) (unpublished article) (on file with author). When the present Article refers to RCAs, it—like the CWC—is referring to chemical RCAs but without the "chemical" qualifier. While RCAs include far more substances than tear gas, tear gas is the most common RCA, especially among U.N. forces, and so it tends to receive greater attention in this Article. Moreover, although RCAs are a subset of non-lethal weapons (NLWs), this Article prefers to refer to them as less-lethal weapons to reflect the simple fact that they actually have a non-negligible lethality rate. See infra Part IV.B.2. As explained in the Conclusion below, this Article encourages U.N. forces to carry and use non-RCA NLWs, but to be careful not to use them in an indiscriminate manner.
12. See generally Sidell, supra note 10.
means of injuring the enemy is not unlimited”

and that “it is especially forbidden . . . [t]o employ poison or poisoned weapons” or “[t]o employ arms, projectiles, or material calculated to cause unnecessary suffering.” Despite these broad prohibitions, which conceivably included the use of RCAs, tear gas was used as a method of warfare in August 1914, when a Paris policeman brought ethyl bromoacetate to the front of the First World War. The initial idea to use chemical agents for riot control seems to have originated with Parisian chemists Kling and Florentin, who encouraged the police to use such agents in their operations because of their incapacitating properties. The initial use of RCAs on the battlefield was so successful that approximately 12,000 tons of tear gas were deployed during the First World War. It is ironic that the French military consistently worried about tear gas during the First World War but was the first to introduce it to the battlefield. Germany initially retaliated with a type of RCA of its own, dianisidine chlorosulphonate, delivered by 105mm howitzers, which was designed to cause violent sneezing by the target. In its haste, Germany failed to test the weaponized chemical, and the targets felt no effect from the gas. It did not take long for Germany to discover the properties of tear gas, although its first attempt to use tear gas also failed because German scientists did not take into account the low winter temperatures in Russia that inhibited vaporization of the gas. Germany eventually added bromaceton to aid with vaporization and finally saw results from tear gas. However, this first mixing of chemical agents led Germany to experiment with tear gas and phosgene (a far more lethal gas), and later to add

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17. Id. art. 23(a).
18. Id. art. 23(e).
19. See Robinson, Solving, supra note 14, at 2. The Hague Gas Declaration was handicapped from the start by the requirement that all parties to a conflict would need to be parties to the agreement in order to be bound by it. This scenario is highly unlikely, particularly in cases of a world-wide war. See Hague Convention IV, supra note 16, art. 2 (“The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.”).
22. See id. at 24–25.
23. See id. at 25.
24. See id.
25. See id.
26. See id. at 25, 78 (recounting an occasion where the Germans captured thousands of French prisoners by using tear gas).
chlorine in place of tear gas (another extremely lethal gas), thus changing the general lethality of chemical warfare forever.\(^\text{27}\)

In an effort to avoid repeating the horrendous gas-related casualties of the First World War, the newly established League of Nations called a conference—the International Conference on the Control of the International Trade in Arms, Munitions, and Implements of War in 1925 (Geneva Conference)—which produced the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Gas Protocol).\(^\text{29}\) Among other things, this Protocol prohibited “the use in war of asphyxiating, poisonous or other gases,” with tear gas arguably prohibited either as an “other gas” or under one of the first two categories.\(^\text{30}\) Despite this new norm, approximately eight thousand tons of a type of tear gas reportedly were used during the Second World War.\(^\text{31}\) One possible reason for this use is that the Protocol, like its predecessors, failed to spell out exactly which agents were prohibited, and prohibited only first use.\(^\text{32}\) For example, neither the Protocol nor the proceedings contained

\(^{27}\). See id. at 25.

\(^{28}\). See Kenneth Adelman, Chemical Weapons: Restoring the Taboo, 30 ORBIS 443, 444 (1986).


\(^{30}\). See 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 263–64 (2005) [hereinafter HENCKAERTS & DOSWALD-BECK, RULES] (discussing how a majority of states initially saw the Geneva Gas Protocol as prohibiting RCAs, but that Australia, Portugal, and the United Kingdom later reversed their opinion, and that the United States maintained that RCAs were not covered by the Geneva Gas Protocol).

\(^{31}\). See Jeffrey Osborne, Verification Div., Org. for the Prohibition of Chem. Weapons [OPCW], Non-Lethal Weapons: Current Issues and the Chemical Weapons Convention, OPCW Lunchtime Lecture Series, Jan. 24, 2003 (on file with author). Even though Germany had chemical weapons that were significantly more lethal than Allied chemical weapons during the Second World War, Germany refrained from using them even when being invaded. This is largely because it mistakenly believed that the Allies had comparable chemical weapons, but perhaps also because Hitler remembered the pain that he had suffered from having been a victim of chemical weapons during the First World War. See Adelman, supra note 28, at 446.

\(^{32}\). See Youmans et al., supra note 13, at 202. Please note that neither does the CWC spell out the agents that are prohibited as chemical weapons. See CWC, supra note 3, Annex on Chemicals, pt. B (Scheds. of Chemicals) (providing a list of specific chemicals, which is to
any mention of RCAs. In 1930, after finding a discrepancy in the authoritative English and French versions of the Protocol (with the French using "similaires" instead of "other"), the United Kingdom, France, and eleven others endorsed the interpretation that the Protocol prohibited tear gases, while the United States asserted that the Protocol did not cover them. Despite this ambiguity, whether the Protocol prohibited tear gas did not become a hot issue until the United States used large amounts of it (approximately seven thousand tons) in Vietnam in the 1970s. The United States had adopted rules of engagement that provided that "[r]iot control agents [would] be used to the maximum extent possible." The U.S.S.R. objected to such use of RCAs as a violation of the Protocol's spirit. Secretary of State Dean Rusk countered that the United States be used solely for verification purposes and "do[es] not constitute a definition of chemical weapons").

33. See generally Geneva Gas Protocol, supra note 29. See also Baxter & Buergenthal, supra note 21, at 861. Interestingly, Reisman and Antoniou base their conclusion that the prohibition of the use of gas in general is "soft" law merely on the basis that tear gas is not clearly prohibited under this regime. See W. Michael Reisman & Chris T. Antoniou, Introduction to The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict, at xxii (W. Michael Reisman & Chris T. Antoniou eds., 1994).


35. See Osborne, supra note 31.

36. See Elizabeth A. Smith, Note, International Regulation of Chemical and Biological Weapons: "Yellow Rain" and Arms Control, 1984 U. Ill. L. Rev. 1011, 1036. It is interesting to note that North Korea allegedly used tear gas in Kampuchea that it had taken from the United States around the time of the Vietnam War. See Paul G. Cassell, Note, Establishing Violations of International Law: "Yellow Rain" and the Treaties Regulating Chemical and Biological Warfare, 35 Stan. L. Rev. 259, 265–66 n.31 (1983) (citing Strategic Implications of Chemical and Biological Warfare: Hearings Before the Subcomm. on International Security and Scientific Affairs and on Asian and Pacific Affairs of the H. Comm. on Foreign Affairs, 96th Cong. 45 (1980) (statement of Matthew Meselson, Professor, Biochemistry, Molecular Biology, Harvard Univ.).


38. See Youmans et al., supra note 13, at 202. The U.S.S.R. continued to give the United States a difficult time in the 1980s, alleging that the United States provided the Afghan mujahadeen with gas grenades. See Cassell, supra note 36, at 266 n.33. However, the U.S.S.R. did not have entirely clean hands during this time, as allegations had been made that it had used much harsher chemical and biological weapons in various situations over the years, such as in Afghanistan, Kampuchea, and Laos. See id. at 263.
was not "embarking upon gas warfare in Viet-Nam" because tear gas was not a "gas that [was] prohibited by the Geneva Convention of 1925 or any other understandings about the use of gas." During this time, the United States claimed that tear gas was not covered by the Protocol because it did not kill the targets but merely incapacitated them while they were in contact with the agent. In response to Secretary-General Thant's call for a "clear affirmation" that tear gas was covered by the Protocol, the U.N. General Assembly passed Resolution 2603A (1969), which purportedly gave its definitive interpretation of the Protocol to include tear gas. However, surprisingly, the Resolution itself did not mention tear gas or RCAs, but instead introduced the new phrase "chemical agents of warfare" without defining it beyond saying that these are "chemical substances, whether gaseous, liquid or solid" and banning those that might be "employed because of their direct toxic effects on man, animals or plants." Despite this debate over the Protocol's scope, no state clarified its interpretation in a reservation, even though several had the chance after the ambiguity emerged. The debate continues over whether the Protocol prohibits RCAs in warfare. The debate, however, has become somewhat moot in light of the CWC's language concerning RCAs and the near-universal adoption of the CWC.

39. See Youmans et al., supra note 13, at 202 (quoting 52 DEP'T ST. BULL. 528 (1965)).
40. Id.
41. See id. Please note that the United States was not a party to the Geneva Gas Protocol until April 10, 1975, although it was one of the original signatories on June 17, 1925. See Geneva Gas Protocol, supra note 29. Regardless, the United States unilaterally declared that it followed the Protocol, even though it continued to use RCAs, because its interpretation of the Protocol did not prohibit such use. See HENCKAERTS & DOSWALD-BECK, RULES, supra note 30, at 264.
45. See Smith, supra note 36, at 1037 (citing 3 STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, THE PROBLEM OF CHEMICAL AND BIOLOGICAL WARFARE 33 (1978)).
46. Although the Nixon Administration had included a reservation that excluded riot-control gases when it sent the Protocol to the Senate for its advice and consent, the Senate dropped this reservation and approved the treaty unanimously. See Cook et al., supra note 15, at 29; Smith, supra note 36, at 1036–37.
47. See Stefan Oeter, Methods and Means of Combat, in The Handbook of Humanitarian Law in Armed Conflicts 105, 148 (Dieter Fleck ed., 1995).
Pepper spray (or Oleoresin Capsicum) made from cayenne peppers or from synthetic materials appears to have replaced tear gas as the preferred less-lethal chemical weapon for many modern forces on account of its added potency against individuals vis-à-vis traditional tear gas.48 The emergence of this relatively new substance and the legal problems associated with RCAs under the Geneva Gas Protocol and the CWC led some military planners down the path of trying to define pepper spray as a non-RCA substance, although this effort appears to have been abandoned.49

Despite the legal questions surrounding them, RCAs continue to play a part in states’ arsenals. It is interesting to note that, in 2007, 125 of the then 182 (now 188) member states of the Organisation for the Prohibition of Chemical Weapons (OPCW) declared that they possessed RCAs, which CWC Article III(1)(e) requires of states.50 Unfortunately states’ particular use of RCAs is not reported to the OPCW, so it is difficult to determine the extent of the legal problems that RCAs pose generally. Nevertheless, their mere existence within many states’ arsenals is sufficient to raise some concerns, and similarly, the use of RCAs by U.N. forces should raise others. The following Part describes instances in which U.N. forces have relied on RCAs in their operations to illustrate the magnitude of the potential problem and the ways that RCA use by U.N. forces might be problematic.

II. USE OF RIOT-CONTROL AGENTS BY U.N. FORCES

U.N. forces are reported to have used RCAs on at least forty separate occasions in fourteen missions.51 Commentators who have written on

48. See Koplow, supra note 7, at 18; Tóth, supra note 7, at 170.
49. See Roger D. Scott, Getting Back to the Real United Nations: Global Peace Norms and Creeping Interventionism, 154 MIL. L. REV. 27, 42 n.84 (1997) (reporting that U.S. military officers tried to adopt this definition but that the Chairman of the Joint Chiefs of Staff decided against it).
51. Please note that this Article recognizes that newspaper reports and other sources are not always entirely reliable. As one commentator has noted, “we may never know for sure” when RCAs have been used in operations. Ronald D. Rotunda, The Chemical Weapons Convention: Political and Constitutional Issues, 15 CONST. COMMENT. 131, 137 (1998). The author has attempted to confirm these reports, without much notable success. However, since these reports ostensibly have not been denied by the respective states or the United Nations, it is relatively safe to assume there is at least some merit to them. At the same time, there also
RCA use by U.N. forces have assumed that such use would be possible in the future without acknowledging that such weapons already have been used by these forces on numerous occasions. The forty examples of RCA use by U.N. forces described in this Part not only take the discourse from the theoretical realm to the practical, but show the vast extent to which U.N. forces have relied on RCAs. Many of these instances suggest that their use was improper, such as against schoolchildren and pregnant women or in combination with deadly force. Admittedly, many instances of RCA use by U.N. forces have been in situations similar to those in which domestic law enforcement personnel might use RCAs. However, a key difference, as explained in Part III.A.2, is that these U.N. forces typically have not had a mandate to act in a domestic law-enforcement capacity.

The first two incidents of RCA use by U.N. forces occurred in the early days of the United Nations. The first reported use was by the U.N.-authorized, U.S.-led United Nations Command in Korea in 1951 against agitated North Korean POWs. The second incident was in 1957 by Danish members of the United Nations Emergency Force (UNEF I) peacekeeping mission in the Gaza Strip, who threw tear-gas bombs at civilians trying to take over a U.N. post. Several days after this incident, U.N. headquarters approved the UNEF I commander to proclaim that UNEF I had assumed responsibility for civil affairs there. It was not until 1993 that RCA use by U.N. forces became far more common, when then Under-Secretary-General for Peacekeeping Kofi Annan called for U.N. forces to be equipped with riot-control gear, after U.N. forces in Somalia, poorly equipped for dispersing threatening crowds, killed scores of demonstrators with live rounds on two separate incidents. This Part focuses on the instances of RCA use by U.N. forces after 1993.
A. RCA Use in the Former Yugoslavia

U.N. forces in the former Yugoslavia have used RCAs in their operations on at least ten occasions. The first incident there, and the third overall, was on August 28, 1997, when U.S. troops of the U.N.-authorized, NATO-led SFOR in Bosnia dropped tear gas from helicopters when SFOR clashed with civilians in the Serb town of Brcko after SFOR troops entered a police station looking for pro-Karadzic police; this led to radio announcements calling for an attack on SFOR troops. Just three days later, SFOR again used tear gas against civilian attackers in another village near Brcko.

The other eight incidents of RCA use by U.N. forces in the former Yugoslavia all occurred in the Kosovo town of Mitrovica. Most involved one side of the conflict trying to cross a bridge into the area controlled by the other. The first such incident was on October 15, 1999, when over a hundred stone-throwing Albanian Kosovars tried to cross over a bridge into the Serb-controlled part of town, and French troops in the U.N.-authorized, NATO-led KFOR drove them back using tear gas and stun grenades. KFOR feared that ethnic violence would erupt if they allowed these Albanian Kosovars to return to their homes in the Serb-controlled side. Similarly, the second incident occurred on February 22, 2000, this time when French and British KFOR troops kept a group of approximately one thousand Albanians from crossing the same or similar bridge into the Serb-controlled part of Mitrovica by firing tear gas at approximately five-minute intervals. Apparently KFOR was trying to partition Mitrovica and the Albanians were protesting because they had strong ties to the Serb-controlled part of the city. Soon thereafter, on March 3, 2000, in a reverse-course effort to reintegrate the city, French troops in KFOR used tear gas and stun grenades against a Serb group that had blocked the bridge into the Serb-controlled part of Mitrovica, enabling armored carriers to return forty-one ethnic Albanians to their homes. Ten months later, another incident occurred in roughly the same place and with roughly the same parties, when French and British KFOR troops kept...
Albanians out of the Serbian quarter of Mitrovica with tear gas and plastic bullets, apparently marking a return to a policy of partition. Between those latter two incidents, on July 17, 2000, KFOR troops used tear gas and stun grenades to disperse a crowd of a hundred violent Serbs who had confronted KFOR troops at the Mitrovica police station to demand the release of the president of the Serb National Council’s security committee. Soon thereafter, on August 14, 2000, when KFOR troops took over a lead-smelting plant in Mitrovica in order to shut it down for ecological reasons, they apparently used tear gas and rubber bullets to control the Serb crowd that had gathered in protest. U.N. forces have continued to use RCAs in Mitrovica in more recent years. On March 17, 2004, KFOR troops fired tear gas and rubber bullets at Albanian youths attacking Serbs, apparently in retaliation for when three Albanian children drowned after being chased into a river by Serbian youths. One month after Kosovo's declaration of independence from Serbia in 2008, KFOR troops used tear gas and stun grenades, along with gunfire, in its effort to retake Mitrovica's courthouse, which had been taken over by Serbs. As these examples show, RCA use in the former Yugoslavia has tended to be used in approximately the same places against the same people in combination with the same types of weapons.

B. RCA Use in Haiti

U.N. forces in Haiti reportedly have used RCAs on at least twelve occasions, starting in 1995 and continuing until the present. The first use of RCAs in Haiti was on April 13, 1995, when troops of the United Nations Mission in Haiti (UNMIH) used tear gas on prison inmates who were wielding hammers and throwing stones while attempting to break out of Haiti's National Penitentiary. At the same time Haitian police opened fire on these inmates. Second, on October 15, 1995, large groups of slum dwellers threw stones at the motorcade of the wife of then U.S. Vice President Al Gore as it passed through Cité Soleil, in pro-

63. See Kosovo: Tension Rising in Divided Town Following Serb’s Arrest, BBC WORLDWIDE MONITORING, July 18, 2000.
67. See Police Open Fire to Quell Mass Prison Breakout, SEATTLE POST-INTELLIGENCER, Apr. 14, 1995, at A2 (noting that a crowd outside of the prison had beaten up an escaped prisoner and returned him to prison authorities).
test against the limited amount of U.S. aid they had been receiving; UNMIH troops used tear gas to repel the crowd.68

The third use of RCAs in Haiti occurred nearly nine years later, on September 24, 2004, when the United Nations Stabilization Mission in Haiti (MINUSTAH) used tear gas to disperse a crowd rioting at a food-distribution center after Hurricane Jeanne. The riot began after gang members cut in front of a thousand hungry hurricane victims—many of whom were elderly and pregnant—who had been waiting in the heat for food for several hours.69 While many problems arise at food-distribution centers in Haiti, leading to the use of RCAs, not all of them involve gangs or criminals. For example, in October and December 2004, MINUSTAH troops used tear gas to restore order among large groups of unruly women—again, many of whom were pregnant—who were trying to grab food for their families.70 Another such use occurred on January 13, 2005.71 In that case, it is unknown why the crowd started throwing rocks at U.N. troops,72 although it likely all started with people shoving in line while trying to get food. Sadly, approximately thirty children from a school near the food-distribution center had to be treated for tear-gas inhalation and skin irritation, and further street protests erupted against the U.N. troops after it was falsely believed that their use of tear gas had caused a woman’s death.73 Food and food distribution has continued to be the main issue that has sparked protests and RCA use in Haiti. More recently, there were incidents of RCA use by MINUSTAH,


70. See Indira Lakshmanan, Awaiting the Next Disaster: Floods, Devastated Economy Leave Little Hope in Haiti, BOSTON GLOBE, Dec. 8, 2004, at A1; Susannah A. Nesmith, In Gonaives, Suffering Endures After Jeanne, MIAMI HERALD, Oct. 16, 2004, at 1A (reporting that the commander of the U.N. forces protecting the food distributors, Capt. Jorge Muga, explained that “sometimes it seems they’re all pregnant”). These news reports did not mention that the riots were incited by gangs, although they might have been if the rioters were hoarding all of the food and water.

71. See Fifth Person Dies of Bird Flu, More Likely, SEATTLE POST-INTELLIGENCER, Jan. 14, 2005, at A4 (suggesting that U.N. forces used tear gas in order to protect those individuals who were working with an NGO to distribute the food); Peacekeepers Fire Tear Gas at Haiti Crowd, A.P., Jan. 14, 2005.

72. See Peacekeepers Fire Tear Gas at Haiti Crowd, supra note 71.

73. Amy Bracken, Two People Killed During Police Raid in Haitian Slum, A.P. WORLDSSTREAM, Jan. 14, 2005 (reporting that the woman had been suffering from a heart ail-ment, and that the precise cause of death was unknown).
in April 2008 against violent protests over high food prices,74 and in August 2008 after Hurricane Gustav set off protests over even higher food prices.75

In addition to RCA use at food-distribution centers, U.N. forces have used RCAs against alleged gang members in slums of Port-au-Prince. On July 6, 2005, MINUSTAH troops used tear gas, along with helicopters, tanks, and machine guns, in a relatively aggressive operation that the United Nations has claimed was “designed to rout gangs,” but that human rights NGOs have claimed was a massacre of unarmed civilians in one of Port-au-Prince’s poorest neighborhoods, Cité Soleil.76 Cité Soleil has been the center of many problems and therefore much RCA use. For example, MINUSTAH again used RCAs at a polling station there in December 2006, in an effort to keep order during municipal elections.77 It also must be noted that MINUSTAH used RCAs against rioting prisoners at an overcrowded prison in 2006,78 and most recently, on March 3, 2009, when students in Port-au-Prince protested curriculum changes by throwing rocks and MINUSTAH, in conjunction with domestic police, responded with tear gas.79

While there are similarities between RCA use in Yugoslavia and Haiti, the instances of RCA use in Haiti are more troubling for three reasons. First, RCA use by U.N. forces there affected vulnerable individuals such as children, pregnant women, and the elderly. When considering use of RCAs in these types of settings, U.N. forces must keep in mind that the lethality of RCAs significantly increases when the targets are these types of vulnerable individuals.80 Where U.N. forces lack control over who is affected by these RCAs on account of their indiscriminate nature (as demonstrated by the January 13, 2005 incident which injured

76. See Haider Rizvi, “Massacre” Charged in U.N. Raid on Slum, IPS-INTER PRESS SERV., July 14, 2005 (asserting that at least twenty-five people were killed in this operation, including a street vendor and a mother with her two children); see also Marc Lacey, U.N. Troops Fight Haiti’s Gangs One Battered Street at a Time, N.Y. TIMES, Feb. 10, 2007, at A1 (providing a photograph of a U.N. peacekeeper before protestors in Cité Soleil with a tear gas canister behind his back, suggesting that RCA use by U.N. forces in Cité Soleil has continued since the alleged massacre there in 2005).
80. See infra Part IV.B.2.
thirty nearby schoolchildren), U.N. forces should forsake RCA use.\textsuperscript{81} Second, U.N. forces in Haiti used RCAs in combination with deadly force and an aggressive attack on a community that allegedly had a history of being repressed by local police authorities.\textsuperscript{82} These two elements should be sufficient for U.N. forces to foreswear further RCA use in Haiti, on account of the possibility of a general escalation of hostilities and retaliation with more-lethal chemical weapons.\textsuperscript{83} Although it is difficult to prove causation, the use of RCAs by U.N. forces in Haiti might be why protestors and other non-state actors in Haiti have been so eager to use RCAs against government forces during their protests.\textsuperscript{84} Some critics might argue that it is better that these protestors and non-state actors used RCAs instead of more lethal weapons. However, to do so, they would have to assume that the choice was between less-lethal and more-lethal weapons, rather than between less-lethal weapons and no attack. Still, the possibility of escalation should be avoided, beginning with U.N. forces refraining from RCA use.

C. RCA Use in Western and Central Africa

Western and Central Africa have received much attention from U.N. forces over the years, and so it is no surprise that there have been a large number of incidents of RCA use by U.N. forces there—fourteen in total. Six such incidents involved operations in Liberia. The first incident, reportedly on April 2, 2004, involved United Nations Mission in Liberia (UNMIL) troops suppressing demonstrations of thousands of students upset by problems associated with budgetary restraints on the school system, and who allegedly were joined by demobilized militia groups.\textsuperscript{85} The second reported incident involved a riot that broke out at a U.N. disarmament location on May 17, 2004, killing one and injuring four, after rebels demanded full and immediate payment for the weapons they had surrendered to the program.\textsuperscript{86} The third reported incident, which occurred on October 21, 2004, is perhaps the most surprising: UNMIL troops used tear gas against parents and students of a primary school who were

\begin{itemize}
  \item \textsuperscript{81} See supra note 71 and accompanying text.
  \item \textsuperscript{82} See Rizvi, supra note 76.
  \item \textsuperscript{83} See infra Part IV.B.3.
  \item \textsuperscript{84} See Jonathan M. Katz, Haiti President Asks U.N. for Long-Term Help, A.P., Sept. 26, 2008 (reporting that hungry Haitian protestors used tear gas in their assault on the presidential palace in 2008, which led the president to promise aid to farmers in producing more food for the country).
\end{itemize}
protesting the closure of their school. Just over a week later, on October 29, 2004, UNMIL troops used tear gas against clashing Muslims and Christians to restore order in the Liberian capital of Monrovia, and at least three people were killed by U.N. efforts to disperse the crowd. Just over a year later, on November 12, 2005, UNMIL troops again used tear gas and batons in an attempt to control hundreds of protesters who were throwing rocks at police after allegations of fraud arose over the presidential elections that brought President Ellen Johnson-Sirleaf into power. Next, on September 17, 2007, fourteen decommissioned Liberian soldiers broke into a radio station in order to make certain demands of President Johnson-Sirleaf, and UNMIL troops used tear gas to repel them.

Two reported incidents of RCA use by U.N. forces occurred in Rwanda. On February 21, 1994, 1500 troops with the United Nations Assistance Mission for Rwanda (UNAMIR) used tear gas against Rwandan rioters who were protesting then President Juvenal Habyarimana's prosecution of Tutsis. As Hutu-Tutsi tensions further intensified and the situation deteriorated in Rwanda in April 1994 (although before Habyarimana's assassination), UNAMIR troops used tear gas against allegedly peaceful protestors, a use that U.N. officials later considered a mistake. This, of course, is not to say that this RCA use contributed to the Rwandan genocide or that there would not be ample justification for using RCAs in the face of an impending genocide.

U.N. forces also have used RCAs in Somalia on at least three occasions. On November 8, 1993, troops in the United Nations Operation in Somalia II (UNOSOM II) used tear gas to disperse a hundred protestors who were at the U.N. compound in Mogadishu calling for the United Nations' withdrawal from Somalia, after Somali warlord Mohamed

88. See Jonathan Paye-Layleh, Muslim-Christian Violence Erupts in Liberian Capital, Head of State Orders Round-the-Clock Curfew, A.P., Oct. 29, 2004 (describing the conflict zone as being "near torched churches and mosques," and explaining that U.N. forces later were given permission to shoot to kill).
90. See Nana Adu Ampofo, Former Liberian Soldiers Charged for Violent Protests, GLOBAL INSIGHT, Sept. 20, 2007 (noting that President Johnson-Sirleaf had left before these protestors arrived).
Farah Aideed charged the United Nations with provoking hostilities there; the crowd dispersed without any injuries.\textsuperscript{93} On January 3, 1994, UNOSOM II troops used tear gas to disperse a crowd of protestors outside of the U.N. compound in Mogadishu who had become angry when rumors of potential employment there proved to be untrue.\textsuperscript{94} Later that same year, on November 5, 1994, UNOSOM II troops again used tear gas and batons against a group of Somali protestors who had been dismissed from employment by a U.S. construction company.\textsuperscript{95}

There are other relatively isolated instances of RCA use by U.N. forces in other African states. In Sierra Leone on July 18, 2002, troops with the United Nations Mission in Sierra Leone (UNAMSIL) used tear gas and fired warning shots in an effort to control several hundred rioters who were attacking Nigerian businesses and business-owners after Nigerian businessmen were accused of kidnapping and murdering a Sierra Leonean currency exchanger.\textsuperscript{96} In the Democratic Republic of the Congo (D.R.C.) on June 3, 2004, troops with the United Nations Organization Mission in the D.R.C. (MONUC) fired tear gas (while Congolese security forces apparently fired live rounds) at a group of protestors in Kinshasa who were trying to storm U.N. property there.\textsuperscript{97} The group ranged in number from tens to hundreds of thousands at different points in time, and blamed the United Nations for having allowed the eastern city of Bukavu to fall to rebel forces.\textsuperscript{98} This, of course, is not to say that it would have been better for the notoriously harsh Congolese security forces to have used the RCAs instead of MONUC, although it arguably would have been more acceptable from the perspective of the CWC’s norms if an entity that was not part of the military forces there—such as the National Congolese Police (PNC)—had used them. In Côte d’Ivoire on January 17, 2006, troops with the United Nations Operation in Côte d’Ivoire (UNOCI) used tear-gas grenades and stun grenades against protesters attacking the U.N. headquarters in Abidjan with petrol bombs after a U.N.-backed mediation group suggested that the Parliament’s mandate should be allowed to expire without renewal.\textsuperscript{99} The protesters

\textsuperscript{93} See Osman Ali, \textit{U.N. Soldiers Kill Aid Worker}, \textsc{United Press Int’l}, Nov. 8, 1993.


\textsuperscript{95} See \textit{Somalis Protest Dismissals by a U.S. Company}, \textsc{N.Y. Times}, Nov. 6, 1994, at A13.


\textsuperscript{98} Id.

\textsuperscript{99} See John Lichfield, \textit{Five Protesters Killed as U.N. Peacekeepers Open Fire in Ivory Coast}, \textsc{Indep.} (London), Jan. 19, 2006, at 27; Peter Murphy, \textit{Anti-UN Riots Called Threat to
rubbed orange peels on their eyes in order to stop the tears,\textsuperscript{100} which suggests that the protesters already had experienced the effects of tear gas and had come somewhat prepared, although gas masks obviously would have been a better form of preparation. Following this incident, violence against the United Nations spread to other cities in Côte d'Ivoire, such as the political capital of Yamoussoukro and Guiglo.\textsuperscript{101} One U.N. spokesperson described the UNOCI as dealing with terrorism rather than peaceful demonstration,\textsuperscript{102} which suggests that the U.N. forces likely were not operating as domestic-law-enforcement. It is unclear what role UNOCI’s use of RCAs had on the spread of violence against the United Nations throughout Côte d'Ivoire around that time, although it might not be unreasonable to assert that the RCA use did not help the situation in the long run, even though it may have helped fend off some of the attackers in the short run.

These fourteen incidents of RCA use by U.N. forces raise at least three problems. First, much like in Haiti in 2004 and 2005, on October 21, 2004 UNMIL troops used RCAs on a group of vulnerable individuals—namely, a large group of primary-school children and their parents. Second, several of these incidents involved RCA use alongside deadly force, which threatens an escalation of hostilities.\textsuperscript{103} Finally, many of these incidents involved hundreds and even thousands of unruly protestors, which must have instilled anxiety if not fear in the U.N. forces, and so it is commendable that they had the discipline to resort to less-lethal weapons before more-lethal ones. However, where domestic law enforcement forces acted alongside these U.N. forces, it arguably would have been better for these domestic forces to have used the RCAs, instead of the U.N. forces. Such use by domestic law-enforcement officers clearly falls within the law-enforcement exception, while it is unclear whether U.N. forces can rely on this exception.\textsuperscript{104}


\textsuperscript{103} See infra Part IV.B.3.

\textsuperscript{104} See infra Part III.A.2.
D. RCA Use in Other Areas

Although most RCA use by U.N. forces has occurred in Haiti, the former Yugoslavia, and parts of Africa, there are a few relatively isolated instances in other areas of the world. For example, on October 20, 1993, troops with the United Nations Peacekeeping Force in Cyprus (UNFICYP) used tear gas against four thousand Greek Cypriot school-children who were trying to cross over the green line into the Turkish part of Cyprus in protest of a speech by the president of Cyprus concerning Cyprus’ division into Turkish and Greek portions. In addition, on December 4, 2002, troops with the United Nations Mission of Support in East Timor (UNMISET) used tear gas against high-school students who were protesting at Parliament the arrest of one of their friends the day before, and who were joined by a nearby group of former rebel fighters protesting unemployment. Both incidents involved targets vulnerable to greater harm from RCAs than the average person.

These forty instances by fourteen separate U.N. forces are all of the readily discoverable examples of RCA use by U.N. forces, and collectively demonstrate that this is not merely a theoretical problem, as some commentators have asserted. To this number could be added instances of RCA development, production, stockpiling, retention, or transfer by U.N. forces, which also are prohibited under CWC Article I(1)(a), and other unreported uses. Some commentators assert that U.N.-authorized forces in Somalia used RCAs when evacuating UNOSOM II personnel in 1995. Other commentators challenge this assertion, pointing out that they merely considered using three types of pepper spray and a tear gas foam barrier but finally decided against using them. U.N. forces in Rwanda also allegedly carried pepper spray without using it. In 1998,

107. CWC, supra note 3, art. I(1)(a).
111. See Koplow, supra note 7, at 18.
the Dutch contingent to the U.N. forces in Bosnia and Herzegovina apparently were to receive RCAs from the United Kingdom, although there were no reports of RCA use there after that time. It is difficult to estimate what percentage of U.N. forces possesses RCAs, since no guidelines or manuals for U.N. forces require (or even encourage) RCA possession, and mere possession usually does not merit media attention. The United Nations’ General Guidelines for Peacekeeping Operations contains a section on crowd control which provides the following: “Force is used only as a last resort and must be restricted to the minimum requirement. The use of crowd control techniques and equipment designed to avoid inflicting casualties is essential.”

Clearly the United Nations understands the need for less-lethal weapons. However, this acknowledgement does not equate to a specific instruction on the use and possession of RCAs, since there are many types of crowd-control equipment that avoid inflicting casualties that are not RCAs, such as slippery foams, acoustic and heat rays, and tasers. U.N. forces typically possess and use the weapons that their home militaries provide, so whether or not they have access to RCAs likely will depend on what weaponry troop-contributing countries normally provide their troops. Similarly, the rules for possessing and using RCAs typically are determined by the home military, only a few of which have adopted provisions in their military manuals on RCAs. This decentralized approach does not mean that the United Nations cannot and should not take steps to regulate RCAs, as will be shown in the remaining portions of this Article.


114. See generally Koplow, supra note 7, at 14–21 (discussing modern NLWs and noting some of the reasons why they have not been more successful); Paul R. Evancoe, Non-Lethal Technologies Enhance Warrior’s Punch, Nat’l Def., Dec. 1993, at 25 (providing examples of other non-lethal technologies and noting some of the reasons why they have not been more successful). See the Conclusion at the end of this Article for a more detailed discussion of the options available to U.N. forces.


116. See Henckaerts & Doswald-Beck, Rules, supra note 30, at 264 (discussing the field manuals and legislation of twelve states that mention RCA use); Henckaerts & Doswald-Beck, Practice, supra note 34, at 1744–48 (reviewing and excerpting the same field manuals and legislation). As a result of this decentralized approach to arming U.N. forces, it is no surprise that the U.N. Peacekeeping Training Manual does not review RCAs in its section on weapon training or in any other section, even though it re-emphasizes the need to use a minimum amount of force to achieve its aims. See Training Manual, supra note 115, at 23–32, 56.
As U.N. operations become increasingly aggressive and crowd control becomes a greater focus of these operations, less-lethal weapons understandably will feature more prominently in forces' arsenals. The following Part looks specifically at the limits to RCA possession and use under the CWC, with the purpose of explaining the legal norms concerning RCAs that the United Nations might elect to uphold. Given the questionable legality of RCAs under the CWC and the availability of less-controversial, less-lethal weapons, it would be best for U.N. forces to foreclose all RCA use.

Before proceeding with that analysis, however, this Article would be myopic if it did not acknowledge that most instances of reported RCA use are not malignant on their face. The exceptions, of course, are those instances in which young children, pregnant women, and elderly people were involved and when RCAs were used in combination with lethal force in more offensive operations. U.N. forces admittedly are faced with the extremely difficult task of completing their important missions while trying not to cause harm to sometimes hostile civilians. It is easy to rationalize RCA use by U.N. forces, especially in light of the more-deadly option of bullets and grenades. However, due regard must be given to the language and spirit of the CWC as it relates to RCAs, as explained in the following Part. Perhaps the difficulty of the U.N. forces' task, combined with the valuable assistance U.N. forces generally provide to maintaining international peace and security, stymie objections from states. Alternatively, perhaps states are too preoccupied with other aspects of the CWC regime and international relations generally to make a fuss over improper RCA use by U.N. forces. Regardless, this Article shines a spotlight on the issue of RCA use by U.N. forces in an effort to encourage greater debate on the matter, rather than to hinder the work of the United Nations or to frustrate the realization of peace. Given that this is an academic article, the focus is on defending a thesis through argumentation and through anticipating counterarguments, with the full knowledge—and even hope—that criticism will be levied where valid counterarguments have been missed or weaknesses inadvertently ignored.

III. LEGAL NORMS AGAINST RIOT-CONTROL AGENTS

As indicated in Part I above, there have been considerable international efforts to prohibit the use of chemicals as a method of warfare in the past. The CWC goes much further than its predecessors in prohibiting

RCAs. Admittedly, the CWC still does not state exactly which chemicals are prohibited. However, it prohibits, *inter alia*, the production and possession of banned chemical weapons, and not just their use (as does the Geneva Gas Protocol). Of particular relevance to a discussion of RCAs are the two sets of CWC provisions that prohibit RCAs as chemical weapons—the first focusing on RCAs as a method of warfare and the second focusing on RCAs as temporary incapacitators. After laying out the first set of provisions, this Part explores the definitions of the key phrases "law enforcement" and "method of warfare" in determining when RCAs are prohibited. This set of prohibitions is relatively ambiguous because the CWC defines neither phrase. This Part then looks in detail at the second set of provisions that prohibit RCAs. It concludes by exploring whether the CWC's legal norms apply directly to the United Nations and U.N. forces.

Before proceeding, however, it is important to emphasize that this Part looks at the legality of RCA possession and use by U.N. forces from a general perspective. It is conceivable that both the United Nations and troop-contributing countries could be held jointly accountable for breaches by U.N. forces of relevant CWC norms if both exercise the appropriate amount of control over the operation.

As this Part concludes, the United Nations likely has no legal obligations under the CWC's RCA prohibitions. The Part is nonetheless important because it lays out the legal norms that bind most of the U.N. membership—norms that should have considerable influence on U.N. actions if the United Nations is to fulfill its purpose of maintaining international peace and security (and other ends provided for in Article 1 of the U.N. Charter), act as an example for the international community, and do its utmost to protect its forces in the short-term and the long-term by supporting the CWC regime.

**A. First Prohibition Set: Riot-Control Agents as a Method of Warfare**

The more direct set of prohibitions starts with Article I(5), which states: "Each State Party undertakes not to use riot control agents as a
method of warfare." A riot-control agent is defined under CWC Article II(7) as "[a]ny chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure." The only relevant exception to Article I(5)'s prohibition is found in Article II(9)(d), which states that "Purposes Not Prohibited Under this Convention" include, _inter alia_, "[l]aw enforcement including domestic riot control purposes." This exception applies, however, only after the law-enforcement purpose is made clear by the state deploying the RCAs. In other words, if a chemical agent has an effect listed in Article II(7) but does not fit within the law-enforcement exception in Article II(9), then it is a banned chemical weapon. Arguments that a chemical was calculated to be less-lethal or is militarily necessary are no excuse from the strict scrutiny provided for in the CWC.

These provisions are nevertheless ambiguous, however, because although Article I(5) clearly prohibits RCAs as a method of warfare and Article II(9)(d) clearly allows RCAs for law enforcement, the CWC defines neither "method of warfare" nor "law enforcement." This section explores the contours of these phrases in order to determine when and whether the activities of U.N. forces fit within these categories.

1. Method of Warfare

Use of RCAs as a method of warfare is a direct violation of CWC Article I(5) and may result in severe penalties. States such as Australia, New Zealand, Romania, and Singapore have declared that this violation may lead to life imprisonment. Other states, such as Hungary and Sweden, provide that such acts may constitute war crimes.

Yet the meaning of the phrase "as a method of warfare" is unclear. The literature contains numerous definitions, many of which seem to be
crafted to support a particular position. While there are numerous ways to interpret a treaty, one of the more logical ways is to interpret it "in the light of its object and purpose" so that the drafters' intentions are given their due effect. Based on the tone of the preamble, the object and purpose of the CWC seems to be the total elimination of chemical weapons, which means that the prohibiting language should be interpreted broadly and the exceptions narrowly. Indeed, if "warfare" were interpreted narrowly, Article I(5)'s prohibition of RCAs would have limited meaning due to the fact that many states since the Second World War have refrained from declaring war when in armed conflict. The main ambiguity lies in whether "warfare" covers all or only international armed conflicts. It turns out not to be too much of an ambiguity, as the Geneva Conventions defined the term to include both international and

127. See, e.g., Harper, supra note 110, at 158 (defining "method of warfare" in the context of RCAs as a method "used to systematically enable or multiply the use of lethal force against hostile enemies").


129. Vienna Convention on the Law of Treaties art. 31(1), opened for signature May 23, 1969, 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

130. See, e.g., CWC, supra note 3, pmbl. para. 1 (stating that the states parties were "[d]etermined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction") (emphasis omitted).


132. See FRITs KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 175 (2001). But see Michael N. Schmitt, Humanitarian Law and the Environment, 28 Deny. J. Int'l L. & Pol'y 265, 290 (2000) (indicating that the CWC's use of the phrase "under any circumstances" makes its prohibitions reach both internal and international conflicts, whereas the Geneva Gas Protocol only applied to international conflicts). This Article proposes that "method" simply means the manner in which a weapon is used, as widely defined in the context of the First Additional Protocol. See, e.g., Isabelle Daoust et al., New Wars, New Weapons?: The Obligation of States to Assess the Legality of Means and Methods of Warfare, 84 Int'l Rev. Red Cross 345, 352 (2002); see also Harper, supra note 110, at 154-55 (discussing a distinction made in Hays Parks' memorandum between a "method" and a "means" of warfare, in which Parks argued that the CWC does not prohibit RCA use because RCAs are a means, not a method, of warfare). This Article dismisses Parks' argument as overly legalistic. See also Schmitt, supra, at 290 (substituting "instrument of warfare" for "method of warfare" when quoting the CWC, thus supporting the notion that one should not be overly legalistic when analyzing the meaning of this word).
non-international armed conflicts.\textsuperscript{133} Regardless, the ambiguity becomes irrelevant in the context of U.N. forces, since U.N. operations depend on a Security Council determination that a situation threatens or has the potential to threaten international peace and security, and thus all fit within the international realm.\textsuperscript{134}

A second ambiguity lies in whether the prohibition even applies to U.N. forces—that is, whether these forces can “wage war.” U.N. Charter Article 42 expressly envisions U.N. forces taking the initiative in a conflict.\textsuperscript{135} Practice indicates that U.N. forces can take and have taken an active part in hostilities. For example, in 2005, U.N. troops in the Ituri district of eastern Congo killed thirty-eight militiamen in a raid supported by helicopter gunships—arguably the most aggressive U.N. operation in recent history.\textsuperscript{136} Names of U.N. force operations such as the 1961 Operation “Rumpunch” in the Congo illustrate nicely how warlike U.N. operations are designed to be.\textsuperscript{137} Under the first-shot principle for the commencement of an international armed conflict, as supported by the ICTY Appeals Chamber in the Tadić case,\textsuperscript{138} it conceivably would not take much to trigger the “method of warfare” language. There are at least three examples of state practice that support this principle. First, the United States claimed the applicability of the law of armed conflict during a brief escalation of tensions with Syria when a U.S. Navy plane was shot down over Lebanon in 1983 and Syrian forces captured the pilot.\textsuperscript{139} Similarly, India claimed the applicability of the law of armed conflict from the first shot fired when its pilots were captured after their planes were shot down—a law Pakistan also has recognized in situations of

\begin{footnotes}
\item[135] U.N. Charter art. 42; see also Ingrid Detter, The Law of War 133 (2d ed. 2000).
\end{footnotes}
limited international conflict. Finally, the United States applied the law of armed conflict in its relatively limited operations in Grenada in 1983 and in Panama in 1989 after the first shot was fired. Indeed, as the U.S. Department of State declared, "'[a]rmed' conflict includes any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity or scope of the fighting." This is as true for international conflicts involving U.N. forces as it is for conflicts between the armed forces of states.

2. Law Enforcement

The phrase "law enforcement" is no less ambiguous, given the lack of a definition in the CWC. Keeping in mind the need to interpret prohibiting language broadly and exceptions narrowly in light of the CWC's object and purpose, under a plain-language reading the term would apply to the punishment of violations of law, or in other words, the enforcement of law. The word "enforcement" involves "the act or process of compelling compliance with a law, mandate, command, decree, or agreement." Enforcement must be distinguished from such activities as verification and monitoring, all of which are types of supervision. As Eric Myjer asserts, there are three functions for supervision: (1) a review function, which deals with determining facts; (2) a creative function, which deals with interpreting the law; and (3) a corrective function, which deals with seeing that a state adjusts its behavior in order to comply with its obligations. Verification and monitoring fit under the review function of supervision, while enforcement falls within the correction function, and interpretation is somewhat important to both. This section focuses on the coercive correction function of enforcement.

140. See generally Khozem Merchant, India and Pakistan Try to Reduce Tensions, FIN. TIMES (London), May 29, 1999, at 4 (reporting one such incident where an Indian pilot was captured by Pakistan).
142. See Greenwood, supra note 139, at 200–01.
144. BLACK'S LAW DICTIONARY 569 (8th ed. 2004).
As for "law," it is important not to get caught up in the philosophical quagmire of defining "law," as the search for a concise definition might end up being much like the fabled quest for the Holy Grail. However, equally eager not to brush off to the side the need to provide some definition of law when it features prominently in the analysis, as some commentators do, this Article adopts the somewhat conservative approach to defining law that legal positivists have adopted. This approach seems fitting in the CWC context because of the CWC's strong emphasis on state sovereignty and equality in Articles VII, VIII, X, XI, XII, XIV, and XVI, as well as in Parts VIII and IX of the Verification Annex. Legal positivism traditionally focuses on law as flowing from the edicts or actions of states, with law being whatever the sovereign determines it to be. Jeremy Bentham, one of the fathers of legal positivism, saw law as an “assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power” that “should act as a motive upon those whose conduct is in question.” Later legal positivists, when trying to define law, emphasized coercion with enforcing rules. For example, Max Weber stated that “an order will be called law if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a staff of people holding themselves specially ready for that purpose.” Likewise, Hans Kelsen used the phrase “coercive order” in referring to law.

148. This Article adopts legal positivism for the sake of simplicity and out of a desire to avoid being too controversial on a relatively minor point in the context of this Article. There are many different approaches to defining law. Indeed, each school within the realm of juridical studies seems to have its own definition, many of which have considerable merit. Moreover, there even are different approaches to legal positivism that are not discussed here. A more nuanced analysis in defining law is reserved for future articles.
152. HANS KELSEN, PURE THEORY OF LAW 30 (Max Knight trans., Univ. of Cal. Press 1989) (1967).
of such coercion, law is something that determines the acts of the subjects of a sovereign, under the threat of significant punishment for disobedience. Many contemporary commentators continue to emphasize the role of coercion in defining law and legal orders. 153

The law enforcement exception in the CWC appears to refer to domestic police activities, under Grotius' view of international law that states have sovereignty within their own territory and in the policing of it. This interpretation is supported by the reference to "domestic riot control purposes" in CWC Article II(9)(d), even though the language is inclusive with its use of the word "including." Experts assert that the CWC's language concerning RCAs and law enforcement was specifically designed to allow domestic police forces to continue uninterrupted their use of RCAs in crowd control. 154 Although not conclusive, a survey of all fourteen of the Reports of the Ad Hoc Committee on Chemical Weapons to the Conference on Disarmament from 1984 to 1992 that deal with the definition of chemical weapons indicates the consistent emphasis on "domestic law enforcement and domestic riot control purposes," although this was changed in the final version to leave open the possibility of non-domestic use of RCAs. 155


154. See, e.g., J.P. Perry Robinson, Non-Lethal Warfare and the Chemical Weapons Convention, Submission to the OPCW Open-Ended Working Group on Preparation for the Second CWC Review Conference 2 (Oct. 24, 2007) available at http://www.sussex.ac.uk/Units/spnu/hsp/Papers/421rev3.pdf (last visited Mar. 31, 2010) [hereinafter Robinson, Non-Lethal Warfare]; Robinson, Solving, supra note 14, at 6 (citing C. Parker Ferguson, Less-than-Lethal Antipersonnel Chemicals, in US Army Edgewood Research, Abstract Digest for the 1995 Annual Scientific Conference on Chemical and Biological Defense Research 77–78 (1995)) ("Law enforcement applications include use by local, state and national law enforcement agencies in hostage and barricade situations; crowd control; close proximity encounters; prison riots; and to halt fleeting suspects.") (emphasis added); see also Dando, supra note 109, at 75; Fidler, supra note 143, at 28, 30–32 (asserting that "law enforcement" under CWC Article II(9)(d) means, inter alia, "the enforcement of domestic law within the territory of a state and in areas subject to its jurisdiction"). Please note that chemicals can be used as a part of law enforcement beyond riot control, such as in jurisdictions that use lethal injections with capital punishment.

Some states use this ambiguity to justify many non-domestic activities under this exception. For example, as then U.S. President Bill Clinton stated to the U.S. Senate before the CWC ratification debate, "Other peacetime uses of RCAs, such as normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and noncombatant rescue operations conducted outside such conflicts are unaffected by the Convention." The U.S. Naval Handbook has adopted this same language. Interestingly, by listing these non-domestic activities in addition to law enforcement, this statement implicitly admits that they do not fit within "law enforcement." Therefore, one might have a basis to apply the references to "domestic law enforcement and domestic riot control purposes" in earlier drafts of the CWC to the final draft. Again, as noted in the Introduction above, while this interpretation of the CWC might allow U.N. forces involved in coordinated operations with local police forces to easily avoid the prohibition by letting the local police do all of the dirty work, the drafts appear to have left this option open.

It is questionable whether U.N. forces can have powers equivalent to those of domestic law enforcement. Commentators often talk of the Security Council's "police powers." However, these powers are usually quite different from "law enforcement powers" or powers to authorize troops to act as "law enforcement officials." Security Council "police" activities generally involve monitoring the world for possible threats to international peace and security, not arresting and detaining individuals in accordance with law—activities that more closely fit within the U.N. forces' general image as peace enforcers as opposed to law enforcers. Admittedly, the United Nations has a long history of

156. William J. Clinton, Report on the Chemical Weapons Convention, 140 CONG. REC. S7635—02 (daily ed. June 24, 1994) (statement of President Clinton); see also Exec. Order No. 11,850, 3 C.F.R. 149 (1971—1975) (allowing RCA use when rescuing the crew of downed aircraft and when civilians are being used as human shields); ROBINSON, NON LETHAL WARFARE, supra note 154, at 2 (citing Hearing on Chemical Weapons Ban Negotiation Issues Before the Comm. on For. Rel., 102d Cong. 102—719 (1992)) (written response of Ambassador Stephen Ledogar to questions asked on May 1, 1992) ("We understand other law enforcement activities to include: controlling rioting prisoners of war; rescuing hostages; counterterrorist operations; drug enforcement operations; and noncombatant evacuation.").

157. See HENCKAERTS & DOSWALD-BECK, PRACTICE, supra note 34, at 1746 (quoting United States, Naval Handbook §§ 10.3.2.1.1—10.3.2.1.2 (1995)).

158. See Reports of the Ad Hoc Committee on Chemical Weapons, 1984—1992, supra note 155 and accompanying text.

placing police officers within U.N.-controlled forces, who invariably form a small fraction of the overall force. For example, officers of a division of the U.N. Department of Peacekeeping Operations known as United Nations Police (UNPOL) have served as an integral part of U.N. forces since the 1960s, and currently there are approximately nine thousand UNPOL officers in eighteen missions throughout the world. More specifically, since 2000, UNPOL has increasingly deployed Formed Police Units (FPUs) in U.N. peacekeeping operations to handle crowd and riot control, among other tasks. Although UNPOL individuals and FPUs might have been involved in all fourteen missions reported to have used RCAs in Part II above, there are no reports that UNPOL officers actually were the ones deploying the RCAs. Rather the absence of reference to these types of individuals and units in the reports suggests that they were not the ones deploying RCAs. Even if, arguendo, UNPOL officers and FPUs did use the RCAs in all forty incidents, such RCA use does not necessarily fit within the law-enforcement exception. Indeed, UNPOL primarily is involved with giving assistance to local police forces and monitoring situations where U.N. forces are operating, not with engaging in actual law-enforcement activities, such as arrest or detention. As the General Guidelines state, “While powers of arrest are not ordinarily part of a peace-keeping mandate, the civilian police and/or human rights components of a multi-disciplinary operation may be mandated to monitor the civil authority’s


162. See United Nations Police, supra note 160.

163. The U.N. General Assembly has adopted Resolution 34/169, which is a code of conduct for law enforcement officials and defines “law enforcement officials” in its Article 1 as “all officers of the law, whether appointed or elected [and whether uniformed or not], who exercise police powers, especially powers of arrest or detention.” Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, art. 1(a), U.N. Doc. A/RES/34/169 (Dec. 17, 1979); see also Adam Abdelmoula, Libya: The Control of Lawyers by the State, 17 J. LEGAL PROF. 55, 57 (1992).
discharge of such responsibilities.” Based on the information provided by UNPOL itself, law enforcement would appear to be a subset of policing. UNPOL has acknowledged that it has been involved in actual law enforcement in only three peacekeeping missions—in Eastern Slavonia (Croatia), Kosovo, and East Timor. In such operations, UNPOL officers typically have operated within a U.N. transitional administration and might have had the power to arrest, detain, and conduct searches, along with other typical law-enforcement functions. Since no incidents of RCA use by U.N. forces have been reported in Eastern Slavonia, and KFOR ostensibly is the only U.N. force to have used RCAs in Kosovo (that is, not UNMIK, which includes UNPOL officers), UNMISET in East Timor becomes the prime candidate for the law-enforcement exception.

The following section analyzes the mandates of all fourteen U.N. forces discussed in Part II above to reveal whether the Security Council authorized them to take on genuine law-enforcement responsibilities, regardless of the presence of UNPOL officers. Critics will argue that one must look beyond the mandates to see what the U.N. forces have been asked to accomplish on the ground, although these critics inappropriately will discount the text of these mandates. After all, if U.N. forces are being asked to accomplish a particular task on the ground, should not this be clearly stated in the mandate? If the Security Council did not agree to put it in the mandate, surely this cannot be one of the U.N. force’s main tasks. The following section gives the text of mandates their due weight. While the Security Council obviously cannot foresee all of the situations in which U.N. forces may need to operate, and possibly use force, the norms prohibiting chemical weapons are of such an important nature that a narrow focus on the text of these mandates seems justified.

164. General Guidelines, supra note 113, ¶ 54.


a. Authorization to Provide Law Enforcement

The mandate of UNMISET in East Timor makes it the most likely candidate to provide unequivocal authorization to handle law-enforcement matters in the host state, as paragraph 2(b) of Resolution 1410 requires UNMISET to “provide interim law enforcement and public security.” It is not entirely clear what law UNMISET was to enforce, although commentators have asserted that UNMISET was to enforce “an ‘international’ standard of criminality,” not the edicts of one particular entity. Nor is it clear when UNMISET stopped providing its interim law enforcement services. A U.N. Secretary-General report issued just over a month before the RCA usage on December 4, 2002 indicated that law and order in Timor-Leste was already being handled by a joint service between the United Nations Police (UNPOL) associated with UNMISET and the Timor-Leste Police Service, and that this force enjoyed a unified chain of command. Therefore, while UNMISET was not in total control of law enforcement at around the time of RCA use by UNMISET troops, it likely had joint control at the time. Moreover, the President of Timor-Leste specifically asked for UNMISET to help control the situation where RCAs eventually were used. In sum, this would appear to be a clear example of U.N. forces using RCAs under the law enforcement exception.

b. Authorization to Assist with Developing a Law Enforcement Agency

Some provisions of mandates of U.N. forces expressly authorize a U.N. force to assist with developing a law enforcement agency. The other provisions of UNMISET’s mandate are similar to those of other mandates of U.N. forces, which fall short of authorizing the force to act in a law enforcement capacity. For example, UNMISET’s mandate requires it to “assist in the development of a new law enforcement agency in East Timor, the East Timor Police Service (ETPS)[.]” The mandates for several other U.N. forces also authorize them to assist in developing a domestic law enforcement agency. UNMIH’s mandate in Haiti was to “provide guidance and training to all levels of the Haitian police and

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167. S.C. Res. 1410, supra note 165, § 2(b).
168. Harrington, supra note 160, at 185–86.
170. Police Patrol Riot-Hit Timor, supra note 106; see also S.C. Res. 1410, supra note 165, ¶ 2(b).
171. S.C. Res. 1410, supra note 165, ¶ 2(b).
monitor the way in which operations were implemented," not to take over any aspects of actual law enforcement from the domestic police force. Preambular paragraph 5 of Resolution 867 stresses the importance of “establishing a new police force with the presence of United Nations personnel,” similar to the manner in which the Governors Island Agreement between the Haitian political leadership and the military leadership specified that the international community merely was to provide “[a]ssistance for . . . establishing a new Police Force with the presence of the United Nations personnel.” However, this mandate did not necessarily mean that UNMIH personnel assumed (or were to assume) law enforcement powers of the Haitian police force, as UNMIH still could be present during the formation of the new police force as an adviser and trainer (as provided for in Resolution 867) without actually taking upon itself the new police force’s law-enforcement powers. The Security Council updated UNMIH’s mandate approximately ten months after it established UNMIH, with the new mandate specifying that UNMIH was to “assist the democratic Government of Haiti in fulfilling its responsibilities in connection with . . . the creation of a separate police force.” Yet again, this new mandate went no further than requiring UNMIH to assist the Government of Haiti in establishing its own police force, and did not mandate UNMIH to become Haiti’s police force. The Security Council established police-related missions in Haiti after the termination of UNMIH in 1996, such as the United Nations Transition Mission in Haiti (UNTMIH) and the United Nations Civilian Police Mission in Haiti (MIPONUH), and the U.N. General Assembly also established the United Nations General Assembly International Civilian Support Mission in Haiti (MICAH); but, as none of these U.N. forces appear to have used RCAs, their mandates are less relevant for the purposes of this Article.

Likewise, neither do MINUSTAH’s multiple instances of RCA use in Haiti easily fall under the law-enforcement exception because MINUSTAH’s mandate only allowed it to assist the Haitian Transitional Government (through the Haitian National Police, which had been established as a professional police force in 2004 by the Consensus on the Political Transition Pact) in stabilizing Haiti and in bringing about

173. Id. pmbl. ¶ 5.
reforms, not to exercise its own police powers directly on the Haitian population. Also similar to MINUSTAH, UNMIL's mandate in Liberia gave it a limited role in "assist[ing] the transitional government of Liberia in monitoring and restructuring the police force of Liberia, consistent with democratic policing, to develop a civilian police training programme, and to otherwise assist in the training of civilian police, in cooperation with ECOWAS, international organizations, and interested States," not to act as Liberia's police force. While UNAMIR's mandate in Rwanda initially authorized it to "investigate and report on incidents regarding the activities of the gendarmerie and police," an updated mandate just over a year-and-a-half after this initial mandate gave UNAMIR the task of "assist[ing] in the training of a national police force." These two versions of UNAMIR's mandate provided no other duties relating to law enforcement. The mandate for UNOCI in Côte d'Ivoire authorizes it to "assist the Government of National Reconciliation in conjunction with ECOWAS and other international organizations in restoring a civilian policing presence throughout Côte d'Ivoire." UNOSOM II's mandate is similar to those already mentioned with respect to the U.N. force assisting the target state in its law-enforcement-related activities, although UNOSOM II's mandate does so as a request, not as a requirement. In particular, paragraph 4(d) of Resolution 814 requests that the U.N. Secretary-General and "all relevant United Nations entities, offices and specialized agencies," which conceivably includes UNOSOM II, "assist in the re-establishment of Somali police, as appropriate at the local, regional or national level, to assist in the restoration and maintenance of peace, stability and law and order, including in the investigation and facilitating the prosecution of serious violations of international humanitarian law." Finally, UNAMSIL's original mandate did not provide it with a law enforcement function. Updates to that mandate came in 2000 and 2001, with the 2000 update requiring UNAMSIL to "coordinate with and assist, in common areas of deployment, the Sierra Leone law enforce-

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U.N. forces, riot-control agents, and the CWC

ment authorities in the discharge of their responsibilities. The 2001 update required UNAMSIL to "assist the efforts of the Government of Sierra Leone to extend its authority, restore law and order and stabilize the situation progressively throughout the entire country." In both cases, UNAMSIL's role was to assist the Government of Sierra Leone in its law enforcement activities, not to take over those activities.

One could interpret these references to a "new law enforcement agency" in the case of UNMINSET, "establishing a new police force" in the case of UNMIH, establishing "a national police force" in the case of UNAMIR, "restoring a civilian policing presence" in the case of UNOCI, "re-establishing of Somali police" in the case of UNOSOM II, and "restor[ing] law and order" in the case of UNAMSIL as inferring that a police force did not exist in the host states, and so by necessity, that the U.N. forces were required to take upon themselves implied powers of law enforcement until the host states established the new police force. However, international law appears to require the express consent of a host state before law enforcement officers can exercise actual police functions in that state, and so an implied powers argument is not particularly persuasive in this context. The conclusion, however, is a little different when this implication is coupled with a broad Security Council authorization for the U.N. force to take "all necessary means" in fulfilling its mandate, without any express limitations provided concerning the host state's responsibilities and rights. For example, UNOCI's mandate authorizes it to "use all necessary means to carry out its mandate, within its capabilities and its areas of deployment[.]" UNAMSIL's updated mandate in 2001 also gave it the power to "take the necessary action to fulfill the additional tasks set out" by the Resolution, although this power was circumscribed by the requirement that UNAMSIL "tak[e] into account the responsibilities of the Government of Sierra Leone"; thus, UNAMSIL could not usurp the government's law enforcement role even if it wanted to do so, at least not from a legal perspective. UNOCI's mandate did not limit those "necessary" powers by the responsibilities of the Government of Côte d'Ivoire, so it would be more acceptable from a legal perspective if UNOCI were to take over law enforcement activities there if it deemed this necessary.

186. S.C. Res. 1528, supra note 180, ¶ 8.
The importance of assisting domestic police forces reform and develop should not be underestimated, in terms of helping remove a potential threat to international peace and security in the long run. When it comes to RCA use in the field, however, domestic police forces that work alongside U.N. forces would be of great assistance to the U.N. force if they used RCAs rather than the U.N. forces.\textsuperscript{188} Without an express mandate to act as a domestic police force, U.N. forces should refrain from using RCAs, even when police forces temporarily withdraw from a particular area, as occurred in Haiti.\textsuperscript{189}

c. Authorization to Maintain a Secure Environment

Arguably, several U.N. mandates could authorize a limited law enforcement function through language authorizing U.N. troops to “maintain a secure environment.” UNMISET’s mandate, for example, required it to “contribute to the maintenance of the external and internal security of East Timor.”\textsuperscript{190} This is similar to the mandates of other U.N. forces that fall short of authorizing law-enforcement activities. For example, the mandate of UNOSOM II provides it with a role in maintaining the security environment of Somalia. Paragraph 14 of Resolution 814 (UNOSOM II’s mandate) “[r]equests the Secretary-General, through his Special Representative, to direct the Force Commander of UNOSOM II to assume responsibility for the consolidation, expansion and maintenance of a secure environment throughout Somalia.”\textsuperscript{191} Likewise, the mandate for UNFICYP in Cyprus makes clear that the Government of Cyprus “has the responsibility for the maintenance and restoration of law and order.”\textsuperscript{192} Paragraph 6 of that mandate “[r]ecommends that the function of [UNFICYP] should be, in the interest of preserving international peace and security, to use its best efforts to pre-

\textsuperscript{188} Please note that there have been instances where domestic police have worked alongside U.N. forces, and the police used RCAs without such use being imputed to U.N. forces. See, e.g., Armed U.N. Troops Rush Rock-Throwing Students, A.P., May 11, 1995 (reporting that Haitian police used tear gas against a group of students throwing rocks, but that the crowd did not disperse until UNMH troops rushed the crowd with their riot gear donned); At Least 2 Die as Police Fire on Haitian Marchers, WASH. POST, Mar. 1, 2005, at A12 (noting that U.N. peacekeepers in Haiti were accompanying demonstrators when police fired tear gas followed by bullets at the demonstrators, without the U.N. troops knowing why); Alex Efty, Greek Cypriot Bikers Ride into U.N. Buffer Zone, 3 Injured, A.P., Aug. 6, 1995 (reporting that Greek Cypriot police used tear gas against protestors, many of whom were riding motorbikes, but that only barbed wire used by UNFICYP troops actually stopped the protestors); Ginger Thompson, Haitians Flock to Vote, on a Day of Anger and Hope, N.Y. TIMES, Feb. 8, 2006, at A3 (“Police officers fired tear gas and United Nations soldiers fired shots into the air.”).

\textsuperscript{189} See, e.g., McKinley supra note 69, at A7 (reporting that Haitian police forces withdrew without giving U.N. forces any warning).

\textsuperscript{190} S.C. Res. 1410, supra note 165, ¶ 2(b)–(c).

\textsuperscript{191} S.C. Res. 814, supra note 181, ¶ 14.

prevent a recurrence of fighting and, as necessary, to contribute to the maintenance and restoration of law and order and a return to normal conditions. With both UNOSOM II and UNFICYP (even though the former was a Chapter VII operation and the latter was a Chapter VI operation), the question becomes whether a request to “assume responsibility for the consolidation, expansion and maintenance of a secure environment” and a recommendation to “contribute to the maintenance and restoration of law and order,” respectively, connote the enforcement of law. References to “security” and “law and order” resemble more the enforcement of peace than the enforcement of particular laws. “Law and order” and “law enforcement” often are associated with one another in the domestic context. However, there is a subtle distinction between the two. Maintaining law and order has more to do with preserving the peace and less to do with upholding a particular law, much like how a sheriff in the Wild West might make an outlaw out of anyone who challenged his authority. In the domestic context, the distinction typically is overlooked because peace and law are tied together. However, in the context of U.N. forces, peace and law arguably are less connected, as is demonstrated by the ability of the Security Council to authorize measures that trump conflicting legal norms in the name of maintaining international peace and security; thus the subtle distinction is far more important here. This is so even if the United Nations and states might treat these terms as interchangeable in common parlance.

d. No Law-Enforcement-Related Authorization

The mandates for the U.N. forces discussed in Part II provide these forces with no law enforcement role. The earlier mandates for the United Nations Command in Korea and UNEF I in the Gaza Strip called for a cessation of hostilities and monitoring of that cessation, not law enforcement.

193. Id. ¶ 5.
195. See U.N. Charter arts. 25, 103.
enforcement. Admittedly, UNEF I eventually took control over civil affairs in the Gaza Strip, even though this was not provided for in its mandate, nor did it happen until after UNEF I’s use of RCAs, and so it is irrelevant for this Article.  

Later U.N. forces also focused on monitoring the cessation of hostilities and otherwise maintaining the peace. SFOR’s mandate derived from Security Council Resolution 1031, which authorized the Implementation Force (IFOR, the predecessor of SFOR) to implement the role specified in Annexes 1A and 2 of the 1995 General Framework Agreement for Peace dealing with the military aspects of this agreement and inter-entity boundary lines. Under Annex 1A of the General Framework Agreement for Peace (GFA), IFOR’s main task was to “establish a durable cessation of hostilities” by doing such things as keeping the parties separated. Security Council Resolution 1088 established SFOR as the legal successor to IFOR for an initial period of eighteen months. A key point here is that law enforcement was not entrusted to IFOR or SFOR. Rather, Article II(3) of Annex 1A to the GFA required the parties (the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska) to “provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with international recognized standards.”

Under Annex 1A of the General Framework Agreement for Peace in Bosnia and Herzegovina, the role of assisting the parties in maintaining civilian law enforcement was entrusted to the U.N. International Police Task Force (UNIPTF) under Annex 11 of the GFA, but even this only gave UNIPTF the role of assisting the parties in maintaining civilian law enforcement. Usurping the role of law enforcement was not part of the Agreement. Besides, UNIPTF was not the U.N. force that used RCAs in Bosnia; rather, it was SFOR, which lacked a mandate to involve itself with law enforcement.

Similarly, KFOR’s mandate was established by Security Council Resolution 1244, which provided that it was responsible, as the international security presence, for, inter alia, “[d]eterring renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces” and “[e]nsuring public

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198. See supra notes 54–55 and accompanying text.
203. Id. Annex 11, arts. I, III.
safety and order until the international civil presence can take responsibility for this task."\textsuperscript{204} The international *civil* presence referred to here later received the name the United Nations Interim Administration Mission in Kosovo (UNMIK). Among other things, UNMIK was responsible under Resolution 1244 for "[m]aintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo[.]."\textsuperscript{205} While UNMIK had more of a law-enforcement type role in Kosovo, all of the instances of RCA use described in Part II above were by KFOR, not UNMIK. While in practice they might have been expected to work together to maintain civil law and order, the express language in their mandates ought not to be ignored merely out of a fear of being legalistic. After all, what would be the point of carefully crafting the mandates of U.N. forces if the details could be disregarded *ad libitum*? Even if, *arguendo*, KFOR had the international *civil* presence's powers to maintain civil law and order when it used RCAs prior to the point when UNMIK could take responsibility for these tasks, the question still remains whether this power could be considered law enforcement. As already discussed, law enforcement is exactly what its name denotes—the enforcement of *law*. From a review of the material on KFOR, KFOR did not appear to be enforcing any law, but rather was using whatever force was necessary to maintain order, however KFOR defined it.\textsuperscript{206} Indeed, as provided in Article I(2) of the Military Technical Agreement Between the International Security Force ("KFOR") and the Governments of Federal Republic of Yugoslavia and the Republic of Serbia, KFOR enjoyed "the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission," without any reference to law being required.\textsuperscript{207} Therefore, even if KFOR went to great lengths to call its troops police officers, these troops actually still would function as *peace* enforcers, not *law* enforcers, which is commendable except when trying to fit a certain KFOR activity under the title of law enforcement. Had there been evidence of KFOR operating to enforce *law* in the traditional sense of the word (with such characteristics as understandability and non-retroactivity of that law),\textsuperscript{208} then this conclusion might have been different.

\textsuperscript{204} See S.C. Res. 1244, *supra* note 165, ¶ 9 (emphasis added).
\textsuperscript{205} See id. ¶ 11(i).
\textsuperscript{206} See *supra* note 194 and accompanying text (distinguishing between "law enforcement" and "law and order").
\textsuperscript{208} See, e.g., LON L. FULLER, THE MORALITY OF LAW 38–39 (1969) (providing his eight desiderata of bad law).
In sum, this section asserts that only one of the fourteen U.N. forces that have used RCAs was clearly authorized to act in a law-enforcement capacity (namely, UNMISET in East Timor), while another might have been able to act in such a capacity if it deemed it necessary (namely, UNOCI in Côte d'Ivoire). The other twelve missions could not have been acting in a law enforcement capacity when they used RCAs on thirty-eight occasions, based on the formal sense of the phrase “law enforcement” and the types of activities their mandates authorized.

Critics will wonder why one has to look only at the formal sense of the phrase “law enforcement” and only at the activities expressly provided for in the mandates. They will advocate a loose interpretation of law enforcement that includes activities that may resemble those of traditional law enforcement although without the name. However, this would inappropriately put the cart before the horse, so to speak, by allowing whatever actions happen on the ground to trump the clear language of the mandate. Such an approach to peace support operations conceivably would lead to chaos.

Moreover, critics will raise the possibility that U.N. forces find themselves in a law-enforcement-type situation when, for example, they temporarily are required to guard prisoners (assuming the absence of such powers in their mandate). These forces might then argue that certainly they should be allowed to use RCAs when a riot breaks out among the prisoners. In response, this Article asserts that the line between law enforcement and warfare by U.N. forces is too difficult to draw—and to expect U.N. forces to draw—to allow U.N. forces the discretion to decide in which situations they may use RCAs and in which situations they may not. Given the alternative, non-toxic, less-lethal weaponry available, which is described towards the end of the Article, there is no point running the risk that the discretion will be mistakenly used or abused.

Nonetheless, the following section explores one caveat: the possibility that U.N. forces may act in a law-enforcement capacity when acting to enforce international law.

3. Enforcement of International Law

Abram Chayes and his co-authors propose that “law enforcement” within the CWC context can include enforcing international law.209 David Fidler challenges this assertion by arguing that “the system of international law suffers deficiencies in the means available for

enforcement of its rules." However, this point cannot logically be extended to a conclusion that the system has no means for enforcement, as he appears to do when he dismisses the possibility that "law enforcement" in CWC Article II(9)(d) includes both domestic and international law. On the contrary, Security Council enforcement actions under Chapter VII and lawful countermeasures by states are just two methods of enforcement that ought not to be overlooked. This debate has particular relevance to this Article, which has as its focus a type of Security Council action—namely, the authorization of U.N. forces to commit certain acts.

The question becomes exactly which part of international law these U.N. forces might be enforcing. U.N. forces usually act to give effect to their respective mandates, not to general international law. The Security Council typically provides these unique mandates, although the General Assembly and even the parties to a dispute have been known to establish U.N. forces with a mandate to take certain actions. Therefore,

210. Fidler, supra note 143, at 28, 32–33 (citing 1 Oppenheim's International Law, supra note 185).
211. Id.
213. See U.N. Dept. of Peacekeeping Operations, Meeting New Challenges: Frequently Asked Questions 3, 5–6, 11, 14, 20, 23 (2006). Some commentators assert that the first time a U.N. force was authorized to enforce its mandate was in 1993 with UNOSOM II. See Sean D. Murphy, Nation-Building: A Look at Somalia, 3 Tul. J. Int'l & Comp. L. 19, 28 (1995) (citing U.N. Doc. S/PV.3188 (Mar. 26, 1993), at 7, 17–19, 26). However, according to the cited U.N. source, Somalia appears to be the first instance in which U.N. forces were authorized to rebuild a country and take other steps beyond merely keeping the peace, not that the enforcement of a mandate had any larger a role to play than in the past. Indeed, U.N. forces essentially have enforced their mandates from the very beginning by basing their powers on their specific mandates, whether those included keeping the peace between two belligerents or rebuilding a country.
214. Recall that there are three types of U.N. military operations. See supra note 5. All U.N.-authorized forces have operated under a mandate from the Security Council. U.N. Charter art. 42. Of the sixty-three U.N.-controlled forces that have been authorized to date, sixty-one have had their mandates established by a Security Council resolution. For a comprehensive list of these resolutions, see Appendix 1 of this Article. Some of these mandates may have originated as a proposal from the Secretary-General or some other entity, although the Security Council typically incorporates these proposals by reference or by establishing a unique mandate of its own. But see infra note 215 (providing two exceptions).
the question is not whether U.N. forces are acting to enforce general international law, but rather whether the underlying agreements or resolutions that they are enforcing can be considered law. The definition and discussion of law enforcement provided above is important here. Under that particular definition, Security Council and General Assembly resolutions generally would not constitute law per se since they do not derive directly from a sovereign state but rather from organs of international organizations. This is so even though the organs derive their powers from the acts of sovereign states—that is, in the states’ creation of the United Nations through ratification of the U.N. Charter and their votes on particular resolutions. Moreover, under a legal positivist definition of law, it is irrelevant that the Security Council has some coercive and binding powers under Chapter VII and Article 25 of the U.N. Charter. As Martti Koskenniemi suggests, from a traditional lawyer’s perspective, the fact that the Security Council has the power to force states to act a certain way does not make such actions and edicts law. Indeed, the fact that Security Council decisions might carry the force of law, as Leland Goodrich and his co-authors assert, does not make these resolutions law per se. Otherwise, Security Council decisions, by definition, never would be able to breach law, because those decisions are law—a proposition that many international lawyers would deem untenable.

Two possible exceptions might include situations in which, first, states establish a U.N. force directly through a treaty and, second, a U.N. force operating under a Security Council mandate has the task of enforcing:

216. See supra notes 143–156 and accompanying text.
217. Please note, however, that other valid definitions of law, and even other valid definitions of legal positivism, could lead to a different conclusion on this point.
220. See Gabriël H. Oosthuizen, Playing the Devil’s Advocate: The United Nations Security Council Is Unbound by Law, 12 LEIDEN J. INT’L L. 549, 550 (1999). Please note that this does not seem to be the majority view on the legal status of Security Council resolutions. See, e.g., HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 172 (2000); Christopher C. Joyner, Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia, 6 DUKE J. COMP. & INT’L L. 79, 88 (1995). Admittedly, the line between law and the force of law is extremely fine, and it likely is irrelevant in most situations. However, since this Article is taking such a close, textualist look at the mandates of U.N. forces, it is necessary to emphasize this most subtle of distinctions. Undoubtedly some critics will dismiss such legal formalism; yet it is through such formalism that law gains its wonderful predictability, and therefore it must not be forgotten. A more detailed analysis of Security Council resolutions as law is reserved for a future publication that is more directly oriented towards legal theory.
ing a treaty—perhaps a cease-fire agreement, a type of treaty often mentioned in the mandates of U.N. forces. Both of these situations come much closer to falling within the legal positivist definition of law enforcement, on account of the fact that the norms created by the treaties flow directly from the edicts and actions of states. The sole example in which states created a U.N. force under the first exception—i.e., through a treaty—is that of the United Nations Secretary Force in West New Guinea (West Irian). The force was created through an agreement between the Netherlands and Indonesia and designed to assist in the transfer of this territory from the Netherlands to the United Nations Temporary Executive Authority. This comes the closest to the enforcement of international law, in that the mandate for that U.N. force was created directly by states. However, that U.N. force ostensibly did not use RCAs during its operations and so is largely irrelevant to this Article’s thesis. The latter exception is potentially far more relevant here, as the Security Council often gives U.N. forces express responsibilities in supervising the implementation of cease-fire agreements established by at least one state. The question arises whether any of the mandates for the fourteen missions and forces mentioned in Part II above require them to enforce a treaty, which goes beyond mere verification, observation, investigation, monitoring, or advising.

a. No Focus on Treaties

After a thorough review of the mandates for the fourteen missions and forces discussed in Part II, six of the fourteen—the United Nations Command in Korea, KFOR in Kosovo, MINUSTAH in Haiti, UNOSOM II in Somalia, UNFICYP in Cyprus, and UNMISET in East Timor—mention nothing about enforcing treaties, or even monitoring or verifying the implementation of treaties. It is impossible to say that the troops of the United Nations Command in Korea were enforcing a treaty when they used RCAs in 1951, since no treaties existed until the parties signed the Korean Armistice Agreement on July 27, 1953.

221. Agreement Between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian), supra note 215, art. VII.
222. This is the case notwithstanding the resolution that the General Assembly adopted after the fact to formally acknowledge the role that the Agreement gave the Secretary-General in implementing it. See G.A. Res. 1752 (XVII), U.N. GAOR (Sept. 21, 1962). The closest example of the enforcement of international law can be found in SFOR and its mandate in Security Council Resolution 1031. See infra Part III.A.3.c.
223. See S.C. Res. 1542, supra note 176; S.C. Res. 1410, supra note 165 (UNMISET); S.C. Res. 1244, supra note 165 (KFOR); S.C. Res. 814, supra note 181 (UNOSOM II); S.C. Res. 186, supra note 192 (UNFICYP).
224. See Agreement Between the Commander-in-Chief, United Nations Command, on the One Hand, and the Supreme Commander of the Korean People’s Army and the Commander
b. Authorization to Monitor the Implementation of Treaties

The mandates for the other eight U.N. forces authorize them to supervise, observe, investigate, monitor, or advise concerning implementation of a treaty, but not to enforce those treaties. The mandate of UNEF I in the Gaza Strip authorized it to "secure and supervise the cessation of hostilities in accordance with all the terms of General Assembly resolution 997 (ES-I) of 2 November 1956," which terms involved "[u]rg[ing] the parties to the armistice agreements promptly to withdraw all forces behind the armistice lines." Therefore, UNEF I was to supervise compliance with the armistice agreement, not to enforce it. UNMIL's mandate provides it with the responsibility of supporting the implementation of the Liberian ceasefire agreement of June 17, 2003. In particular, paragraph 3(a) of Resolution 1509 requires UNMIL "to observe and monitor the implementation of the ceasefire agreement and investigate violations of the ceasefire." In addition, paragraph 3(h) requires UNMIL to "liaise with the [Joint Monitoring Committee] and to advise on the implementation of its functions under the Comprehensive Peace Agreement and the ceasefire agreement." As already mentioned, observation, monitoring, and advising are far different forms of supervision from enforcement.

UNMIH's mandate, Security Council Resolution 867, mentions two treaties—the Governors Island Accord and the New York Pact—giving rise to the question of whether UNMIH was to enforce them. The President of Haiti, Jean-Bertrand Aristide, and the Commander-in-Chief of the Armed Forces of Haiti, Lieutenant-General Raoul Cédras, signed the Governors Island Agreement on July 3, 1993, which was designed to resolve the crisis in Haiti by starting a dialogue among its political powers. The goal was to establish a political truce, a plan for Parliament to return to normal operations, an arrangement to confirm the new Prime Minister, and an agreement to adopt instruments to help with the transition, including the creation of a new police force. The principal political forces in Haiti and political blocs in Haiti's Parliament came together for talks from July 14-16, 1993, which culminated in their sign-

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225. G.A. Res. 1000, supra note 197, ¶ 1.
227. S.C. Res. 1509, supra note 177, ¶ 3.
228. Id. ¶ 3(a).
229. Id. ¶ 3(h) (emphasis added).
230. See Governors Island Agreement, supra note 174, ¶ 5 (containing and summarizing the Governors Island Agreement).
231. See id.
ing of the New York Pact, which provided for a six-month political truce along with, *inter alia*, all of the goals articulated in the Governors Island Agreement. The mandate of UNMIH mentions these treaties. Paragraph 1 of Resolution 867 makes the extension of UNMIH’s mandate dependant on a Security Council review of “whether or not substantive progress had been made towards the implementation of the Governors Island Agreement and the political accords contained in the New York Pact.” On its face, this provision could be seen as ambiguous because it is unclear as to who is to implement these treaties—the parties or UNMIH. However, when interpreting the provision in light of the entire resolution and the treaties themselves, it would appear that the parties are to implement them because nowhere is UNMIH expressly required to implement them whereas the treaties do expressly require such implementation from the parties. Similarly, the mandate of UNAMIR in Rwanda specified that UNAMIR’s term could be extended beyond six months “only upon a review by the Council . . . as to whether or not substantive progress ha[d] been made towards the implementation of the Arusha Peace Agreement.” Again, it is unclear whether the parties or UNAMIR were to make progress in implementing the Arusha Agreement. Again, when interpreting the provision in light of the entire resolution and the treaties, it would appear that the parties to the Arusha Peace Agreement were to implement it because nowhere is UNAMIR expressly required to do so, while the Agreement itself expressly requires implementation by the parties. In addition, Resolution 872 requires UNAMIR to “monitor observance of the cease-fire agreement, which


233. S.C. Res. 867, supra note 172, ¶ 1.

234. See Governors Island Agreement, *supra* note 174, ¶ 5–6 (parties pledging to each other to cooperate in implementing the Agreement, and granting the United Nations merely the role of verifying that the parties had complied with both the letter and spirit of the agreement, not of enforcing such compliance); New York Pact, *supra* note 232, Annex (laying out what the parties to the Pact promised to undertake, without creating obligations on the United Nations beyond providing experts to give technical and juridical advice on the drafting of legislation to create the Conciliation Commission and in its implementation, and not actually implementing the legislation).


calls for the establishment of cantonment and assembly zones and the
demarcation of the new demilitarized zone and other demilitarization
procedures," as well as to "investigate at the request of the parties or on
its own initiative instances of alleged non-compliance with the provi-
sions of the Arusha Peace Agreement relating to the integration of the
armed forces, and pursue any such instances with the parties responsible
and report thereon as appropriate to the Secretary-General."\footnote{237} Regardless
of what these agreements provide, what is clear is that UNMIH’s and
UNAMIR’s mandates are limited to monitoring and investigating matters
relating to these treaties, not enforcement of these treaties.

UNAMSIL’s mandate is somewhat different from other mandates
that require U.N. forces to assist in the implementation of a peace
agreement. Paragraph 8(a) of Resolution 1270 requires UNAMSIL to
"cooperate with the Government of Sierra Leone and the other parties to
the Peace Agreement in the implementation of the Agreement."\footnote{238} Given
that the following subparagraph starts with "assist,"\footnote{239} it is difficult to
argue that "cooperate" and "assist" are synonymous—after all, why else
would the Security Council use different terms for the same concept in
such close proximity? Nonetheless, what is clear is that the requirement
to "cooperate" falls far short of a requirement to enforce that agreement
against the will of the parties; rather, "cooperate" would seem to have
the opposite meaning. The only other treaty that the mandate mentions is
the ceasefire agreement of May 18, 1999, adherence to which
UNAMSIL was required to monitor.\footnote{240} Yet again, monitoring is different
from enforcement.

One of the major tasks assigned to MONUC, operating in the
Democratic Republic of the Congo, is to "monitor the implementation of the
[1999 Lusaka] Ceasefire Agreement and investigate violations of the
ceasefire."\footnote{241} However, monitoring implementation and investigation of
violations is different from actually enforcing the agreement. Indeed,
paragraph 1 of Resolution 1279 "[c]alls upon all parties to . . . imple-
ment fully the provisions of the Ceasefire Agreement,"\footnote{242} and does not
expressly require MONUC to enforce the agreement. Resolution 1279
mentions no other treaties, and no later resolutions require MONUC to
enforce a treaty.

Resolution 1528 authorizes UNOCI in Côte d'Ivoire to "observe and
monitor the implementation of the comprehensive ceasefire agreement of

\footnotesize{\textsuperscript{237}} S.C. Res. 872, \textit{supra} note 178, \textsection{3(b), 3(e).
\footnotesize{\textsuperscript{238}} S.C. Res. 1270, \textit{supra} note 182, \textsection{8(a) (emphasis added).
\footnotesize{\textsuperscript{239}} Id. \textsection{8(b).
\footnotesize{\textsuperscript{240}} Id. \textsection{8(e).
\footnotesize{\textsuperscript{241}} See S.C. Res. 1279, \textit{supra} note 196, \textsection{7(a).
\footnotesize{\textsuperscript{242}} See id. \textsection{1.}
3 May 2003, and investigate violations of the ceasefire,” all of which falls short of a requirement to enforce the treaty.\textsuperscript{243} Another provision of Resolution 1528 “[s]tresses the importance of the complete and unconditional implementation of the measures provided for under the Linas-Marcoussis Agreement,” although the resolution makes clear that the implementation obligation applies to the parties when it “demands that the parties fulfil their obligations under the Linas-Marcoussis Agreement.”\textsuperscript{244} Therefore, it is clear that UNOCI does not have the role of enforcing this agreement or any other treaties.

\section*{c. Authorization to Enforce a Treaty}

Only one of the fourteen U.N. forces has a mandate that provides an unequivocal authorization to enforce a treaty. IFOR, the legal predecessor of SFOR, had a clear mandate in Security Council Resolution 1031 to “take all necessary measures to effect the implementation of and to \textit{ensure compliance} with Annex 1-A of the [General Framework Agreement for Peace in Bosnia and Herzegovina.]”\textsuperscript{245} This example comes closest to international law enforcement since the General Framework Agreement flowed directly from the edicts of a state and the U.N. forces are obliged through their mandate to enforce those edicts.

Despite the examples above, the question remains whether these U.N. forces act to enforce the U.N. Charter itself. After all, U.N. Charter Article 2(3) requires states to settle their disputes through peaceful means and Article 2(4) prohibits states from threatening or using force against each other outside of self-defense and lawful collective-security measures;\textsuperscript{246} surely adherence to these provisions is what U.N. forces are trying to accomplish, if nothing else. Nevertheless, the mandates for the fourteen U.N. forces discussed above are silent concerning general obligations under the U.N. Charter. While the U.N. Charter acts as the foundation for these forces and all other U.N. activities, it cannot be said to play a direct role in shaping the activities of these U.N. forces beyond giving the Security Council and General Assembly the ability to establish the mandate for such forces to handle threats and potential threats to international peace and security.\textsuperscript{247} After all, U.N. forces act in accordance with

\begin{itemize}
\item \textsuperscript{243} S.C. Res. 1528, \textit{supra} note 180, \textsection 6(a).
\item \textsuperscript{244} \textit{Id.} \textsection 10 (emphasis in original).
\item \textsuperscript{245} S.C. Res. 1031, \textit{supra} note 199, \textsection 15 (emphasis added).
\item \textsuperscript{246} See U.N. Charter arts. 2(3), 2(4).
\item \textsuperscript{247} See \textit{id.} art. 24(1) (providing the Security Council with “primary responsibility for the maintenance of international peace and security”); \textit{id.} art. 11 (giving the General Assembly a role in maintaining international peace and security); Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151, 163 (July 20) (asserting that the Security Council has primary responsibility over maintaining
\end{itemize}
their mandates, and the U.N. Charter is never mentioned as a source of power or limitation for them. Moreover, the question remains whether treaties actually are law. Certainly the majority opinion would say yes; after all, the classic sources doctrine, which is based on Article 38 of the ICJ Statute, lists international conventions as a principal source of international law. The present Article is not a theoretical piece that focuses on authoritatively challenging that opinion; fortunately numerous international law scholars already have done so. Gerald Fitzmaurice first argued in 1958, and others have explored since then, that treaties can be interpreted as sources of obligations, as opposed to sources of law. While parties to a particular treaty are bound by that agreement based on international contract principles and general international law, such principles actually are pseudo-law inasmuch as they are not generally applicable. This point gets into the subtleties between traité-contrat and traité-loi, a distinction that might be somewhat obscure for those less familiar with the French approach to treaty law, although a valid distinction nonetheless. Ultimately, at least according to Fitzmaurice’s line of reasoning, treaties constitute a source of law only when their rules and obligations are deemed to be reflective of custom. Assuming this line of reasoning is correct, which this Article accepts on account of the persuasive analysis these eminent international law scholars provide, then none of the peace

international peace and security while the General Assembly has secondary responsibility after the Security Council).

248. See supra note 213 and accompanying text.
250. See Gerald Fitzmaurice, Some Problems Regarding the Formal Sources of International Law, in SYMBOLAE VERZIII 153 (F. M. van Asbeck et al. eds., 1958); see also David Kennedy, International Legal Structures 33–36 (1987) (discussing that legal naturalists “reinterpreted treaty law to be binding as an expression of community judgement about the justice of the norms included,” rather than binding as law per se); Tadeusz Gruchalla-Wesierski, A Framework for Understanding “Soft Law”, 30 McGill L.J. 37, 37, 39–46 (1984) (explaining that treaties contain legal and non-legal soft law, or rather obligations that the parties retain a large measure of discretion over, which may be distinct from normal law); Maurice Mendelson, Are Treaties Merely a Source of Obligation?, in PERESTROIKA AND INTERNATIONAL LAW 81 (W. E. Butler ed., 1990); Jan Klabbers, The Concept of Treaty in International Law 1–2 (1996).
252. See Fitzmaurice, supra note 250, at 153. Therefore, these scholars would seem to suggest either that the majority does not operate under the correct definition of “law” or that its view of treaties is insufficiently nuanced.
treaties and ceasefire agreements mentioned in U.N. force mandates are law because they are specific to particular disputes and not generally applicable. Regardless, if any of the mandates of U.N. forces authorize the enforcement of international law, SFOR's does; the rest of the thirteen mandates fall short.

For the reasons stated in this section, this Article joins the others who have asserted that RCAs can be used lawfully only for domestic (or internal) law-enforcement purposes—that is, in enforcing laws passed by a state's own competent authority and within that state's own jurisdiction. This assertion is not as narrow as it might first seem with respect to states. For example, use of tear gas by military police in enforcing military law within proper jurisdiction, such as a base, post, or embassy grounds, is considered as internal use even though technically not within state territory, and thus fits squarely within this definition of law enforcement. Nevertheless, with regard to U.N. forces, it does mean that they might lawfully use RCAs only in certain operations when acting specifically as a domestic police force (and when authorized to act as such), and possibly within areas of their direct and complete control, such as at the U.N. Headquarters in New York.

4. Minding the Gap

The difference between "method of warfare" and "law enforcement" seems relatively well established in the CWC, with the first reflecting military force and the second reflecting domestic police force, a distinction in activities which began in the mid-nineteenth century with the Age of Specialization. The question, however, arises whether there is a gap between these notions. If there is a gap—such as use in non-warfare and non-law-enforcement settings—then it is not enough to provide that RCAs cannot be used as a method of warfare but that they can be used for law enforcement. Ample support exists for such a gap. Indeed, there are many functions of military forces that are neither "warfare" nor

255. See DANDO, supra note 109, at 76.
257. See HENCKAERTS & DOSWALD-BECK, PRACTICE, supra note 34, at 1743.
"law enforcement"—after all, there is a whole category of operations known as MOOTW, or military operations other than war, which includes for example disaster relief and counter-narcotics operations. This gap is further reflected between the language of the Convention and the interpretations of various governments. For example, in defining "method of warfare," then U.S. President Bill Clinton provided the U.S. Senate with his interpretation of "method of warfare," which included methods used in international and internal armed conflict. Peacetime uses that included "law enforcement operations" and a host of other activities—"humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and noncombatant rescue operations"—did not fit within his definition of "method of warfare." It is within this supposed gap of non-law-enforcement, non-warfare "other" activities where RCA use by U.N. forces might exist under this first set of prohibitions. This is where the second prohibition set comes into play, on account of its clearer language, which is discussed in the following section.

B. Second Prohibition Set: Riot-Control Agents as Temporary Incapacitator

There is another set of prohibitions that is free from this tricky "method of warfare" qualifier. This second set begins with Article I(1)(b) of the CWC, which bans the development, production, acquisition, stockpiling, retention, transfer, use, and military preparation for use of chemical weapons, and the assistance, encouragement, and inducement for others to do any of these activities. Article II(1)(a) defines a chemical weapon as a toxic chemical, which is defined in Article II(2) as "[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." The only provision that modifies this prohibition is the exception for law enforcement under Article II(9)(d), which does not mention a "method of warfare." As a Russian proverb states, "One who sits between two chairs may easily fall down." Under this second set of CWC provisions, there simply is no second chair for RCAs to fall between, unlike the first prohibition set of provisions that contains the

258. Supra note 156 and accompanying text.
260. See CWC, supra note 3, art. I(1)(b).
261. See id. arts. II(1)(a) & II(2) (emphasis added).
262. See id. art. II(9)(d).
unclear phrase “method of warfare” along with the unclear phrase “law enforcement.”

Critics might point to the legal canon lex specialis derogat legi generali (specific law prevails over general law) to argue that the ambiguous “method of warfare” set of provisions ought to govern RCAs, since the earlier set of provisions mentions them by name, while the second set mentions only the admittedly more general “chemicals [causing] death, temporary incapacitation or permanent harm.” However, this Article posits that these are synonyms to a certain extent in that RCAs cause death, temporary incapacitation, or permanent harm. Therefore, both sets of provisions are potentially relevant in a given situation at the same time. Some experts appear to agree with this position. For example, Chayes and his co-authors point out that the first set was intended to be a redundancy for the second set. The second set makes clear that RCAs must not be used except for law enforcement purposes. That RCAs at least incapacitate temporarily seems intuitive, even though they do not immobilize as some incapacitating agents such as opioides do. Indeed, RCAs cause temporary blindness in addition to extreme irritation and pain to exposed skin, nasal and oral areas, and airways. The United States claims that the CWC does not address RCAs due to their “transient,” rather than “incapacitating,” effect. However, the qualifier “temporary”—as in “temporary incapacitation” in the CWC’s definition of “toxic chemical”—has

264. See Chayes et al., supra note 209, at 3 (viewing the first set of provisions as “reiter[ating] a rule already implicit in the Convention’s text” at Article II(1)(a), which rule implicates the second set of prohibitions); see also Barbara Hatch Rosenberg, Riot Control Agents and the Chemical Weapons Convention, Paper for the Open Forum on Challenges to the Chemical Weapons Ban, May 1, 2003, at 36–37 (May 1, 2003), available at http://www.sussex.ac.uk/Units/spru/hsp/documents/OpenForumCWC.pdf (last visited Mar. 31, 2010). As previously noted, what this Article refers to as the first set of prohibitions was actually negotiated and drafted later than the second set, as Article I(5) was not added until the final draft, when the non-aligned states insisted on this redundancy before they would agree to it.


266. See generally Sidell, supra note 10; Robert J. Kaminski et al., Assessing the Incapacitative and Deterrent Effects of Oleoresin Capsicum During Resistive Encounters with the Police, Paper Presented at the National Defense Industrial Association’s Non-Lethal Defense Conference IV, Mar. 20–22, 2000 (quantitatively showing how pepper spray temporarily incapacitates targets). One commentator suggests that the category of “incapacitating agents” was designed to cover anesthetics, although even this commentator acknowledges that the CWC’s broad language here easily can include RCAs. See Tóth, supra note 7, at 174–75.

267. HENCKAERTS & DOSWALD-BECK, PRACTICE, supra note 34, at 1745 (quoting US FIELD MANUAL § 38(d) (1956)) (describing RCAs as having “merely transient effects that disappear within minutes after exposure to the agent has terminated”); see also Schmitt, supra note 132, at 286 n.94.
existed since the earliest rolling texts of the draft Convention and captures the essence of the term "transient." It is difficult to see how short-term blindness and restricted breathing are not incapacitation, even if that incapacitation lasts only for a few minutes. The Australian Defence Force Manual and the Canadian LOAC Manual both consider RCAs as "tear gas and other gases which have debilitating but non-permanent effects." Even U.S. Army field manuals describe RCAs as "producing temporary irritating or disabling physiological effects when in contact with the eyes or when inhaled." In 1998, the Deputy Assistant Judge Advocate General to the U.S. Department of the Navy concluded, when reviewing the legality of pepper spray, that pepper spray is "designed specifically to temporarily incapacitate" and has "physiological effects [that], while relatively painful, are temporary." All of this suggests that it might not be appropriate to distinguish RCAs from incapacitating agents.

In sum, RCAs squarely fit under Article II(2)'s definition of toxic chemicals, in addition to fitting squarely under Article I(5)'s prohibition of RCAs as a method of warfare. Under either the first set of prohibitions or the second, RCAs are unlawful, except under certain conditions related to law enforcement. Therefore, under this second set of prohibitions, the gap between "method of warfare" and "law enforcement" ceases to provide a gray area in which RCAs might be acceptably used. To be clear, by asserting that U.N. forces should not use RCAs except in a law-enforcement capacity, this Article is not requiring of the United Nations and U.N. forces more than what the CWC requires of its member states, even though member states may not agree with this particular interpretation of the CWC. Inasmuch as U.N. forces typically do not engage in law enforcement stricto sensu, there is no reason for U.N. forces to carry RCAs at all, let alone use them. The next section looks specifi-

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268. See Robinson, Solving, supra note 14, at 3 (citing 1987/88 Ekéus Rolling Text, CD/795, Feb. 2, 1988). As incapacitating weapons were legal before the CWC, the debate used to surround the divide between incapacitating and lethal chemical weapons. See Robin Clarke, We All Fall Down: The Prospect of Biological and Chemical Warfare 49 (1968). The continuing debate suggests that the divide merely shifted, although it is entirely unclear how proponents of RCA get around the express qualifier "temporary."


271. See Hersh, supra note 265, at 60 (emphasis added).

272. Henckaerts & Doswald-Beck, Practice, supra note 34, at 1758 (quoting U.S. Dep’t of the Navy, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, May 19, 1998, §§ 4–5, 6(c)).
cally at whether these legal norms under the CWC apply to U.N. forces per se.

C. Application of RCA Norms to U.N. Forces

The preceding sections of this Part focused on the international legal norms that currently exist concerning RCAs under the CWC. The question arises whether U.N. forces are bound by these particular legal norms through international law, rather than through the domestic laws of the host or troop-contributing states. ICJ Statute Article 38(1) states that international law can be established through international conventions, international custom, and general principles of law, among other sources of law, and so these are the primary types of law that this section analyzes when looking for relevant norms concerning RCA use by U.N. forces.

1. Treaties and U.N. Forces

Beginning with international conventions, the CWC consistently refers to binding state parties, not entities that are not state parties such as the United Nations. Nowhere in the CWC are non-state actors (other than the OPCW) given legal obligations. In 2004, the U.N. Security Council adopted a resolution under Chapter VII of the U.N. Charter—Resolution 1540—that requires states to adopt laws to ensure that the provisions of the CWC (especially Articles I, VI, and VII) cover the activities of non-state actors operating within the states’ territory so that there are no safe havens for CWC violators. However, Resolution 1540 does not impose legal obligations on non-state actors themselves. As the ICJ determined in its Reparations advisory opinion, the United Nations “certainly is not” a state, but has a “large measure of international personality” vis-à-vis the complete international legal personality of states. The ICJ has since maintained that distinction between the

274. Although this Article focuses on the legal obligations of the United Nations concerning the activities of U.N. forces, it is important to reiterate that troop-contributing states likely will have undertaken legal obligations through their ratification of the CWC. See supra note 8 and accompanying text.
275. See, e.g., CWC, supra note 3, art. I (starting all five paragraphs with “Each State Party[,]” then laying out the general obligations of the CWC under each respective provision).
United Nations and states,\textsuperscript{278} and its opinion is persuasive in determining whether the CWC directly applies to the United Nations and U.N. forces. In an effort to apply these provisions indirectly to the United Nations, some might argue that the United Nations is bound by the same treaty obligations as are all of its member states, since the United Nations (or any other international organization) is an alter ego for its member states.\textsuperscript{279} Alternatively, each member state of the CWC has an obligation under Article VII(1)(a) of the CWC to “[p]rohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity.”\textsuperscript{280} If states have an obligation to stop subordinate entities from engaging in prohibited activities under the CWC, then perhaps states have a parallel obligation to stop transnational entities from engaging in such activities. Inasmuch as states contribute troops to U.N. forces and retain a measure of control over them, it is not difficult to envision an international court or tribunal analogizing to an alter-ego or subordinate-superior relationship and concluding that member states’ obligations can flow upstream to the United Nations and U.N. forces. Nonetheless, the far more traditional view is that the law applicable to the United Nations includes only international law and the domestic law of the host state, subject to the provisions of any relevant Status of Forces Agreements (SOFAs), not the domestic law or legal obligations of the troop-contributing country.

Regardless of whether either of these analogies is made, two major problems still remain. First, the CWC has 188 signatories (three of which are not U.N. members, i.e., the Cook Islands, the Holy See, and Niue), which leaves seven U.N. members that are not party to the CWC. Further, even if all 192 members of the United Nations were party to the CWC, these analogies still would not be valid since they ignore the international legal personality of the United Nations, which is distinct from that of its members.\textsuperscript{281} Indeed, if international organizations are to have legal personality in the international system, then these arguments cannot work with regard to creating obligations for international organizations. Nevertheless, it is not beyond the realm of possibility that an international court or tribunal could rely on either argument and ignore

\begin{thebibliography}{9}
\item \textsuperscript{278} See, e.g., Difference Relating to Immunity from Legal Process of a Special Rapporteur of Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, 94 (Apr. 29) (Weeramantry J., separate opinion).
\item \textsuperscript{280} CWC, supra note 3, art.VII(1)(a).
\item \textsuperscript{281} See supra note 275 and accompanying text.
\end{thebibliography}
the existence of international legal personalities to find that the United Nations and U.N. forces have treaty obligations under the CWC.

2. Customary International Law and U.N. Forces

There remains the possibility of relying on customary international law to create obligations that bind the United Nations and U.N. forces. Briefly stated, customary international law is a source of international law that is established by general and consistent state practice (or *usus*) accompanied with an acknowledgement of that practice being legally obligatory (or *opinio juris*). Concerning the state practice element, the practice need not be universally consistent, although significant inconsistencies generally will frustrate the formation of custom.

Jean-Marie Henckaerts and Louise Doswald-Beck assert that the prohibition on RCAs as a method of warfare constitutes customary international law confirmed by state practice. Assuming, *arguendo*, that state practice sufficiently supports this assertion, this still might not be enough to establish a customary international law norm that is applicable to the United Nations and U.N. forces: the question remains whether the customary norm prohibiting RCA use as a method of warfare covers peacekeeping and other complex activities in which U.N. forces typically engage. The majority of states, led by the United Kingdom, have tried to interpret the RCA prohibition as broadly as possible to cover all use in a non-law-enforcement setting, while the United States has adamantly interpreted the prohibition narrowly so that RCAs can continue to be used in activities such as U.N. peacekeeping operations.

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283. See, e.g., *RESTATEMENT (THIRD) ON FOREIGN RELATIONS LAW § 102(2) (1987).*


285. *See HENCKAERTS & DOSWALD-BECK, RULES,* supra note 30, at 264. Please note that Henckaerts and Doswald-Beck cite practices (military manuals and/or legislation) of only twelve states; *see id.* at 264, which might be insufficient to demonstrate *usus*, and they say nothing about *opinio juris* in this context.


287. *See supra* note 156 and accompanying text; *see also* Exec. Order No. 11,850, 3 C.F.R. 980 (1971–1975) (establishing U.S. policy towards RCA use in settings outside of domestic law enforcement); S. Exec. Res. 75, 105th Cong., 1st Sess., 143 Cong. Rec. S378, 5817 (April 17, 1997), § 2(26) (Senate insisting that the policies of Executive Order No. 11850 not be modified as a result of CWC ratification, and otherwise requiring, *inter alia*, that RCAs be allowed for operations where the United States is not a party to the conflict and
officials have recognized that the U.S. position represents the minority view,288 although this has not stopped the disagreement over the applicability of the CWC to RCA use. Regardless, this disagreement likely is sufficient to stop this nascent customary norm from covering the types of activities in which U.N. forces typically engage, and therefore likely will not cover the activities of U.N. forces themselves. Other commentators assert that the Geneva Gas Protocol has attained the status of customary international law;289 however, even assuming this is true, it has little impact on the analysis here because the norms under the Geneva Gas Protocol relating to RCAs are too vague to be determinative in this analysis. At a minimum, many key states, including the United States, have made clear that they do not consider RCAs to be prohibited under the Geneva Gas Protocol, which would undermine the assertion that the Geneva Gas Protocol reflects customary international law.290 Because these provisions do not create customary international law norms in relation to RCAs, there is no need for this Part to discuss whether this customary international law would apply to international organizations such as the United Nations and the forces it controls or authorizes.291

3. General Principles of Law and U.N. Forces

General principles of law might also create obligations on the United Nations in the RCA-use context. For example, the doctrine of international estoppel could create an obligation for the United Nations if the United Nations voluntarily made an unambiguous statement that it considered the CWC, or the provisions regarding RCAs, as binding upon it and another entity detrimentally relied on this statement in good faith.292 Former Secretary-General Annan's call for the total elimination of chemical weapons, which opened this Article, arguably is not suffi-

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288. See Robinson, Solving, supra note 14, at 3.
291. See, e.g. Amerasinghe, supra note 6, at 19-20.
ciently unambiguous to establish an obligation for the United Nations under international estoppel, since it did not even hint that the United Nations itself had any sort of obligation to refrain from using such weapons. This is so despite the fact that the International Court of Justice adopted a relatively low standard for the application of the estoppel doctrine under the Nuclear Tests cases. By requiring an unambiguous unilateral statement from the United Nations, some form of consent by the United Nations still is required in order to hold it legally responsible. This is true even assuming that general principles of law can apply to international organizations (which might not be a valid assumption if these are general principles of domestic law). The United Nations would have had no such domestic law to contribute to the development of that general principle, and therefore it might be difficult to say that the United Nations implicitly consented to the application of that general principle of law to itself. Nevertheless, former Secretary-General Annan’s call for the total elimination of chemical weapons arguably is sufficient to create a strong moral obligation on the United Nations to refrain from using RCAs in its operations, given their questionable legality under the CWC.

As a result of the apparent lack of binding legal obligations on the United Nations to stop its forces from using RCAs, one is left to make normative arguments as to why U.N. forces have a moral obligation to refrain from using RCAs in their operations, and why the United Nations and interested states should take steps to see that this norm is followed. The following two Parts focus on these two aspects.

IV. REASONS FOR PROHIBITING RIOT-CONTROL AGENTS

Assuming, arguendo, that the United Nations cannot be held responsible for violations of the CWC by U.N. forces per se, the United Nations prohibiting its forces from using RCAs still makes sense from a moral and strategic perspective due to the dangers inherent in RCA use. Indeed, the United Nations has a profound interest in protecting all of its forces, if only to encourage greater troop contributions in the future.

293. See Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 266–67 (Dec. 20) (“It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations.”). No other U.N. statements were found that even come close to being sufficiently unambiguous to create an obligation under this doctrine.

294. See Difference Relating to Immunity from Legal Process of Special Rapporteur of Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 88, 92 (Apr. 29) (stating that “protection of its personnel, when engaged about their duties, is of prime importance to the proper functioning of the United Nations system”); Robert C.R. Siekman, The Legal
One must not forget that all weapons have their advantages and disadvantages. Although there are benefits to RCA use by U.N. forces, such benefits come at an overly high price—truly a Faustian bargain. Whereas the previous Part looked at the legal basis for using RCAs, this Part shifts to a more practical analysis of the advantages and disadvantages that force commanders ought to consider when making operational decisions to carry and use RCAs. Because the disadvantages outweigh the advantages, the United Nations and interested states should take steps to shape the legal norms in such a way so as to prohibit U.N. forces from carrying and using RCAs.

A. Benefits to U.N. Forces from Riot-Control Agents

Admittedly, less-lethal weapons such as RCAs hold benefits for military and peace operations alike. The fundamental benefit that proponents rely on when promoting RCA use is that these weapons are more humanitarian vis-à-vis traditional weapons because they are less lethal. The ability of RCAs to temporarily incapacitate insurgents potentially decreases the danger of fratricide and noncombatant injuries, and lessens the danger to soldiers who have to deal with insurgents. In Vietnam, some commanders and politicians saw the “deployment of available chemical weapons (tear gas) for offensive operations during the early stages of the operation” as indispensable, especially in urban conflicts, because of their low lethality. More recently, U.S. Army Major General David Grange expressed pride for having ordered his SFOR troops in Bosnia & Herzegovina to use tear gas on the occasion reported at the

Responsibility of Military Personnel, in DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 108, 116 (Charlotte Ku & Harold K. Jacobson eds., 2003) (recognizing that, although the 1994 Safety Convention does not expressly apply to U.N.-authorized forces, it still “may be considered to apply also to UN-authorized (even if not UN-led operations”).


297. See id. at 76.

298. See Harper, supra note 110, at 159 (mentioning the immediate benefit of avoiding unnecessary noncombatant casualties from using RCAs in warfare as a trade off with easier escalation); Cook et al., supra note 15, at 37; Schnitt, supra note 132, at 286.

beginning of Part II.A above, and wished there had not been so many bureaucratic barriers hindering its greater use, because he believed it saved lives then. While there is no question that RCA use has the potential to save lives, one must also assess and acknowledge the costs—the topic of the following section. At the least, one would hope that U.N.-force commanders would show some sensitivity to the controversy surrounding RCAs and not dismiss constraints as mere bureaucratic annoyances.

Another potential, although unpersuasive, benefit for allowing U.N. forces to use RCAs is to enable them to threaten retaliation in kind. Indeed, RCAs can easily be made or acquired by non-state actors, which has led to their increased use. For example, in 1999 alone, the Center for Nonproliferation Studies reports twenty-seven instances of tear gas by non-state actors. Some evidence suggests that tear gas continues to be used by non-state actors, for example, when hungry Haitian protesters used tear gas in their assault on the presidential palace in 2008. Such reasoning not only threatens the United Nations' moral high ground, but also potentially violates the spirit of Article I of the CWC, which prohibits chemical weapons “under any circumstances,” indicating that retaliation in kind is not acceptable.

**B. Dangers to U.N. Forces from Riot-Control Agents**

The perceived benefits from RCAs are outweighed by several dangers, each of which increases the chances of injury to U.N. forces. U.N.-authorized forces are in a particularly precarious position vis-à-vis regular U.N.-controlled peacekeeping forces due to their lack of blue helmets and their accompanying protection (whatever the value of that protection might be in reality). While RCAs clearly can help U.N. forces protect civilians and contain low-level disturbances—a fact that certainly should not be ignored—this section focuses on the protection of U.N. forces because it assumes that this approach will have a greater impact

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301. See Oppenheimer, *supra* note 117.


on the decisions of the United Nations and troop-contributing countries inasmuch as their interests are shown to be directly affected by RCA use.


Part III.A.2 above focused on the question of whether the U.N. forces that have used RCAs in their operations could have been doing so as a part of law enforcement. Apart from UNMISET in East Timor, none of the other missions or forces were expressly authorized to act in a law-enforcement capacity. Even if U.N. forces can engage in law-enforcement activities as a regular part of their mandated responsibilities, the United Nations might not want to rely on this exception because it simply is too difficult to apply to extremely complex peace support operations in a way that provides confidence that RCAs are being used lawfully. In the abstract, some U.N. forces are mandated to act as a buffer between combatants without themselves getting involved in the hostilities—so-called first-generation peacekeeping operations. In reality, though, actual mandates and necessities on the ground have transformed these U.N. operations into far more complex endeavors. This is to say nothing about multifunctional second- and third-generation operations that have far broader mandates to, inter alia, use force beyond mere self-defense and have both military and civilian elements to them. If one recognizes some activities of a U.N. force as falling under "law enforcement" and some not, these activities can be so intertwined as to hinder effective distinction. For example, Frits Kalshoven foresees a situation in which tear gas would be used on one street corner in riot-control mode, and on another corner of the same intersection as a method of warfare in capturing members of an armed group. The

304. See generally supra notes 167–170.


306. See, e.g., Sally Morphet, U.N. Peacekeeping and Election-Monitoring, in UNITED NATIONS, DIVIDED WORLD: THE UN'S ROLES IN INTERNATIONAL RELATIONS 183, 235 (Adam Roberts & Benedict Kingsbury eds., 1993) (arguing that first-generation peacekeeping operations actually are "complex and varied").


308. See KALSHOVEN & ZEGVELD, supra note 132, at 174; see also Jan Medema, The CWC and Non-Lethal Weapons (unpublished discussion paper, 7th Workshop of the Pugwash
United Nations obviously would not want to classify any of its activities as warfare, even though they might be virtually indistinguishable from war-like activities of states. These different U.N. force activities easily blur together for U.N. forces on the ground, just as the mandates of police and military forces tend to blur when military personnel use less-lethal weapons. In a recent week-long meeting to develop doctrine for international police peacekeeping, the U.N. Department of Peacekeeping Operations itself acknowledged that two of the four strategic challenges it faces in the peacekeeping context are the complexity of the tasks on the ground and a lack of knowledge and doctrine. At this point in time, it is impractical to expect U.N. forces to ponder the subtle nuances of when they can and cannot use RCAs—a difficult determination even when made with the best intentions.

Admittedly U.N. forces operate under rules of engagement, in which their protocols for RCA use are spelled out (protocols which likely will depend upon the level of the threat faced). While the model, mission-specific, and revised U.N. rules all are kept confidential, one gets the sense from reading the work of authors with access to these rules that they are quite simple, and there are few, if any, reassurances that they capture legal subtleties. Nor is it prudent to try to simplify into a carry-along card the complex legal principles relating to RCAs as contained in the CWC and as applied in extremely complex operations. Therefore, for the sake of preserving the integrity of the CWC regime, it would be ideal to prohibit U.N. forces from carrying and using RCAs.

2. "Non-Lethal" as a Misnomer

The label "non-lethal" for these chemical weapons is a misnomer. As Robin Coupland of the ICRC asserts, "No weapon when used and as a function of its design carries a zero risk of mortality among its victims." In particular, so-called non-lethal chemical incapacitants generally have a lethality rate of ten to twenty percent, which is comparable to that of military firearms (approximately thirty-five percent), artillery (approximately


311. See supra note 10.

twenty percent), grenades (approximately ten percent), and civilian handguns (approximately ten percent). 313 Most surprisingly, the lethal gases of the First World War had a lethality rate of approximately seven percent. 314 A somewhat recent example of the lethality of so-called non-lethal weapons is the Moscow theater hostage rescue of October 2002, where the calmative gases that Russian security forces used had over a fifteen percent lethality rate on the hostages alone. 315 Although RCAs have a lethality rate of approximately 0.5 percent, 316 this rate is not insignificant, especially when used on a large crowd, as in the forty instances of use by U.N. forces described above in Part II. For example, if RCAs are used on a crowd of a thousand people, approximately five people will die. Chances of lethality increase when RCAs are used in large doses, in confined spaces, and on weaker individuals such as the elderly, pregnant women, and children. 317 Even in healthy adults, RCAs can cause bronchospams, chemical pneumonitis, pulmonary edema (fluid in the lungs), heart failure, hepatocellular damage, gastroenteritis with perforation (if ingested), and serious dermatitis with erythema and blisters when a large dose is delivered in an area with high temperature and humidity—all of which can be fatal. 318 Multiple exposures to RCAs can cause the formation of tumors, pulmonary disease, and reproductive problems. 319 Furthermore, these agents often are used incorrectly, thus exacerbating their dangerous effects. 320

Not only are RCAs lethal, they occasionally are used in combination with more-lethal weapons as a force multiplier, where the agent is used to drive targets out from cover, making the targets vulnerable to attack.
from more-lethal weaponry. Those who might question whether this approach still exists today need only look to the use of tear gas in clearing Afghan caves or the use of white phosphorus in the November 2004 Falluja offensive in Iraq to flush insurgents out from their hiding places so they could be more vulnerable to U.S. firepower. U.N. forces also reportedly have used RCAs in combination with tanks and machine guns, such as in the July 2005 operation against supposed gangs in Haiti, perhaps to increase the efficacy of those other weapons. In addition to such offensive use, U.N. forces often accompany RCA use with gunfire into the air. Even this can be problematic because the people on the ground do not necessarily know that shots are not being aimed at them, unless they are watching the firing troops (which will not always be the case). Therefore, use of RCAs might signal to the targets that lethal force is imminent, thus sparking an immediate, disproportionate reaction.

Furthermore, RCAs (although lethal) still are less-lethal than the alternatives and may cause agitated targets not to be as deterred as they would be by alternative weaponry, thus potentially putting U.N. forces in greater danger of attack. Thus, RCAs can put U.N. forces in a vulnerable position from multiple perspectives.

3. Escalation of Hostilities

Any intervention by U.N. forces in a riot runs the risk of escalating hostilities within a host state. Reliance on RCAs by U.N. forces, however, poses a special risk of panic and inadvertent or deliberate escalation, not unlike the risks associated with all chemical agents. For example, Iranian troops fled in panic when Iraq used tear gas on the battlefield in July 1982. During the Korean War, North Korean pamphlets


323. See supra note 71 and accompanying text.


325. It is irrelevant whether the bullets are encased in rubber or not. Please also note that experts predict that less-lethal weapons will continue to be used in conjunction with conventional weapons in future armed conflicts. See, e.g., Coupland & Loye, supra note 309, at 63.

326. See Adelman, supra note 28, at 444.

327. Burck & Flowerree, supra note 43, at 115. Surprisingly, given its effectiveness, this was the only report of RCA use during the Iran-Iraq War.
decried as an atrocity U.S. use of RCAs against a POW uprising. The use of tear gas by U.N. forces in Haiti on January 13, 2005, which led to street protests when it was falsely believed that a woman died on account of tear gas, is an example of how a situation can escalate when RCAs are used. These examples indicate how RCA use can raise tensions, when subjects either do not know the less-lethal nature of the gases or believe that the use was inappropriate for the situation. UNAMIR’s use of RCAs on peaceful protestors in Rwanda in 1994 (which U.N. officials later recognized as a mistake) may have added to the tensions between the warring parties and the United Nations. UNFICYP troops in Cyprus and UNMIL troops in Liberia should feel fortunate that no such escalation was reported after they deliberately used tear gas against protesting schoolchildren in 1993 and 2004, respectively. Such panic and anger may provoke extreme retaliation by the other side, who may see gas vapors and users in protective gear and assume the worst. Even if targeted forces know that the deployed gases are less-lethal RCAs, tensions may still escalate if these forces consider RCAs as prohibited chemical weapons (as a reasonable reading of the CWC might indicate), or if the use seemed cruel (as with deliberate use on primary-school children or pregnant women).

Tear gas and other RCAs appear to be a type of “gateway” chemical weapon, much like how gateway-drug theory sees use of tobacco, alcohol, and marijuana as leading to harder drugs. At least two authors assert that Germany developed and deployed its devastating chemical weapons during the First World War only after France initiated chemical attacks with tear gas. One author asserts that use of lethal chemical weapons in Manchuria, Ethiopia, and Yemen all started with tear gas use, and goes on to claim that “[e]very confirmed resort to lethal chemical warfare has started with tear gas.” After prohibiting tear gas in all armed conflicts, the Netherlands Military Manual states that such use “runs the danger of provoking the use of other more dangerous chemi-

328. CRODDY, supra note 43, at 117.
329. Bracken, supra note 73.
330. See supra note 92 and accompanying text.
331. Again, this is not to say that this use of RCAs in Rwanda somehow contributed to the genocide or that there would not be ample justification for using RCAs in the face of an impending genocide.
332. Supra notes 87, 105 and accompanying text.
333. See KALSHOVEN & ZEGVELD, supra note 132, at 42–43.
335. See CRODDY, supra note 43, at 118; HABER, supra note 20, at 24.
Even proponents of RCA use in warfare recognize the dangers of chemical escalation when RCAs are used. For example, one U.S. official acknowledged in 1980 that U.S. use of RCAs could convince other states that they are entitled to respond with more-lethal chemical weapons of their own. Moreover, a U.S. Army Field Manual warns commanders that targeted forces may misunderstand RCA use as a chemical weapons attack, and requires that they "consider international ramifications and Rules of Engagement before recommending the use of herbicides or RCAs." Support for the notion that RCAs lead to chemical escalation can be found in state practice. The Viet Cong responded to U.S. reliance on tear gas by acquiring its own chemical agents. Insurgents during the Spanish Civil War threatened to use their own form of "gas" after the Spanish government deployed tear-gas shells against insurgents' positions. Some commentators have speculated that Saddam Hussein would have relied on U.S. use of RCAs, had it used them, as a pretext to unleash his far-more-lethal chemical weapons during the First Gulf War. Although mere speculation, KFOR's use of tear gas in 1999 may have convinced Serb forces that it was acceptable for them to (reportedly) use a different less-lethal weapon, BZ, against the Kosovo Liberation Army in 1999.

Even if RCA use does not immediately lead to escalation, it might do so indirectly over time as a state becomes dependant on RCAs and increases its reliance on them. For example, even though then U.S. Secretary of State Rusk stated in March 1965 that the United States would only use tear gas for riot control in Vietnam, use became virtually unlimited just five months later when the tactical advantages to RCAs became readily apparent after a U.S. Marine successfully drove four hundred civilians and enemy combatants from a cave using CS grenades without civilian injuries. Regardless of whether the escalation is direct or

337. See Henckaerts & Doswald-Beck, Practice, supra note 34, at 1744-45 (quoting Netherlands, Military Manual § 14 (1993)).
340. See Clarke, supra note 268, at 48.
341. See Henckaerts & Doswald-Beck, Practice, supra note 34, at 1762 (citing SIPRI, The Problem of Chemical and Biological Warfare, 1 Rise of CB Weapons 147 (1971)).
342. See Eberhart, supra note 299.
344. See Dando, supra note 109, at 76–77; Hersh, supra note 265, at 173–79; "Non-Lethal" Weapons, supra note 336, at 2 (discussing the transformation of U.S. policy and use
indirect, U.N. forces ought to take steps to avoid such escalation by refraining from relying on chemical agents such as RCAs.

4. Hasty Use of Indiscriminate Weapons

RCAs used hastily and in an indiscriminate manner cause serious problems. Military planners might be more eager to use more force earlier and reserve questions for later if convinced that no permanent damage can be done to their targets or to those carrying out the attacks. As already mentioned, this belief is unfounded and, combined with overuse, could lead to disastrous consequences.

While RCAs and other less-lethal weapons might decrease casualties in the short-term, they also might decrease combatants' efforts to discriminate between combatants and noncombatants. The international humanitarian law (IHL) principle of discrimination requires that an attacker be able to differentiate between combatants and military objectives, on the one hand, and noncombatants and civilian objects, on the other, with the attacker then targeting only the former. Even though this principle is central to all of IHL, it is perhaps best reflected in Article 48 of the First Additional Protocol to the Geneva Conventions:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

This principle essentially creates an obligation for combatants to exercise reasonable care to ensure that they cause no unnecessary suffering to civilians. The IHL prohibition of indiscriminate attacks applies to all attacks, regardless of whether the weaponry is more- or less-lethal. The indiscriminate nature of chemical weapons, rather than their lethality, likely was the impetus for interwar efforts to ban their use. Indeed, only two percent of casualties from chemical weapons died during the First World War, compared with 25.8 percent of non-gas casualties, and only 4.1 percent of non-fatal gas casualties were discharged as disabled, com-

345. See generally Cook et al., supra note 15, at 39.
346. See Dando, supra note 109, at 16.
pared with the 25.4 percent wounded by non-gases. These statistics cut against the argument made by RCA proponents, who rely exclusively on RCAs' low lethality in concluding that they are "humane." Low lethality alone ought not determine how humane a weapon is. The prohibition of indiscriminate attacks must be given its due consideration.

RCAs generally are considered to be indiscriminate area weapons. One need only remember the roughly thirty Haitian schoolchildren treated for tear-gas inhalation and skin irritation to understand that RCAs continue to be indiscriminate area weapons today. RCAs typically are so indiscriminate that not even those who deploy them are entirely safe from their effects—for example, when the wind changes directions after the gas is released. Allowing U.N. forces to use such indiscriminate weapons as RCAs in their missions makes as much sense as allowing swimmers to relieve themselves in a designated portion of a pool. Admittedly, it is possible for RCAs to be delivered in more targeted ways than as aerosolized sprays, which could decrease their indiscriminacy. For example, the Deputy Assistant Judge Advocate General of the U.S. Navy conducting the legal review of the pepper spray explained that the "contemplated [Oleoresin Capsicum] dispersers utilize a target specific stream of ballistic droplets for controlled delivery and minimal cross contamination (i.e., point target delivery), rather than an aerosolized spray which increases the likelihood of unintended subject impact." However, as the use of "contemplated" in this quote indicates, this type of dispersal mechanism might not be that common. Even if, arguendo, U.N. troops had the capacity to deliver all RCAs in streams of state-of-the-art "ballistic droplets," there still would remain the tendency to use them too hastily before giving warnings or before clearly identifying the target as a combatant, which is a distinct problem from the perspective of the IHL principle of discrimination.

5. History of Abuse

Virtually all weapons and weapon systems can be tied to past acts of oppression. However, tear gas and other RCAs have had a particularly close connection with severe human rights violations and torture in the

349. See Clarke, supra note 268, at 162.
350. See Michael O'Hanlon, Technological Change and the Future of Warfare 92 (2000); Hu et al., supra note 43.
351. Bracken, supra note 73.
352. See Mad Mag., June 2009, at 1 (attributing to Alfred E. Neuman a similar analogy of having a smoking section in a restaurant).
past, and do so again. As David Koplow points out, RCAs could provide torturers with the ideal tool, given the fact that they typically do not leave detectable wounds when inflicting temporary yet intense harm. These less-lethal weapons can be used in dangerous, if not sinister, ways that the designers did not imagine or intend. For example, tear gas grenades were used against Japanese-American internees in Californian internment camps around the time of the Second World War, which raised serious human rights concerns. Over the years, there have been several reports that Guantanamo Bay prisoners have been abused with pepper spray. In addition, Darfur police used tear gas, in addition to brutal force, against refugees in a U.N.-supervised camp, apparently as U.N. officials stood by and watched. U.N. forces themselves have used tear gas on communities regularly subjected to repression by local police authorities, as occurred in Haiti in July 2005. This use might easily be confused with the abuse that dissidents might have suffered at the hands of their local authorities, especially if the U.N. forces took no action against the past abuse of those local authorities.

Some critics will think it is impossible that U.N. forces would use RCAs as a form of torture and that it is unbelievable that anyone would ever fear such abuse from U.N. forces. However, if anything has been learned from the past decade’s allegations of sexual exploitation and

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354. See Hu et al., supra note 43.
355. See Koplow, supra note 7, at 138.
356. See Fidler, supra note 259, at 98.
359. See, e.g., Tom Allard, US Tortured Second Australian: Electric Shocks, Claims Lawyer, SYDNEY MORNING HERALD, May 21, 2004, at 1; Rendition Is Just Another Word for Torture, IRISH TIMES, Apr. 5, 2006, at 18. One newspaper report even claims that such abuse has gotten worse since U.S. President Barack Obama entered office. See Jail’s Sting in the Tail, SYDNEY MX (Sydney, Austl.), Feb. 26, 2009, at 10 (reporting that guards in Guantanamo Bay have applied pepper spray to prisoners’ toilet paper).
360. See The Genocide Must be Stopped, SCOTSMAN (U.K.), Nov. 18, 2004, at 27.
361. See supra note 82 and accompanying text; see also Stevenson Jacobs, Police Open Fire During Pro-Aristide Protest in Haiti, Killing at Least One, Witnesses Say, A.P., Mar. 24, 2005 (reporting that local police killed two during earlier peaceful protests in Cité Soleil, although the police claimed that they only fired tear gas).
abuse by U.N. forces, it is that not all U.N. forces are angels, as some are inclined to believe. Further, what is most important in the context of avoiding escalation is public perception: U.N. forces should avoid even the appearance of impropriety, and so should foreswear use of RCAs and all weapons of oppression in their operations.

6. Deadly Delivery

The delivery mechanisms for these agents can also cause serious injuries and death when used at close range or dispersed with an exploding mechanism. A U.S. Marine Corp Reference Publication provides such a warning with regard to RCA projectiles launched from rifle-equipped grenade launchers, which purportedly can penetrate wood. These RCA projectiles, as well as RCA grenades, mortar and artillery shells, and even cluster bombs, create potentially lethal shrapnel. In fact, this fact was central to Germany’s argument that its use of poison gas delivered by exploding projectiles in battles after the Battle of Ypres was not technically a violation of the 1899 Hague Gas Declaration: its projectiles did not have the “sole object” of diffusing poison gas. Using non-lethal RCAs in a manner that has such lethal effects can dramatically escalate a conflict. Whether such ordnance as artillery shells and cluster bombs can be used in riot-control is an entirely separate matter, which relates more to the dangers from escalation.

7. Destabilizing an Important Disarmament Regime

Finally, any violation or perceived violation undermines the chemical weapons disarmament regime and destabilizes the international community. Indeed, it is believed that the use of tear gas and defoliants during the Vietnam War severely weakened the Geneva Gas Protocol. Israeli use of tear gas has often inflamed its neighbors to the point of destabilizing the entire region, especially when tear gas proved fatal.

363. See, e.g., Hu et al., supra note 43.
365. See Rosenberg, supra note 264, at 36 (discussing how the Bazalt Works in Russia is weaponizing RCAs in this manner).
367. See DANDO, supra note 109, at 81 n.26.
when used in a confined space in high concentrations. The stability of the CWC regime would likely suffer if U.N. forces continue to use RCAs on a large scale, partly because of the CWC’s express prohibition and partly because U.N. forces are meant to be exemplary forces. Improper use of RCAs at least undermines the CWC disarmament regime, and at most threatens its entire undoing. Moreover, U.N. forces, in particular U.N.-controlled peacekeeping operations, have always had as their primary task the disarmament of parties to a conflict. If U.N. forces are to be successful in disarming parties to a conflict, they may not be seen as using prohibited weapons themselves. Otherwise, the United Nations and its forces may lose legitimacy in the eyes of the belligerents.

Given these seven concerns, it might be best for the United Nations to take steps to prohibit RCAs in all situations. Doing so would help ensure against chemical escalation during or as a result of U.N. operations. With these points in mind, the following Part looks at how best to limit RCA possession and use during U.N. operations.

V. HOW TO PROHIBIT RIOT-CONTROL AGENTS

U.N. forces can best be protected from the dangers mentioned in the preceding Part by an express prohibition by the Security Council on their use and possession of RCAs. This Part discusses six ways in which the United Nations and interested states can help ensure that U.N. forces forsake RCAs in future operations, in addition to the simple act of prohibiting them in U.N. rules of engagement.

A. Prohibition by the Security Council

The first and easiest way to prohibit U.N. forces from possessing or using RCAs is for the Security Council simply to prohibit such posses-

369. See Dando, supra note 109, at 188.
371. See Dando, supra note 109, at 189–90.
sion and use when crafting the mandates for these forces. This essentially is the only way for the United Nations to prohibit their use by U.N.-authorized forces because the initial authorization is the main way the United Nations currently exercises control over these forces (although the development of other control mechanisms over these forces would be ideal). U.N.-controlled operations also rely on a Security Council mandate, which also is the main way the Security Council exercises control over these forces, so their RCA use could be curtailed if their authorizations took this into account as well.

B. U.N. Accession to the CWC

The United Nations could formally accede to the CWC. As Part III.C.1 above emphasizes, only a state can be a party to the CWC. However, if the CWC allowed U.N. accession, there would be nothing to stop it from joining the CWC, particularly given its international legal personality. To do so would require amendment of the accession clause of Article XX to include international organizations, which in turn would require an Amendment Conference called by a third of the membership, in which a majority voted in favor of the amendment and none opposed it, followed by ratifications or acceptances by all of those states that voted in favor. A simplified process is available only for technical changes to the CWC annexes, which requires only a proposal, recommendation by the Executive Council, and no objection by a state party within ninety days. These amendments certainly are easier said than done. Although a few technical changes to the CWC successfully have been made, the type of substantive amendment that this section mentions would likely take years of intense political wrangling and would require endorsement from member-states’ legislatures. Still, if there is enough political will for such an amendment, it remains a possibility.

Unfortunately, the CWC lacks a provision similar to Article 96 of the First Additional Protocol of the Geneva Conventions, which allows a
non-state party to a conflict to accede \textit{sua sponte} to the obligations of the Geneva Conventions and which then obliges the other parties to the conflict to follow the obligations contained in the Geneva Conventions.\textsuperscript{377} Several commentators assert that the United Nations should not join the Geneva Conventions even if it could because doing so would make belligerents view U.N. forces differently, perhaps as combatants, thus putting them in danger of being targeted.\textsuperscript{378} However, such dangers do not exist when joining the CWC, as state belligerents are absolutely prohibited from using and possessing chemical weapons, including certain uses of RCAs, under the CWC.

Assuming, \textit{arguendo}, that it were possible for the United Nations to accede to the CWC, doing so would oblige the United Nations to include within its initial authorizations some mechanism for ensuring that its authorized forces do not rely on RCAs unlawfully—whether through express prohibition of such use, reference to the CWC, or reference to a yet-to-be created Secretary-General Bulletin addressing this topic. Still, U.N. accession to the CWC would have limited impact on U.N.-authorized forces, since the United Nations has no direct control over the rules of engagement or the daily functioning of these forces outside of its initial authorization and subsequent amendments to that authorization.

\textbf{C. Prohibition in SOFAs}

The United Nations could include an RCA prohibition in Status of Forces Agreements. Such an approach has been used with regard to binding U.N. forces to abide by the Geneva Conventions.\textsuperscript{379} The 1999 U.N. Secretary-General’s Bulletin on the observance by U.N. forces of international humanitarian law included in section 3 a requirement that the United Nations, through its SOFAs with host states, “ensure that the [U.N.] force shall conduct its operation with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel.”\textsuperscript{380} While the SOFAs referred to in this bulletin typically act as a type of privileges and immunities agreement between the

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\textsuperscript{377} See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 96(2), June 8, 1977, 1125 U.N.T.S. 3.


\textsuperscript{379} See Documents on the Laws of War, \textit{supra} note 5, at 723.

\textsuperscript{380} Secretary-General’s Bull., Observance by United Nations Forces of International Humanitarian Law, § 3, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999). Please note that the legal weight of this declaration is unknown. For example, it is unclear whether this bulletin creates a basis upon which a prosecutor could charge U.N. forces with war crimes. This topic is reserved for future research.
United Nations and the host state, there is no reason why their scope could not be expanded to include a provision requiring U.N. forces to abide by the CWC's prohibitions concerning RCAs. While this approach will work with regard to U.N.-controlled forces, since the United Nations typically negotiates these SOFAs with host states, the United Nations will not have any influence over SOFA negotiations for U.N.-authorized forces because the lead entity negotiates the SOFA on behalf of the group. Likewise, there are a host of pre-existing SOFAs between troop-contributing countries and host states that will not be subject to the requirement mentioned in the Secretary-General's Bulletin or the United Nations' SOFAs with the host state. The United Nations and the international community, nevertheless, could put considerable pressure on these states and entities to include within their new or amended SOFAs a provision addressing the prohibition of RCAs, although the United Nations ultimately has no control over the contents of these SOFAs. Alternatively, the United Nations could include the necessary language in a provision of the Model SOFA. At least one scholar asserts that the rules in the Model SOFA are customary law binding the United Nations, the host state, and the participating states concerning all U.N. operations, regardless of whether a relevant SOFA already has entered into force. Inclusion of this language in the Model SOFA would simplify dramatically the task for the United Nations of binding all of its forces to obey the prohibitions on RCAs. That said, it is unclear whether a provision in the Model SOFA would be sufficient to form customary international law without the requisite state practice and opinio juris.

D. Declaration of War

Contributing states that are opposed to RCA possession and use by any member of a U.N. force could declare a "state of war" with the U.N. forces. Such a declaration could trigger the CWC's "method of warfare" language. While this option admittedly is drastic, states have done this in the past so that violations of IHL by their own forces could be treated as

381. It must be noted again that most troops probably already have obligations under the CWC, given that most, if not all, of the contributing states are party to the CWC. Still, there might be merit in trying to establish a separate obligation directly on U.N. troops in case a troop-contributing state happens not to be a party to the CWC at the time of violation or if one is interested in holding the United Nations itself accountable for the violation of these norms.

382. For example, NATO signed the Interim Agreement for Peace and Self-Government in Kosovo, a type of SOFA, on behalf of the rest of NATO with the Federal Republic of Yugoslavia, which agreement ensured the immunity of NATO personnel, among other things. See Siekman, supra note 294, at 115–16.

383. See id. at 108.

war crimes. Assuming states felt strongly enough about RCA prohibition, why not in the case of RCAs? While such a declaration would bind only the declaring state, it might deter states from using RCAs for fear of being seen as violating CWC Article I(5). Nonetheless, it must be acknowledged that this option is difficult for the obvious reason that states dislike declaring war these days, even when military force is being used in an interstate setting that would have been considered a “war” before the Second World War. Besides, if states are participating in a U.N. peace support operation, they generally have already decided to take a separate path from that involving war.

E. Prohibition by the Secretary-General Bulletin

The Secretary-General could issue a bulletin prohibiting the carriage and use of RCAs by U.N. forces, similar to his 1999 bulletin requiring U.N. forces to abide by IHL in all operations. Doing so conceivably would apply the prohibition of RCAs (as a method of war) to national contingents in U.N.-controlled operations whose states are not party to the CWC. A significant problem with regard to U.N.-authorized forces is that they generally are not bound by such bulletins, although they could be bound by the content if the bulletin in question represented lex lata as opposed to lex ferenda. One way to fix this shortcoming would be for the Security Council to incorporate such a bulletin into its authorization by reference, which is essentially the same as the first option mentioned above.

Another alternative with the same effect would be for the Secretary-General to issue a directive through the U.N. Department of Peacekeeping Operations to all U.N. peacekeepers to refrain from carrying and using RCAs in all of their operations. This is what happened in July 2007, when such a directive required U.N. peacekeepers in Liberia, East Timor, Côte d’Ivoire, Haiti, Kosovo, and the D.R.C. to refrain from carrying and using rubber bullets and bean-bag rounds after U.N. peacekeepers killed two ethnic Albanian protestors with rubber bullets expired thirteen years prior. The protestors had been protesting, along with three thousand other individuals, the United Nations’ plan for Kosovo. Whether it is by a bulletin or a Secretariat directive for U.N. peacekeeping forces, the Secretary-General has a crucial role in developing the norms that regulate the activities of these forces, regardless of whether or not these norms are legally binding.

385. See Sickman, supra note 294, at 121.
386. See DOCUMENTS ON THE LAWS OF WAR, supra note 5, at 721.
387. See id. at 722. After all, who gave power to the Secretary-General to bind states in such matters?
388. See Nebi Qena, U.N. Suspends Rubber Bullets, A.P., July 12, 2007 (explaining that rubber coatings harden over time and may become fatal after expiration).
F. Creation of an Armament Review Body

Finally, there is the possibility of the Security Council creating a body to review the legality of the activities and armaments of U.N. forces, or some other mechanism to review the authorizations it creates. This is a particularly attractive option inasmuch as it involves the Security Council, through its subsidiary organ, to a greater extent and on an ongoing basis in the operations it initiates through its resolutions, thus increasing the chances of the Security Council adjusting or clarifying the parameters of its authorizations as the need arises. A fundamental problem with this and the other options is that the Security Council must want to make a decision that impacts U.N. forces, either by subjecting U.N. forces to the CWC’s prohibitions regarding RCAs or in some other manner. Given U.S. eagerness to rely on RCAs in peace operations in the past and its veto within the Security Council, all of the options mentioned in this Part might not be viable at this time. Still, as Clarke’s Second Law states, “The only way of discovering the limits of the possible is to venture a little way past them into the impossible.”

CONCLUSION

Dulce bellum inexpertis—War is sweet to the inexperienced. This is not to say that military commanders who applaud RCA use are inexperienced. Rather, critics likely will discount much of this Article as the ivory-tower ruminations of a lifelong civilian, and they will have a point. This Article admittedly has focused on what U.N. forces should not do, instead of explaining what they should do. This relatively negative approach to the methods and means of warfare for U.N. forces must be particularly frustrating for U.N. force commanders who see the spectrum of tools at their disposal ever shrinking, first with the ban of rubber bullets and bean-bag rounds in July 2007, and now the perceived problems with RCAs. The August 2007 lifting of the ban on rubber bullets for those fired from shotguns only partially ameliorated the situation for these commanders, if only because it strengthened the argument against RCA use. Indeed, the United Nations decided to allow rubber-bullet-firing shotguns in an effort to avoid the severe injuries that indiscriminate RCA use

389. See Dando, supra note 109, at 189.
390. See Karel Wellems, Remedies Against International Organisations 52 (2002).
392. See supra Part V.E.
had caused to civilians in East Timor.  
Regardless, what these commanders need to realize is that international law essentially is negative in orientation, inasmuch as it tells subjects of international law what they cannot do. Some commentators have tried to extend the Lotus principle to international organizations, finding some support in ICJ decisions such as the Certain Expenses advisory opinion. However, such a notion is not without its dangers. Nonetheless, international law tends to provide limitations on subjects of the international legal order, and force commanders generally will be well served if they get used to the frustration associated with international law filling (and fulfilling) this role.

This Article has argued that RCA reliance by U.N. forces is potentially illegal and certainly bad policy. In light of these arguments, force commanders should disavow RCAs for the following reasons:

- The CWC prohibits RCAs as a method of warfare and as a temporary incapacitator, although both avenues of prohibition are subject to the law-enforcement exception.

- Only one of the fourteen U.N. forces that have used RCAs had a clear mandate to engage in law enforcement, which means that thirty-nine instances of RCA use by U.N. forces did not readily fall under this exception. Future use likely will not fall under this exception either without changes to Security Council practice when issuing mandates to U.N. forces.

- The activities of contemporary U.N. forces are sufficiently complex to make it difficult to say with confidence that these forces are not using RCAs as a method of warfare.

- Even if the United Nations and U.N. forces might not have legal obligations directly under the CWC or customary inter-

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396. See Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151, 168 (July 20) ("But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization.") (emphasis in original).
397. See Jan Klabbers, An Introduction to International Institutional Law 66–69 (2d ed. 2009) (discussing Seyersted's ideas and the response from other commentators, and concluding inter alia that the notion of inherent powers for international organizations is problematic because "it possibly goes against the wishes of the drafters" and because "it seems to rely on a solid vision of the nature of international organizations").
national law relating to RCAs, there are numerous moral and strategic reasons for them to foreshew RCA use, such as RCAs' considerable lethality, indiscriminate nature, history of abuse, and tendency towards promoting escalation.

- The United Nations and states that have an interest in seeing U.N. forces refrain from RCAs can help by encouraging the United Nations to accede to the CWC (if such becomes possible under the CWC) or declare itself as being legally bound by the CWC; add express RCA prohibitions in their mandates and SOFAs; and have the Secretary-General adopt a bulletin prohibiting U.N. forces from using RCAs, among other options.

This Article has focused on developing these arguments and has left to commanders and their legal advisers the task of choosing the weapons that do not violate the limitations of international law, no matter how frustrating those limitations might be from a tactical, strategic, or political perspective.

Nonetheless, a few words of guidance still must be provided in order to help in choosing more appropriate weapons. After all, commanders are placed in an admittedly difficult position when faced with angry civilians (perhaps even children, pregnant women, and elderly citizens) on the one hand, and a clear mission on the other. Certainly U.N. forces should not use deadly force against such individuals. At the same time, U.N. forces cannot abandon their mission and let these civilians do entirely as they please. This is the exact situation where less-lethal methods and means are most needed. In such situations, U.N. forces should be familiar with using non-toxic varieties of less-lethal weaponry, such as slippery foams, acoustic and heat rays, and tasers, which carry many of the same benefits as RCAs without the legal problems under the CWC regime. One particularly promising category of non-toxic, less-lethal

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398. This happened in Somalia on June 16 and September 9, 1993, when U.N. forces used live rounds against demonstrators in Mogadishu (apparently without first trying to use less-lethal weapons) after part of the group attacked the forces. Their response killed approximately 20 and 126 Somalis (including women and children), respectively. See Mike McCurry, U.S. Dep't of State Daily Press Briefing (Sept. 10, 1993); Pringle, supra note 56, at 13 (reporting that it was from the earlier incident that former U.N. Secretary-General Kofi Annan started to call for U.N. forces to have riot-control gear); Watson, supra note 56, at A13; Geoffrey York, U.S. Chief Rules Out Tear Gas in Somalia Guns Only Choice for U.N. Troops, GLOBE & MAIL (Canada), Sept. 4, 1993 (reporting how the U.S. commander of the U.N. force ordered the forces not to use tear gas as crowd control, an order which the Canadian troops objected to).

399. See generally Koplow, supra note 7, at 14–21 (discussing modern NLWs and noting some of the reasons why they have not been more successful); Paul R. Evancoe,
weaponry is malodorants, which includes stinkbombs made up of sulfur compounds, skatole, and other obnoxious (but not noxious) smells that are specifically selected because they are “not incapacitating or a sensory irritant,” and thereby avoid problems with the CWC. These types of weapons give new meaning to this Article’s title Gas Smells Awful, although their use hopefully will help with crowd control with fewer negative effects on the targets and the CWC regime than RCAs. Various NATO member-states and Russia are busy developing non-RCA, less-lethal weapons. Even with these types of less-lethal weapons, extreme care must be taken—especially with acoustic and heat rays—so as to ensure that they are not used in an indiscriminate or other manner that will raise problems under the IHL regime. Again, the focus of this Article is on the CWC regime and suggesting what is inappropriate under that body of law.

One also must not forget that traditional forms of crowd control might be more effective than other less-lethal means and methods already mentioned. For example, in 1995, Greek Cypriot police used tear gas against protestors in Famagusta, Cyprus, many of whom were on motorbikes, although the protestors were not actually stopped until UNFICYP troops deployed approximately a mile of barbed wire. Again, in 1995, the Haitian police’s firing of tear gas over a period of four hours failed to disperse a group of students throwing rocks, but UNMIH troops succeeded by charging the crowd with their full riot-gear donned. These more traditional forms of crowd control raise few, if any, red flags from the perspective of international law, and therefore ought not to be forgotten, especially when the alternatives mentioned in the preceding paragraph appear not to suffice for all applications. Since FPUs allegedly “master an array of non-lethal tactics” in their training, presumably they know how to use tactics that do not involve RCAs.

If U.N. forces are to rely on RCAs without worrying about the legal ramifications, the Security Council must use its Chapter VII authority to expressly authorize them to engage in law enforcement, rather than

402. See Efty, supra note 188.
merely to assist local law enforcement officers. When providing this authorization, it would be prudent for the Security Council to specify that FPU's are to handle law enforcement as it relates to crowd and riot control since these units specialize in such matters and will be (or at least should be) more familiar with how and when to use RCAs in an appropriate manner. In the absence of such a Security Council authorization, it would be best—legally speaking—for these U.N. forces to refrain from RCAs altogether.

By prohibiting RCAs, the United Nations has much to gain. In particular, the United Nations may protect its credibility and provide greater protection to its forces. Moreover, U.N. actions would provide an example for its member states, by abiding by such important international legal norms as those contained in the Chemical Weapons Convention. As Albert Einstein once said, obviously speaking in hyperbole to emphasize the point, "Setting an example is not the main means of influencing another, it is the only means." The CWC regime is too important an institution to the maintenance of international peace and security for the United Nations to risk undermining it through its own actions. The United Nations does just that by continuing to use RCAs in its operations.
### APPENDIX I

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