

Legal Issues in Emerging Armaments: Using the Non-Lethal Weapons Experience as an Example

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**A bit of history: the case of
the “mellow monkeys”**

That was then – this is now

- ◆ **January 13, 1993: Governments, including U.S., agreed to Chemical Weapons Convention banning all chemical weapons (defined in detail in treaty) and requiring their destruction.**
 - **United States ratified on April 25, 1997.**
 - **Narrow interpretation of treaty provision for riot control agent (RCA) use in combat.**
 - **“The United States is not restricted by the [CWC] in its use of RCAs in various peacetime and peacekeeping operations. These are situations in which the U.S. is not engaged in the use of force of a scope, duration, and intensity that would trigger the laws of war with respect to U.S. Forces.” -- President’s Certification Document.**
- ◆ **22 U.S.C. 6761 establishes criminal sanctions for CWC violation by individuals.**

That was then – this is now

- ◆ **The Biological Weapons Anti-Terrorism Act (1989), 18. U.S.C. § 175, *et seq.***
 - **Prohibits anti-materiel uses**
 - **Permits prophylactic, protective, peaceful purposes**
 - **Criminal penalties for any work in violation of treaty or statute.**
 - *DOD non-lethal weapons program does not “do” biological non-lethal weapons.*

Active Denial System

◆ **The Active Denial System (ADS) is an advanced non-lethal technology that projects a long-range, man-sized beam of millimeter waves up to 1000 meters to dissuade movement or actions by individuals, crowds, etc.**

- **Burning sensation intended to deter threat.**
- **Extensive public diplomacy campaign during development, including media access.**

• **ADS was tested on more than 11,000 people who voluntarily subjected themselves to its beam. Second-degree burns occurred in only two cases.**

◆ **ADS deployed to USCENTCOM (Afghanistan) in 2010 for perimeter security at a forward operating base, but for practical and political reasons was never employed.**

◆ **March 2012: Marine Corps expressed its continuing interest in ADS.**

Weapons Review Requirement

◆DOD Directive 5000.1

- Requires legal review of new weapons or munitions, to ensure compliance with U.S. domestic law, treaties or agreements to which the U.S. is a party.**

◆DOD Directive 3000.3

- Requires legal review of all non-lethal weapons.**

◆DOD Directive 2060.1

- Requires arms control treaty review where determined applicable.**

◆ Legal reviews conducted by DOD General Counsel or Judge Advocate General of appropriate military service.

◆ Policy review by OSD separate.

Joint Non-Lethal Weapons Directorate

- ◆ **Executive Agent for DOD non-lethal programs.**
 - **Colonel Tracy J. Tafolla, USMC, Director.**
 - **JNLWD Attorney-Adviser is Mr. Joseph Rutigliano, International and Operational Law Branch, Headquarters, U.S. Marine Corps, (703) 614-2793, Joseph.Rutigliano@usmc.mil.**

- ◆ **DOD General Counsel and other military services have counterpart attorney-advisers.**

“Take home” points

- ◆ **“Emerging armament technologies” is not only complex and challenging technologically but legally and politically.**
- ◆ **Experience has shown several things:**
 - **If you’re developing an emerging armament technology and the other side doesn’t have it or is trailing your progress, it and its sympathizers will challenge its “legality” in order to delay your program until it can catch up.**
 - **Corporate leaders and military program managers have a phenomenal knack for “puffing” their product using ill-advised, inaccurate terms that ultimately may damage their efforts.**
 - **Corporate leaders and military program managers lose time and cost themselves money by failing to bring subject-matter expert lawyers into program development at the earliest opportunity.**

Questions?



Aim for the Cat