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Chemical and Biological Warfare: Focus on Asia

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NOTE

CHEMICAL AND BIOLOGICAL WARFARE: FOCUS ON ASIA

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I. INTRODUCTION

Former Deputy Secretary of State Walter J. Stoessel, Jr. recently charged that the Soviet Union had used chemical weapons, including poisonous gas, to cause the death of over 3,000 Afghanistan citizens from 1979 to 1981.[1] Following this accusation, the

1. Halloran, *U.S. Accuses Soviet of Poisoning 3,000,* N.Y. Times, Mar. 9, 1982, at A1, col. 1 (testimony before the Senate Foreign Relations Committee). The charge was based upon information received from Soviet-trained Afghan Army defectors, Afghan refugees in Pakistan, doctors who had treated victims of the chemical weapons attacks, survivors of attacks, and journalists covering Afghanistan. *Id.* at A9, col. 1. Deputy Secretary Stoessel testified that State Department analysis of the information indicated that several different agents, including irritants, incapacitants, lethal nerve gas, phosgene, mustard gas, toxic smoke, lewisite, and possibly mycotoxins have been used. *Id.* The Soviet Government responded by calling the charge "a lie." N.Y. Times, Mar. 12, 1982, at A5, col. 2.

In his address to the United Nations Second Special Session on Disarmament on June 17, 1982, President Reagan charged the Soviet Union and its allies with violation of "the Geneva Protocol of 1925, related rules of international law, and the 1972 biological weapons convention." *Id.*, June 18, 1982, at A16, col. 4. The President alleged that "the Soviet Government has provided toxins for use in Laos and Kampuchea and are themselves using chemical weapons against freedom fighters in Afghanistan." *Id.* The President prefaced this charge with the following observation: "The need for a truly effective and verifiable chemical weapons agreement has been highlighted by recent events." *Id.* President Reagan continued, after his allegations:

> We have repeatedly protested to the Soviet Government as well as to the Governments of Laos and Vietnam their use of chemical and toxin weapons.
>
> We call upon them now to grant full and free access to their countries or

Department of State released a report charging that the Soviet Union's use of chemical and toxin weapons in Afghanistan, Kampuchea, and Laos violated both treaties and established principles of international law.[2] On December 20, 1982, the "Tribunal of the Peoples, in its second Session of Afghanistan, condemned the Soviet Union for violations of the established rules of war."[3] This condemnation was based in part on the use of chemical weapons against Afghans since 1979. The evidence included a film taken by Dutch journalist Bernd de Bruin showing a chemical attack on an Afghan village.[4] On January 24, 1983, a spokesman for the French Embassy in Bangkok confirmed that the French government had evidence supporting claims that the Soviet Union was conducting chemical warfare in Southeast Asia.[5] These charges are the latest developments in a growing effort to confirm the reported use of chemical or biological weapons (CBWs) in Asia.

In 1981 Secretary of State Alexander Haig revealed that the State Department had obtained physical evidence from Southeast

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to territories they control so that United Nations experts can conduct an effective independent investigation to verify cessation of these horrors.

Evidence of noncompliance with existing arms control agreements underscores the need to approach negotiation of any agreements with care. *Id.*

2. Hilts, *New Report on Chemical War,* Washington Post, Mar. 23, 1982, at 1, col. 4. The report avers that since 1975, Soviet forces have supervised Laotian and Vietnamese forces in the use of lethal chemical and toxin weapons in Laos, that Vietnamese forces have used lethal chemical and toxin weapons in Kampuchea, and that Soviet forces have used a number of lethal chemical weapons, including nerve gases, in Afghanistan since the 1979 invasion. *Id.* at 6, col. 1. The report was based upon substantiated reports of attacks, refugee interviews, journalists' reports, intelligence information, and victims' autopsies. *Id.* For a more complete report, see Taubman, *U.S. Offers Report to Show Soviet Use of Chemical War,* N.Y. Times, Mar. 23, 1982, at A1, col. 4; *Excerpts from State Department Report on Chemical Warfare, id.* at A14, col. 1. The official Soviet news agency, Tass, characterized the charges as "dirty lies." *Id.* at A1, col. 4.

3. Wall St. J., Jan. 24, 1983, at 24, col. 3. The Tribunal of the Peoples is the successor to the Bertrand Russell war crimes tribunal, which has generally focused its attacks on the West. *Id.*

4. *Id.*

5. *Id.,* at 26, col. 6. The official French report has not been made public but is reportedly based on biological specimens from the Thailand-Kampuchea border. *Id.*

Asia confirming the presence of high levels of three mycotoxins,[6] all of which are poisonous to humans and animals but none of which are indigenous to Southeast Asia.[7] Secretary Haig declared: "The use in war of such toxins is prohibited by the 1925 Geneva Protocol and related rules of customary international law; their very manufacture for such purposes is strictly forbidden by the 1972 Biological Weapons Convention."[8] Richard Burt, Director of the State Department's Bureau of Politico-Military Affairs, went further than Haig or Stoessel in attributing responsibility for the attacks.[9] Burt asserted that the Soviet Union was "directly involved" in the use of chemical weapons (CWs) in Afghanistan and that armed forces of the governments of Laos, Kampuchea, and Vietnam[10] were deploying CWs in Kampuchea and Laos.[11] He further asserted that the Soviet Union was involved with the use of CWs in Southeast Asia.[12] Burt concluded that the use of these

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6. Crossette, *U.S. Presents an Analysis to Back Its Charge of Toxin Weapons' Use,* N.Y. Times, Sept. 15, 1981, at A1, col. 1. Toxins are "poisonous products of pathogenic . . . bacteria." BLACK'S LAW DICTIONARY 1337 (5th 1979). Mycotoxins are produced by fungi. Sullivan, *Toxin Is Called a Pillar of Soviet Arsenal,* N.Y. Times, Sept. 15, 1981, at A8, col. 4.

7. N.Y. Times, Sept. 15, 1981, at A6, col. 3; *Id.,* Sept. 14, 1981, at A8, col. 3.

8. N.Y. Times, Sept. 14, 1981, at A8, col. 3. The Soviet, Vietnamese, and Laotian governments denied that chemical agents were being used in Southeast Asia. Crossette, *supra* note 3, at A7, col. 6; Burns, *Moscow Says Toxin Charge Made by Haig Was a 'Big Lie,'* N.Y. Times, Sept. 15, 1981, at A8, col. 5.

9. *'Yellow Rain' and Other Forms of Chemical and Biological Warfare in Asia: Hearing Before the Subcomm. on Arms Control, Oceans, International Operations and Environment of the Senate Comm. on Foreign Relations,* 97th Cong., 1st Sess. 12 (1981) (statement of Richard Burt, Director, Bur. of Politico-Military Affairs, U.S. State Dep't) [hereinafter cited as *Senate Hearing*]; *see also* Shribman, *U.S. Finds Chemical Warfare Toxins in Indochina,* N.Y. Times, Nov. 11, 1981, at A8, col. 4 (claiming discovery of a "smoking gun").

10. Secretary of State Haig had observed in his Berlin speech of September 13, 1981, that "Vietnam . . . has seized Kampuchea and now threatens the peace of Southeast Asia." N.Y. Times, Sept. 14, 1981, at A8, col. 2. The Vietnamese Government's armed forces have been linked to deployment of chemical weapons in Laos and Kampuchea. *See Use of Chemical Agents in Southeast Asia Since the Vietnam War: Hearing Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs,* 96th Cong., 1st Sess. *passim* (1979) [hereinafter cited as *House Hearing*]; N.Y. Times, Apr. 25, 1982, at A9, col. 2.

11. *Senate Hearing, supra* note 9, at 17.

12. *Id.* Burt listed reasons why "the links to the Soviet Union are strong":

> The Soviets are providing extensive military assistance and advice in Laos, Kampuchea, and to the Vietnamese forces fighting there. The Sovi-

toxins in Asia violated the 1925 Geneva Protocol, the 1972 Biological Weapons Convention, and customary international law.[13]

Reports of CBW use in Asia led United States Government officials to conclude that various agents, lethal and nonlethal, are being used against resistance groups in Afghanistan, Kampuchea, and Laos.[14] Refugees from Laos who were victims of what is known as "yellow rain"[15] have reported violent itching, headaches, tearing and swelling of the eyes, difficulty in breathing, se-

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ets certainly know what is happening and are in a position to stop it if they chose.

The Soviets are advising and controlling chemical warfare activity in Southeast Asia. Soviet chemical experts have inspected a number of chemical weapons storage facilities there. Both lethal and nonlethal chemicals are believed to be stored at these sites and are transported between storage facilities and ordinance camps or field use areas as needed.

There exist, insofar as we are aware, no facilities in Southeast Asia capable of producing the mold and extracting the mycotoxins in the quantities in which they are being used. Such facilities do exist in the Soviet Union, including microbiological plants, under military control and with heavy military guard.

The Soviets have resisted every effort to mount an impartial investigation of chemical weapons use in Southeast Asia and Afghanistan.

Id. Burt also testified that some attacks were reportedly conducted by Soviet biplanes used as crop dusters. *Id.* at 13. These attacks released colored clouds of particles, often yellow, which victims and witnesses called "yellow rain." *Id.*

13. *Id.* at 17. The Soviets denied the charge that they or the governments they support in Southeast Asia were using lethal CWs. N.Y. Times, Nov. 12, 1981, at A3, col. 3.

14. *See Senate Hearing, supra* note 9, at 14-15; *House Hearing, supra* note 10, *passim;* OFFICE OF THE SURGEON GENERAL, DEP'T OF THE ARMY, FINAL REPORT OF THE DASG INVESTIGATIVE TEAM: USE OF CHEMICAL AGENTS AGAINST THE HMONG IN LAOS 3, 5 (1980) [hereinafter cited as DASG REPORT]; Halloran, *supra* note 1.

Senator Dan Quayle of Indiana reported having information that Soviet medical personnel have been seen at combat locations administering antidotes to survivors and performing autopsies on some of those not so fortunate. N.Y. Times, Mar. 16, 1982, at A22, col. 3 (Letter to Editor). Data gleaned by intelligence agencies has indicated that about 10,000 people—6,000 Laotians, 3,000 Afghans, and 1,000 Cambodians—have been killed by various chemical weapons in Asia. Gwertzman, *U.S. Prepares Report on Chemical Warfare Deaths,* N.Y. Times, Mar. 18, 1982, at A8, col. 1. The State Department reported that blood and urine samples from four victims of an attack on February 13, 1982, by Vietnamese forces on Kampuchean guerrillas indicated "high levels of toxin exposure." Weinraub, *U.S. Cites Evidence on Chemical War,* N.Y. Times, May 14, 1982, at A7, col. 1. Mycotoxins were identified as one agent. *Id.*

15. *See supra* note 12.

vere nausea, uncontrollable vomiting of blood, diarrhea, blisters on the skin, hemorrhaging from mucous membranes and bodily orifices, and convulsions.[16] Those directly exposed to the agents died shortly thereafter, often within one hour. Those not directly exposed suffered similar symptoms in lesser degrees of severity, but for longer periods of time and often died after several days of intense suffering.[17]

Much of the CBW use has been directed at the Hmong tribes, mountain people who sided with the French and the United States during their respective conflicts in Southeast Asia.[18] Thus, revenge has been suggested as a motive for an apparent attempt to exterminate the Hmong.[19]

It is apparent that CBWs[20] have been used in Asia.[21] This Note

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16. For in-depth coverage of victim symptomology, see DASG REPORT, *supra* note 14. *See also Senate Hearing, supra* note 9, at 14; *House Hearing, supra* note 10, at 17-18 (statement of Tou Yi Vang, Hmong refugee).

17. *House Hearing, supra* note 10, at 7 (statement of Rep. Leach).

18. *Id.* at 14 (statement of Rep. Leach).

19. *Id.; see also id.* at 7-8 (drawing a parallel between this effort and Hitler's attempt to exterminate the Jewish race); Wall St. J., Jan. 24, 1983, at 22, col. 3.

20. United States government officials have tended to include toxins in the category of "chemical weapons." *See* Halloran, *supra* note 1, at A1, col. 1; N.Y. Times, Sept. 14, 1981, at A1, col. 5. Because toxins are chemical products of micro-organisms, *see supra* note 6, they are generally classified as biological agents. A.V. THOMAS & A.J. THOMAS, JR., 2 DEVELOPMENT OF INTERNATIONAL LEGAL LIMITATIONS ON THE USE OF CHEMICAL AND BIOLOGICAL WEAPONS 2 (1968) [hereinafter cited as THOMAS & THOMAS]; Brungs, *The Status of Biological Warfare In International Law,* 24 MIL. L. REV. 1, 47, 58-59 (1964); Neinast, *United States Use of Biological Warfare, id.* at 14.

21. For more complete treatment and development of the facts and allegations, see THE ORGANIZATION OF THE JOINT CHIEFS OF STAFF, UNITED STATES MILITARY POSTURE FOR FY 1982, 107 (1982); UNITED STATES DEP'T OF STATE, REPORTS OF THE USE OF CHEMICAL WEAPONS IN AFGHANISTAN, LAOS, AND KAMPUCHEA (June 1980) (referred to as the "Compendium"); UNITED STATES DEP'T OF STATE, UPDATE TO THE COMPENDIUM ON THE REPORTS OF THE USE OF CHEMICAL WEAPONS (Mar. 1980); 127 CONG. REC. 9021-22 (daily ed. Dec. 9, 1981) (statement of Rep. Leach); NEWSWEEK, Sept. 28, 1981, at 44.

Private investigative journalism has done much to bring the issue to light. One of the most comprehensive of these investigations is S. SEAGRAVE, YELLOW RAIN (1981). An independent investigation by ABC News resulted in "Rain of Terror" aired on the evening of December 21, 1981. *See also* Phillips, *Moscow's Poison War: Mounting Evidence of Battlefield Atrocities,* HERITAGE FOUND. BACKGROUNDER, Feb. 5, 1982; Rothwell, *Yellow Rain Over Laos,* AM. SPECTATOR, Jan. 1982, at 7; Hamilton-Merritt, *Tragic Legacy from Laos,* READER'S DIGEST, Aug. 1981, at 96.

undertakes an examination of legal responsibility for the use of CBWs by positing a hypothetical case brought before the International Court of Justice (ICJ) by the United States on behalf of resistance groups in Afghanistan, Kampuchea, and Laos[22] against the governments of the Soviet Union, Vietnam, Kampuchea, and Laos. The allegations are those detailed above, namely, (1) the Soviet Union is employing lethal or seriously injurious CBWs against Afghan resistance groups; (2) the Soviet Union is supplying and assisting the armed forces of Vietnam, Laos, and Kampuchea in their use of lethal or seriously injurious CBWs against resistance groups in Laos and Kampuchea; and (3) the Laotian government, with the assistance of Soviet and Vietnamese armed forces, is employing CBWs in an extermination campaign against the Hmong tribes in Laos.

The issues to be resolved are (1) whether the parties to this case have violated binding agreements that prohibit the use of lethal or seriously injurious chemical and biological weapons in warfare; (2) whether the parties have violated general principles of international law, as distilled from treaties, custom, judicial decisions, and writings of international scholars; and (3) whether

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The Wall Street Journal has persistently called attention to CBW use in Asia, particularly through its "Yellow Rain" editorial series. *See Yellow Rain: Gaining Speed,* Wall St. J., Mar. 11, 1982, at 26, col. 1; Kucewicz, *Asian Refugees: Death in the Night, id.,* Mar. 1, 1982, at 22, col. 3 (reporting the coincidental nighttime deaths of many Hmong refugees in the United States and speculating on a possible link with exposure to CBW agents; Wall St. J., Jan. 4, 1982, at 31, col. 1 (letter to the Editor from Richard Burt, Director of the Bureau of Politico-Military Affairs of the U.S. Department of State); Wain, *Yellow Rain: The UN's 'Pitiful Farce' . . ., id.* at col. 3; Leach, . . . *And the Choices Now Facing the U.S., id.; Denial, id.,* Dec. 30, 1981, at 6, col. 1; *ABC's Deadly Evidence, id.,* Dec. 18, 1981, at 22, col. 1; *Whitewashing Yellow Rain, id.,* Nov. 23, 1981, at 26, col. 1; *Anyone Serious?, id.,* Nov. 13, 1981, at 34, col. 1 ("Yellow Rain—III"); *How Many Smoking Guns?, id.,* Nov. 3, 1981, at 34, col. 1 ("Yellow Rain—I"). *See also* NEWSWEEK, Feb. 22, 1982, at 26; Klass, *Lifting the Curtain on Afghanistan's Horror,* Wall St. J., Jan. 24, 1983, at 24, col. 3; *Chemical Warfare Reported in Afghanistan,* N.Y. Times, Sept. 9, 1982, at A6, col. 3; *U.S. Suspects Afghans of Chemical Warfare, id.,* Aug. 11, 1982, at A5, col. 2; *Canada Prepares Study On Asian Chemical War, id.,* June 21, 1982, at A7, col. 2; *Lawyers Cite Evidence of Chemical War In Asia, id.,* June 11, 1982, at A5, col. 5; Boffey, *Some Are Swayed On Chemical War, id.,* Mar. 28, 1982, at A15, col. 1; Boffey, *Man-Made Substances Found in 'Yellow Rain,' id.,* Dec. 18, 1981, at A12, col. 2.

22. "Only states may be parties in cases before the Court." Statute of the International Court of Justice, art. 34(1), 59 Stat. 1055, T.S. No. 993, 1 U.N.T.S. at xvi.

the aforementioned elements of law apply to the types of armed conflicts occurring in Afghanistan, Laos, and Kampuchea.

This Note concludes that (1) the Geneva Protocol of 1925 and the Biological Weapons Convention of 1972 provide conventional restraints upon the use of lethal or seriously injurious CBWs; (2) modern treaties, customs, judicial decisions, and writings form a public international law norm that imposes a legal restraint limiting the use of lethal or seriously injurious CBWs and binding all states regardless of their acceptance of conventional prohibitions; and (3) the law of war today is characterized more accurately as the "law of armed conflict," because it must of necessity apply to conflicts that are not purely interstate.

Before discussing international law as it applies to the instant hypothetical case, however, this Note will examine conventions and general international law concerning the use of CBWs.

II. CONVENTIONAL RESTRAINTS

A. Introduction

In resolving a dispute, the ICJ initially refers to "[i]nternational conventions, whether general or particular, establishing rules expressly recognized by the contesting states."[23] Because an international agreement need not incorporate established international law but may include provisions which supplement, supersede, or derogate from existing international law,[24] a convention is primarily a source of international law only for its signatories.[25] This Note's examination of the major treaties in the area of CBWs will emphasize the contractual obligations undertaken by the signatories.[26]

Among the recent weapons conventions applicable today are the 1925 Geneva Protocol (Protocol)[27] and the 1972 Biological

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23. *Id.* art. 38(1)(a).

24. *See* J. BRIERLY, THE LAW OF NATIONS 57 (H. Waldock 6th ed. 1963); G. HACKWORTH, 1 DIGEST OF INTERNATIONAL LAW 17 (1940).

25. J. BRIERLY, *supra* note 24, at 57.

26. For treatment of the major conventions as sources of general international law, see *infra* text accompanying notes 23-101.

27. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65 [hereinafter cited as Protocol] *reprinted in* THE LAWS OF ARMED CONFLICTS 110 (D. Schindler & J. Toman eds. 1973) [hereinafter cited as SCHINDLER & TOMAN].

Weapons Convention (BWC).[28] Earlier international agreements were signed by a previous government of the Soviet Union, and colonial mother countries of Afghanistan, Kampuchea, Laos, and Vietnam.[29] Because the issues of state and government succession, although worthy of examination, are beyond the scope of this Note, the later section on general international law will discuss the older, less widely accepted agreements.

B. The 1925 Geneva Protocol

The signatories to the Geneva Protocol agree:

> Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; and
> Whereas the prohibition of such use has been declared in Treaties to which the majority of the Powers of the world are Parties; and
> To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and practice of nations;
> That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration. . . .
> The present Protocol will come into force for each Signatory Power as from the date of deposit of its ratification, and, from that moment, each Power will be bound as regards other Powers which have already deposited their ratifications."[30]

The Soviet Union and Vietnam are parties to the Protocol; Af-

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28. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062 [hereinafter cited as BWC], *reprinted in* A DOCUMENTARY HISTORY OF ARMS CONTROL AND DISARMAMENT 600 (T. Dupuy & G. Hammerman eds. 1973) [hereinafter cited as DUPUY & HAMMERMAN]. One hundred sixteen nations are party to the Geneva Protocol. UNITED STATES DEP'T OF STATE, TREATIES IN FORCE 289 (1981) [hereinafter cited as TREATIES IN FORCE]. Eighty-eight nations are party to the BWC. *Id.* at 265-66.

29. The Soviet Union has denied succession to pre-Revolution treaties. O'Brien, *infra* note 108, at 18 n.43. Kampuchea, Laos, and Vietnam were colonized by France; Afghanistan was a colony of Great Britain.

30. Protocol, *supra* note 27, at 575.

ghanistan, Kampuchea, and Laos are not.[31] The Soviets ratified the Protocol in 1928 with the following reservation qualifying its obligation:

> (1) The said Protocol is only binding on the Government of the U.S.S.R. as regards those Powers and States which have both signed and ratified the Protocol or have finally acceded thereto.
> (2) The said Protocol shall cease to be binding on the Government of the U.S.S.R. toward any Power at enmity with him whose armed forces, or the armed forces of whose allies, fail to respect the prohibitions laid down in the Protocol.[32]

Vietnam recently acceded to the Protocol[33] but maintained a similar reservation.[34] The first part of the U.S.S.R.'s reservation seems to reiterate the final "effectiveness" provision which makes the Protocol binding only between the ratifying or "Contracting parties." Thus, a ratifying party presumably would be free to make first use of the prohibited weapons against any state not a party to the Protocol. The second part of the reservation implies that once the Protocol is violated by a signatory nation or the ally of a signatory nation, even if the ally itself is not a party, the Soviet Union may use any of the prohibited weapons against the violator and its allies. The reservation thereby reduces the reserving party's obligation to the following: No first use of the prohibited weapons against other contracting parties, but only if the allies of these parties have complied with the Protocol.

First, the Protocol prohibits "the use in war of asphyxiating, poisonous, or other gases, and of all analogous liquids, materials, or devices."[35] This terminology constitutes a broad proscription and has been subject to varying interpretations.[36] In the process

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31. TREATIES IN FORCE, *supra* note 28, at 289.

32. SCHINDLER & TOMAN, *supra* note 27, at 119. A number of states ratified the Protocol with similarly worded reservations, including the United Kingdom, France, Australia, Chile, Israel, and Portugal. *Id.* at 115-19. *See also* 120 CONG. REC. 40,023-24 (1974).

33. *See* SCHINDLER & TOMAN, *supra* note 27, at 111.

34. Telephone interview with an employee of the Treaty Office of the Department of State (Mar. 16, 1982).

35. Protocol, *supra* note 27, at 25.

36. These varying interpretations are due, in large part, to a disparity between the English and French texts of the Protocol. The French version prohibits "gaz asphyxiantes, toxiques ou similaires." Tucker, *Weapons of Warfare,* in LAW AND RESPONSIBILITY IN WARFARE 165 (P. Trooboff ed. 1975). Thus, the English version can lead to a broad interpretation that prohibits all other gases,

of interpreting a convention, the ICJ would likely "giv[e] effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances."[37] The ICJ might focus on the words "asphyxiating" and "poisonous" in the Protocol. "Asphyxiating" means "suffocating."[38] "Poisonous" is defined as having the property of "chemically produc[ing] an injurious or deadly effect."[39] These adjectives were included to encompass "first-generation chemical agents that played such a large part in World War I,"[40] such as phosgene, chlorine and mustard gas, and other choking, blistering, and vomit-inducing agents.[41] The Protocol's use of the word

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and the French version can lead to a narrow interpretation that prohibits only similar other gases. *Id.* The former interpretation could be the basis of an argument that the Protocol prohibits all lethal and nonlethal chemical agents. *Id.* For further discussion on the debate arising from a comparison of the English and French texts, see 3 STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, THE PROBLEM OF CHEMICAL AND BIOLOGICAL WARFARE 47-48 (1973) [hereinafter cited as 3 SIPRI]; THOMAS & THOMAS, *supra* note 20, at 75-76.

Much of the recent debate has focused on the legality, according to the Protocol, of using lethal antiplant or nonlethal antipersonnel agents, including tear gas and herbicides. The United States argued for the narrower interpretation of the Protocol to defend the United States use of herbicides and tear gas in Vietnam. ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS 11 (1980) [hereinafter cited as ACDA]; Tucker, *supra*, at 165-66; *see* N.Y. Times, Mar. 6, 1971, at A3, col. 4. A discussion of nonlethal antipersonnel or lethal antiplant agents is beyond the scope of this Note. For a comprehensive treatment of this issue, see Levie, *Weapons of Warfare*, in LAW AND RESPONSIBILITY IN WARFARE 153-60 (P. Trooboff ed. 1975); Baxter & Buergenthal, *Legal Aspects of the Geneva Protocol of 1925*, 64 AM. J. INT'L L. 853 (1970); Moore, *Ratification of the Geneva Protocol on Gas and Bacteriological Warfare: A Legal and Political Analysis*, 58 VA. L. REV. 419 (1972); Tucker, *supra*, 161-72.

37. A. MCNAIR, THE LAW OF TREATIES 365 (1961); *see also* Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, entered into force Jan. 27, 1980, U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875 (1969) ("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.").

38. WEBSTER'S NEW INTERNATIONAL DICTIONARY 163-64 (2d ed. 1955).

39. *Id.* at 1905.

40. S. SEAGRAVE, YELLOW RAIN 37 (1981); *see* Bunn, *Banning Poison Gas and Germ Warfare: Should the United States Agree?*, 1969 WIS. L. REV. 375, 380-81 (The Protocol "symbolized the abhorrence for gas which even military men had after World War I.").

41. *See* THOMAS & THOMAS, *supra* note 20, at 1-3.

"analogous"[42] extends the prohibition to include other poisonous or asphyxiating liquids, materials, and devices. The proscription also covers the use of "other gases," not asphyxiating or poisonous.[43] There can be little doubt that this language proscribes the use in war of all lethal or seriously injurious chemical agents.[44]

Second, the Protocol forbids "the use of bacteriological methods of warfare."[45] Bacteria are microorganisms, but not all microorganisms are bacterial.[46] Thus, a literal interpretation of this proscription would not encompass microorganisms such as fungi and viruses.[47] A strong argument may be made, however, that this limited construction frustrates the drafters' intentions.[48] There is little doubt that this particular prohibition applies to all bacteriological agents that are lethal or severely injurious. From a contractual perspective, however, a stricter interpretation, consonant with the literal meaning of "bacteriological," is perhaps more

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42. *See supra* text accompanying note 30.

43. *Id.*

44. Most of the debate centers on whether agents that are not lethal or seriously injurious are included in the Protocol's prohibition. *See supra* note 36 and accompanying text; THOMAS & THOMAS, *supra* note 20, at 89-91. Baxter and Buergenthal conclude that the scope of the Protocol's prohibition extends to "all chemical agents having a direct toxic effect on man . . . ." Baxter & Buergenthal, *supra* note 36, at 866.

45. Protocol, *supra* note 27, at 575.

46. THOMAS & THOMAS, *supra* note 20, at 76-77.

47. Indeed, one authority limits the definition of bacteriological warfare to "the use of bacteria" and broadly defines biological warfare to include "the use of bacteria, other micro-organisms, higher forms of life, such as insects and other pests, and the toxic products of these." Neinast, *supra* note 20, at 1 n.1.

48. "If biological agents as presently delineated which infect with disease signify more than the then known bacterial agents, they should also be considered within the prohibition." THOMAS & THOMAS, *supra* note 20, at 77. Baxter and Buergenthal assert that the comprehensiveness of this specific prohibition is borne out by the interpretation given it by General Assembly Resolution 2603 A of December 16, 1969, *reprinted in* SCHINDLER & TOMAN, *supra* note 27, at 125-27. Baxter & Buergenthal, *supra* note 36, at 868. This interpretation of the Protocol prohibits the use of "[a]ny biological agents of warfare—living organisms, whatever their nature, or infective material derived from them—which are intended to cause disease or death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal, or plant attacked" in international armed conflicts. SCHINDLER & TOMAN, *supra* note 27, at 126. Even this broad, modern interpretation appears to exclude toxins, which are not living, not "infective," and do not multiply in a host body. *See supra* note 6.

appropriate.[49]

Third, the Protocol limits its proscription of CBWs to "use in war."[50] Preparatory measures such as research, development, production, stockpiling, or transfer apparently are permitted.[51]

The scope of the "use in war" requirement is less clear.[52] Although this requirement encompasses the traditional concept of international war, or war between or among states,[53] there is little basis for restricting the Protocol's application to formally declared war.[54] Even though the Protocol may not be applicable "of its own force" to civil wars or other purely domestic disturbances,[55] it is likely that its drafters intended the Protocol to encompass international armed conflicts,[56] "whether or not formally declared or otherwise recognized by one or both parties."[57]

Application of the "use in war" requirement to armed conflicts having both international and intranational characteristics is more difficult.[58] If hostilities in such a conflict escalate to an extent that a belligerent participant or an international organization

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49. *But see* 3 SIPRI, *supra* note 36, at 72, 139. The SIPRI writers find that the Protocol's prohibition of "biological means of warfare" is comprehensive and invites no restrictive interpretation. *Id.* at 139.

50. Protocol, *supra* note 27, at 575.

51. S. BAILEY, PROHIBITIONS AND RESTRAINTS IN WAR 127 (1972); F. KALSHOVEN, THE LAW OF WARFARE 91-92 (1973); SIPRI, *supra* note 36, at 28.

52. It is not helpful merely to observe that the Protocol's prohibitions do not apply "in non-war situations." *See* S. BAILEY, *supra* note 51, at 127.

53. *See* Baxter & Buergenthal, *supra* note 36, at 868. "[T]he Protocol in itself is not applicable to armed conflicts not having an international character." 3 SIPRI, *supra* note 36, at 28.

54. " 'War' is obviously referred to in its material sense rather than in its formal sense as *declared* war." Baxter & Buergenthal, *supra* note 36, at 868. After reviewing the events that initiated the 20th century's major conflicts, one authority notes that "declarations of war are practically out of fashion nowadays . . . ." F. KALSHOVEN, *supra* note 51, at 10.

55. Baxter & Buergenthal, *supra* note 36, at 869.

56. *Id.* The authors note that "it would be patently out of keeping with the purposes of the Protocol to apply it in 'war' but not in 'international armed conflict,' as if any such distinction could be made for the purpose of the use of weapons in combat." *Id.*

57. Moore, *supra* note 36, at 470-71.

58. Baxter and Buergenthal refer to this phenomenon as a " 'mixed' conflict" and cite the Vietnam conflict as an example. Baxter & Buergenthal, *supra* note 36, at 869. The SIPRI writers would categorize the Vietnam conflict as one that is not exclusively "inter-state, but of an international character." 3 SIPRI, *supra* note 36, at 29.

or tribunal deem it appropriate to apply the general laws of war or other international agreements regulating the conduct of hostilities, it would be illogical and inconsistent not to apply the Protocol.[59] Similarly, the involvement of another state in a conflict essentially within one state may lend sufficient "international character" to invoke the application of international laws of war.[60] The Australian scholar Julius Stone has observed, however, that to qualify as an international war, hostilities must exist at least between governments, if not between states.[61] Thus, if one party is not a government or does not at least possess "some authority which for the purpose of hostilities has the status of a government,"[62] the other belligerent participant is free to deal with the first party at its "discretion."[63] Submitted almost thirty years ago,[64] Professor Stone's assertions, although modern in their apparent recognition of modern trends in warfare,[65] lack the perspective of more recent authorities.[66] Present day writers likely would consider the Protocol applicable of its own force to armed conflicts of international character, whether that character results from the participation of an identifiable insurgent government or the involvement of outside states.[67] It must be remembered, however, that the Protocol's terms expressly bind only those parties who have ratified it[68] and that only states can be parties to the Protocol.[69] In its contractual sense, the Protocol therefore applies

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59. Baxter & Buergenthal, *supra* note 36, at 869. The authors note that "[c]onsistency would seem to demand that the prohibitions of the Geneva Protocol become operative *pari passu* with the rest of the international law of war." *Id.*

60. *See* Moore, *supra* note 36, at 471.

61. J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 305 (2d ed. 1959).

62. *Id.* Stone cites as examples of this status the insurgent government of Franco in Spain and the Republic of North Korea during the Korean conflict. *Id.*

63. *Id.*

64. The same assertions are made in the first edition of Professor Stone's work. J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 305 (1954).

65. *See supra* note 54.

66. *See, e.g., supra* notes 56 & 59.

67. *See supra* notes 53-57 and accompanying text.

68. *See supra* text accompanying note 30.

69. *But see* 3 SIPRI, *supra* note 36, at 29. Their view is:

> This latter problem [that a belligerent participant cannot be a party to the Protocol if it is not a state] is, however, mostly formal. The obligation of an insurgent party within a state to observe humanitarian rules accepted by that state is no more paradoxical than is the obligation of a new state,

only to interstate armed conflicts.

The Protocol prohibits its parties, including the Soviet Union and Vietnam, from resorting to first use of lethal or seriously injurious chemical or bacteriological weapons against other parties to the Protocol in interstate armed conflict. The use of these weapons against resistance groups within Afghanistan, Kampuchea, and Laos, none of whom are parties to the Protocol, apparently would not violate the obligations of either Vietnam or the Soviet Union.[70]

C. The 1972 Biological Weapons Convention

The 1972 Biological Weapons Convention (BWC)[71] is more pervasive in scope than the Procotol. The Soviet Union, Vietnam, and Laos are nonreserving parties to the BWC.[72] Kampuchea signed the BWC on April 10, 1972,[73] but had not ratified it as late as 1981.[74] In accordance with article I of the BWC, each signatory agrees never to develop, produce, stockpile, or otherwise acquire or retain:

(1) [m]icrobial or other biological agents, or toxins whatever their

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born into a community of states, to observe the customary rules of that community.

Id. Would it be any more paradoxical for a state in which there is an insurgent party to observe humanitarian rules accepted by the insurgent party? *See also* Moore, *supra* note 36, at 471-72. Moore observes that a mixed conflict or highly violent internal conflict triggers the Protocol's application only if parties to the Protocol are opposing belligerents. *Id.* at 471.

70. *See supra* text accompanying notes 30-34. The acceptance of reservations is not at issue here. That issue would arise if both belligerent participants were parties and one party's obligation was qualified by a restrictive reservation while the other party's was not. Because several major nations ratified the Protocol with similar restrictive reservations, the significance of an acceptance issue in the instant situation is undermined. *See supra* note 32. For a discussion of reservation acceptance, see W. BISHOP, INTERNATIONAL LAW 132-33 (3d ed. 1971). For a discussion of reservation acceptance with regard to the Protocol, see THOMAS & THOMAS, *supra* note 20, at 80.

71. *See supra* note 27.

72. TREATIES IN FORCE, *supra* note 28, at 265-66. Afghanistan deposited its ratification on Mar. 26, 1975. ACDA, *supra* note 36, at 128. Laos deposited its ratification on Mar. 20, 1973. *Id.* at 129. The Soviet Union did so on Mar. 26, 1975. *Id.* at 130. Vietnam acceded on June 20, 1980. Telephone interview with employee of the Treaty Office of the Department of State (Mar. 19, 1982).

73. ACDA, *supra* note 36, at 129.

74. TREATIES IN FORCE, *supra* note 28, at 266.

> origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
> (2) [w]eapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.[75]

The remaining articles of the BWC provide guidelines for reaching the objective of article I.

Article II of the BWC requires each party to destroy or divert to peaceful use within nine months after the Convention becomes effective all material prohibited in article I that the state possesses or has within its jurisdiction or control.[76] Article III precludes parties from transferring prohibited materials and forbids a state party to assist, encourage, or induce "any State, group of States, or international organizations" in manufacturing or acquiring any of the prohibited materials.[77] Article IV imposes an affirmative obligation upon each party to ban within its own territory, or in territories under its control or jurisdiction, those activities proscribed in article I.[78] Pursuant to article VI, a signatory to the BWC may lodge a complaint with the Security Council of the United Nations if that signatory finds that "any other State Party is acting in breach of obligations deriving from the provisions of the Convention."[79] This article also requires each party "to cooperate in carrying out any investigation which the Security Council may initiate . . . on the basis of the complaint . . . ."[80]

Article VII demands that each party provide support or assistance to any signatory requesting aid, if the United Nations Security Council decides that a violation of the convention has endangered the requesting party.[81] Article VIII precludes an interpretation of the BWC's provisions as a limit or restriction on the obligation of any signatory that is also a party to the Geneva Protocol.[82] Article IX requires each party to continue negotiations for a ban on chemical weapons.[83] Article X permits exchange of equipment and information for peaceful purposes, including sci-

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75. BWC, *supra* note 28, art. I, at 587.
76. *Id.* art. II.
77. *Id.* art. III.
78. *Id.* art. IV, at 588.
79. *Id.* art. VI(1).
80. *Id.* art. VI(2).
81. *Id.* art. VII, at 589.
82. *Id.* art. VIII.
83. *Id.* art. IX.

entific development and prevention of disease.[84] Finally, article XIII makes the BWC "of limited duration"[85] and allows a state party to withdraw from the convention with three months advance notice to the Security Council if the party decides that "extraordinary events, related to the subject matter of the Convention, have jeopardized the supreme interests of its country."[86]

The articles of the BWC, together with its assertive preambulary language,[87] absolutely prohibit the use and possession of biological and toxin weapons.[88] This prohibition eliminates the interpretational problem arising from the "use in war" requirement of the Geneva Protocol.[89] Thus, the BWC's force and application do not depend upon technical distinctions among different types of armed conflicts, nor do they depend upon technical or scientific distinctions among different types of agents and weapons. All "microbial or other biological agents"[90] are proscribed, thereby avoiding the problem of interpreting the "bacteriological warfare" language in the Protocol.[91] Also, the complete ban on "microbial or other biological" weapons and the specific ban on toxin weapons,[92] precludes the interpretational problems arising from the Protocol's prohibition against "asphyxiating, poisonous, or other gases, and of all analogous liquids, materials, or devices."[93]

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84. *Id.* art. X, at 590.

85. *Id.* art. XIII(1), at 591.

86. *Id.* art. XIII(2).

87. The preamble evidences that the drafters viewed the BWC as a step toward the disarmament of "all types of weapons of mass destruction," particularly chemical weapons. *Id.* at 585. In the preamble, the parties reaffirmed adherence to the Protocol's principles and objectives and called upon all other nations to adhere. *Id.* They also recognized the urgent need to eliminate chemical and biological weapons. *Id.* Finally, the preamble expresses the parties' determination "to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons." *Id.* at 586.

88. The SIPRI writers observe that "prohibitions of possession, even though they . . . have as their primary object and purpose the prevention or limitation of use," do not belong to the law of war. 3 SIPRI, *supra* note 36, at 14-15.

89. *See supra* text accompanying notes 51-69.

90. A microbe is defined as "[a] very minute organism; a microorganism; a germ;—popularly applied to bacteria, esp. to the pathogenic forms." WEBSTERS NEW INTERNATIONAL DICTIONARY 1552 (2d ed. 1954). Thus "microbial" agents is likely synonymous with bacteriological agents.

91. *See supra* notes 47-49 and text accompanying notes 45-49.

92. *See supra* note 20.

93. Protocol, *supra* note 27, at 575; *see also supra* note 36 and accompanying text.

The BWC, despite its admirable goals, has one fatal flaw—a complete failure to provide for compliance verification or outside supervision.[94] The BWC does include a procedure for filing a complaint with the Security Council[95] and obliges parties to lend support or assistance to a Security Council investigation,[96] but these measures do not meet the objective of rigid control required in the Preamble. The inclusion of an "escape clause" also undermines the force of the BWC. Article XIII(2) permits a state which decides its "supreme interests" are jeopardized by "extraordinary events, related to the subject matter of the Convention," to withdraw after giving three months prior notice to the other parties and the Security Council.[97] One authority has commented that this "escape" mechanism indicates that the BWC is not an "explicit recognition of the absolutely unlawful character of the use of biological weapons."[98] Although this provision does invite subjective determinations by the governments of individual states, it is not unique to the BWC[99] and may represent merely a recognition of each state's "inherent right" to defend itself.

The parties to the Convention have failed to follow carefully the provisions of the BWC. In its use of deadly toxins in Afghanistan, the Soviet Union is violating articles I, II, and IV of the BWC. Furthermore, by supplying and assisting the armed forces of Kampuchea, Laos, and Vietnam in their use of toxin weapons against resistance groups, the Soviet Union also violated article III of the BWC. Vietnam transgressed articles I, II, III, and IV of the BWC by employing toxin weapons against resistance groups

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94. *See* BWC, *supra* note 28, arts. I-XV, at 587-92.

95. *Id.* art. VI(1), at 588. Kalshoven comments that this mechanism is "not an entirely satisfactory solution of the problem of supervision, but at least something." F. KALSHOVEN, *supra* note 51, at 93.

96. BWC, *supra* note 28, art. VI(2), at 588.

97. *Id.* art. XIII(2), at 591. The withdrawing state must supply the Security Council with a statement of the extraordinary events forming the necessity to withdraw. *Id.* There is, however, no measure provided in the event the Security Council deems this statement to be false, erroneous, or an insufficient reason for withdrawal. *See id.*

98. 3 SIPRA, *supra* note 36, at 149.

99. The Partial Test Ban Treaty contains a similarly worded escape clause. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, art. IV, 14 U.S.T. 1313, 1316-17, T.I.A.S. No. 5433, 480 U.N.T.S. 43, 51-53. *See also* Jenks, *Liability for Ultrahazardous Activities in International Law*, [1966] 1 ACADÉME DE DROIT INTERNATIONAL: RECEUIL DES COURS [RECEUIL DES COURS] 99, 144 (1966).

in Kampuchea and Laos, and by assisting the governments in those countries to employ toxin weapons. Laos disobeyed articles I, II, and IV by using toxins against the Hmong in its own territory.

Kampuchea has signed but not ratified or acceded to the BWC.[100] Nevertheless, there is limited authority that, as a signatory, Kampuchea may not engage in acts contrary to the objectives and purposes of the BWC.[101] It is doubtful, however, that Kampuchea has any legal obligation under the BWC.

D. Summary

The 1925 Geneva Protocol retains some force as a legal restraint on the use of CBWs. Because of specific contractual terms and reservations in the Protocol, limiting the obligations of the Soviet Union and Vietnam, the use of CBWs in Asia has not violated the prohibitions of the Protocol. The Soviet Union, Vietnam, and Laos all have violated the more comprehensive 1972 BWC, however, by their possession and use of toxin weapons in Asia.

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100. *See supra* text accompanying notes 73-74.

101. Kampuchea is also a signatory but not a ratifier of the Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW: CASES AND MATERIALS 264-86 (1980) [hereinafter cited as BASIC DOCUMENTS]. Article 18 of the Vienna Convention provides:

> A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting acceptance or approval until it shall have made its intention clear not to become a party to the treaty . . . .

Id. at 269. Kampuchea signed the Vienna Convention on May 23, 1969, but has yet to ratify. Telephone interview with an employee of the Treaty Office of the State Department (Mar. 19, 1982). If Kampuchea were a fully ratified and obligated party to the Vienna Convention, then the issue would be whether Kampuchea has made clear its intention not to become a party to the BWC. Because Kampuchea is not a fully obligated party to the Vienna Convention, its obligation as a signatory to the BWC is uncertain. Some authority exists to indicate that a state which has signed a treaty requiring ratification has placed some limitation on its freedom of action. This limitation remains, however, only until the treaty enters into force. *See* A. MCNAIR, THE LAW OF TREATIES 199 & n.4 (1961). The BWC entered into force for the United States on March 26, 1975. TREATIES IN FORCE, *supra* note 28, at 214.

III. General International Law

A. The General Law of War

Several fundamental principles[102] in the law of war[103] are germane to an examination of the legality of CBWs. These principles include military necessity, humanity, chivalry,[104] reprisal, and self-defense. The first three principles prohibit almost all use of

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102. "Principles provide the common denominator for a number of related rules." G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 44 (5th ed. 1967).

103. Some authorities treat these principles in their discussion of "general principles of law recognized by civilized nations" according to article 38(1)(c) of the Statute of the International Court of Justice. *See, e.g.*, Kelly, *Gas Warfare in International Law*, 9 MIL. L. REV. 1, 50-51 (1960); Neinast, *supra* note 20, at 36; N. SINGH, NUCLEAR WEAPONS AND INTERNATIONAL LAW 60-64 (1959). These general principles are a supplementary source, in the event custom and convention provide inadequate assistance in the resolution of a dispute. 1 L. OPPENHEIM, INTERNATIONAL LAW 29 (H. Lauterpacht ed. 1952).

One distinguished authority states that the general principles referred to in article 38(1)(c) "hardly come into the picture" in the area of the law of war. G. SCHWARZENBERGER, *supra* note 102, at 200. Professor Schwarzenberger submits: "They [laws and customs of war] are the common denominator of roughly parallel municipal articles of war and *règlements*, which the leading military nations had enacted as standards of conduct for their own guidance and largely copied from one another." *Id.*

This view is supported by the weight of authority, which has tended to treat general principles of the law of war not as correlations or analogies to widely recognized national or municipal law concepts but as basic time-honored customary principles or general rules. M. McDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 521-22 (1961); 2 L. OPPENHEIM, INTERNATIONAL LAW 226-27 (H. Lauterpacht ed. 1952); *see* M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 313-16 (1959); F. KALSHOVEN, *supra* note 51, at 27-29; R. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 47-50 (1957); Mallison, *The Laws of War and the Judicial Control of Weapons of Mass Destruction in General and Limited Wars*, 36 GEO. WASH. L. REV. 308, 312-14 (1967); O'Brien, *Biological/Chemical Warfare and the International Law of War*, 51 GEO. L.J. 1, 37-43 (1962). These principles or general rules are said to serve both as a basis for the development of specific rules and as "a guide for determining the legal status of weapons and methods of war where no more specific rule is applicable." R. TUCKER, *supra*, at 47.

In reliance upon the foregoing authority, the discussion on general international law with regard to CBWs does not include, as per article 38(1)(c) of the Statute of the International Court of Justice, an examination of "general principles of law recognized by civilized nations." *See supra.*

104. M. GREENSPAN, *supra* note 103, at 313-16; M. McDOUGAL & F. FELICIANO, *supra* note 103, at 521-22; 2 L. OPPENHEIM, *supra* note 103, at 226-27; R. TUCKER, *supra* note 103, at 46.

CBWs, and the latter two principles permit their use only in extreme circumstances.

1. *Military Necessity and Humanity*

A belligerent party participating in an armed conflict strives primarily to attain submission of the enemy with the least possible expenditure of life, time, and resources.[105] The principles of humanity and military necessity both forbid the unnecessary infliction of suffering or destruction.[106] The principle of military necessity permits a belligerent to apply only that degree and kind of regulated force, not otherwise prohibited by the laws of war, necessary to achieve that objective.[107] Conversely, the principle of humanity forbids the use of force in degree or kind which is not necessary to achieve the objective of armed conflict.[108] The principle of humanity, therefore, is arguably a proscriptive version of the military necessity principle rather than a separate and competing interest.[109] For this reason, the following discussion focuses only upon military necessity.[110]

The military necessity of a particular weapon can be analyzed properly only in relation to its intended use as a means of achieving a particular military objective.[111] The necessity first hinges upon the legitimacy of the military objective;[112] this determination is problematic because it is subject to both political and military interpretation.[113] Second, the military necessity is contingent

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105. M. GREENSPAN, *supra* note 103, at 313-14; R. TUCKER, *supra* note 103, at 364.

106. R. TUCKER, *supra* note 103, at 46.

107. *See* M. GREENSPAN, *supra* note 103, at 313-14.

108. M. GREENSPAN, *supra* note 103, at 315; 2 L. OPPENHEIM, *supra* note 103, at 227; R. TUCKER, *supra* note 103, at 46, 364.

109. O'Brien, *supra* note 103, at 41. Tucker observes that both principles oppose unnecessary human suffering and physical destruction; thus military necessity "implies" humanity—these are "two aspects of the same principle." R. TUCKER, *supra* note 103, at 48 n.8. *But cf.* Mallison, *supra* note 103, at 314 ("It is essential to apply each principle in the light of the other if the common interests of states are to be honored.").

110. *See generally* O'Brien, *The Meaning of 'Military Necessity' in International Law*, 1 INSTITUTE OF WORLD POLITY 109 (1957) [hereinafter cited as O'Brien-1].

111. *See* THOMAS & THOMAS, *supra* note 20, at 195.

112. O'Brien, *Legitimate Military Necessity in Nuclear War*, in 2 INSTITUTE OF WORLD POLITY 35, 49 (1960) [hereinafter cited as O'Brien-2].

113. *Id.*; M. MCDOUGAL AND F. FELICIANO, *supra* note 103, at 525. "It is not

upon the avoidability of the suffering and destruction that a particular weapon inflicts. The demarcation between necessary and unnecessary suffering, however, is vague and subjective.[114]

The doctrine of proportionality—the core concept of military necessity—alleviates these uncertainties to some extent.[115] This doctrine provides that the use of a weapon is legal if there is no significant "disparity between the ensuing destruction of values and the military advantage gained."[116] There must be proportionality "between military ends and military means."[117] It is a test of reasonbleness, requiring evaluation of all the facts, including a comparison of a particular weapon with alternative weapons,[118] in the context of that particular weapon's use.

Today, the primary focus of the proportionality analysis of weapons is controllability—the capacity to limit the effects of a weapon to a certain number or category of people.[119] An uncon-

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easy to see how military objectives could be evaluated as legitimate or nonlegitimate save in terms of their relation to some broader political purpose postulated as legitimate."). *Id.* at 526.

114. Baxter, *The Role of Law in Modern War*, 47 PROC. AM. SOC'Y INT'L L. 90, 91 (1953); Brungs, *supra* note 20, at 59-60.

115. *See* O'Brien, *supra* note 103, at 41.

116. Mallison, *supra* note 103, at 322-23.

117. O'Brien-2, *supra* note 112, at 54. McDougal and Feliciano make a more comprehensive statement of proportionality, which they term "the fundamental policy of minimum unnecessary destruction":

> [W]here the suffering or deprivation of values incidental to the use of a particular weapon is not excessively disproportionate to the military advantage accruing to the belligerent user, the violence and the weapon by which it is effected may be regarded as permissible. All war instruments are "cruel" and "inhuman" in the sense that they cause destruction and human suffering. It is not, however, the simple fact of destruction, nor even the amount thereof, that is relevant in the appraisal of such instruments; it is rather the needlessness, the superfluity of harm, the gross imbalance between the military result and the incidental injury that is commonly regarded as decisive of illegitimacy.

M. MCDOUGAL & F. FELICIANO, *supra* note 103, at 615-16. A disproportionate use of a weapon occurs when one side drops a delayed action bomb, but the bomb does not explode until after the war is concluded. Mallison, *supra* note 103, at 323.

118. *See* O'Brien, *supra* note 103, at 41-42; O'Brien-2, *supra* note 112, at 55. The proportionality analysis necessarily shifts the focus of the issue away from illegality per se to illegality in a concrete situation. THOMAS & THOMAS, *supra* note 20, at 208. Indeed, one authority characterizes proportionality as "a limitation on the use of authorized weapons." Neinast, *supra* note 20, at 36.

119. This is even more important considering the demise of the distinction

trollable CBW which causes serious harm indiscriminately on a vast scale would qualify as inherently disproportionate because it could not "achieve military objectives without disproportionate ancillary destruction."[120] Yet the authorities agree that because CBWs vary in harmfulness and controllability, a blanket ban on CBWs based upon proportionality is untenable.[121]

Given the large-scale military objectives of a major armed conflict, proportionality allows for considerable ancillary suffering and destruction in the use of a particular weapon.[122] That level of suffering and destruction, however, may be disproportionate in a limited war,[123] in which both technical and tactical controllability

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between combatants and noncombatants. The immunity of noncombatants was considered a fundamental rule of the law of war. 2 L. OPPENHEIM, *supra* note 103, at 524. Modern technology, particularly in aerial and submarine warfare, and modern modes of armed conflict, particularly total war and guerrilla warfare, have reduced its viability. O'Brien, *supra* note 103, at 39-40. Some authorities indicate that this distinction still has force. *See, e.g.*, F. KALSHOVEN, *supra* note 51, at 28. Professors McDougal and Feliciano observe that the conditions or premises upon which this rule is based, namely the limitations of military technology and the lack of civilian participation in the "belligerent effort," are no longer necessarily extant. M. MCDOUGAL & F. FELICIANO, *supra* note 103, at 580-81. These modern developments narrow the rule to a prohibition against attacks directed primarily at civilians who are completely unconnected with military operations, productions, or communications. *See* O'Brien, *supra* note 103, at 40, 42; *see also* Nurick, *The Distinction Between Combatant and Noncombatant in the Law of War*, 39 AM. J. INT'L L. 680 (1945).

120. Mallison, *supra* note 103, at 342. A virulent epidemic biological agent is an example of this type of CBW. *Id.* at 324.

121. *See, e.g., id.* at 322-28, 342-44; M. MCDOUGAL & F. FELICIANO, *supra* note 103, at 632-40. O'Brien makes the following observation with regard to nuclear weapons, which also could apply to CBWs:

> [T]here can be no valid blanket, *a priori*, acceptance or condemnation of nuclear weapons. While it is clear that the larger nuclear devices are not, as some claimed in 1945, "just another weapon," the development of such a variety of bombs—large and small, "clean" and "dirty," and of such a spectrum of uses for them, precludes a generic, universal condemnation of nuclear weapons as inherently disproportionate and beyond the limits of legitimate military necessity.

O'Brien-2, *supra* note 112, at 76.

122. THOMAS & THOMAS, *supra* note 20, at 209. A virtually uncontrollable and indiscriminate weapon can cause disproportionate suffering even in a total war context. Mallison, *supra* note 103, at 342. Professor O'Brien argues that even with an indiscriminate weapon all the considerations in its use must be evaluated to determine proportionality. O'Brien, *supra* note 103, at 42.

123. Mallison, *supra* note 103, at 342. A relatively early definition of limited war is that

is critical.[124] Thus, "if biological or chemical weapons are to be used lawfully in limited war they must be weapons of very limited destructive power which are employed under the most rigid technological and tactical controls,"[125] and which result in no disproportionate suffering or destruction in relation to the military objective for which they are used.[126]

Arguably, CBWs have been employed against resistance fighters in Asia with sufficient controllability to avoid disproportionate ancillary suffering.[127] Although classifiable as biological agents, the mycotoxins used are neither contagious nor epidemic-inducing.[128] Thus, the degree of controllability required in limited conflicts such as those in Afghanistan, Kampuchea, and Laos may be satisfied. The consideration which renders disproportionate the use of lethal or seriously injurious agents in Asia, however, is the existence of alternative conventional weapons.[129] The superior military capabilities of the Soviet Union's forces enable them to achieve their limited military objective—the suppression of insurgency—by more conventional means. In light of this obvious military advantage, the Soviet motivation for employing CBWs in Asia is unclear.

> in which the belligerents restrict the purposes for which they fight to concrete, well-defined objectives that do not demand the utmost military effort of which the belligerents are capable and that can be accommodated in a negotiated settlement. Generally speaking, a limited war actively involves only two (or very few) major belligerents in the fighting. The battle is confined to a local geographical area and directed against selected targets—primarily those of direct military importance.

R. OSGOOD, LIMITED WAR: THE CHALLENGE TO AMERICAN STRATEGY, at 1-2 (1957), *quoted in* Mallison, *supra* note 103, at 340-41.

124. *See* THOMAS & THOMAS, *supra* note 20, at 209; Mallison, *supra* note 103, at 342.

125. Mallison, *supra* note 103, at 343.

126. Thus CBWs are analyzed according to military necessity in a manner no different from other more conventional weapons. *See* O'Brien, *supra* note 103, at 43.

127. The number of deaths documented by the State Department—a minimum of approximately 10,000 over a period of approximately six years—suggests that there has been little large scale indiscriminate use of the weapons. *See* Tennessean (Nashville), Mar. 23, 1982, at 1, col. 5.

128. *See supra* note 20.

129. *See supra* text accompanying note 118.

2. *Chivalry*

The principle of chivalry recognizes the need for fairness, forbearance, and mutual respect between belligerent opponents,[130] and forbids the use of treacherous or dishonorable methods of conducting hostilities.[131] This principle emerged in the context of knightly combat during the Middle Ages,[132] but its viability in the age of modern warfare, when combatants and noncombatants are killed in great numbers from considerable distances, is insignificant or nonexistent.[133] Because the principle connotes forbearance, however, it still may have vitality in the context of a limited armed conflict, in which at least one party refrains from bringing its full military might to bear.[134] This argument, however, ignores the reality that modern military technology has depersonalized the conduct of hostilities.[135] Today even a limited armed conflict entails the use of methods which kill or injure many at a distance.[136] It is therefore unlikely that chivalry can be cited as the basis of legal restraint in the use of CBWs.

3. *Reprisal*

The right of reprisal is a means by which the laws of war may be enforced.[137] This right permits otherwise unlawful acts by one belligerent in response to violations of the laws of war by an op-

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130. 2 M. GREENSPAN, *supra* note 103, at 316; 2 L. OPPENHEIM, *supra* note 103, at 227; J. STONE, *supra* note 61, at 337.

131. R. TUCKER, *supra* note 103, at 46.

132. 2 L. OPPENHEIM, *supra* note 103, at 227.

133. *See* J. STONE, *supra* note 61, at 337; M. MCDOUGAL & F. FELICIANO, *supra* note 103, at 522. Professor Mallison dismisses this principle as "a relic of medieval times." Mallison, *supra* note 103, at 312.

Arguably, odorless and colorless CBWs are weapons whose use is treacherous. *See* R. TUCKER, *supra* note 103, at 52 n.15. The element of surprise, however, has always been a legitimate military tactic or strategy. Brungs, *supra* note 20, at 59 (noting that accepted weapons such as land mines and booby traps also give no warning). Thus, "treachery" connotes a breach of faith or confidence rather than an act of clandestine nature, *id.*, such as feigning surrender to flush the enemy and then killing him. O'Brien, *supra* note 103, at 39.

134. *See supra* note 123.

135. *See supra* text accompanying note 133.

136. Professor Stone notes that the devices and methods used even in hand-to-hand combat, such as bayonets, are meant for quick death and not for sportsmanlike dueling. J. STONE, *supra* note 61, at 338.

137. M. GREENSPAN, *supra* note 103, at 407; J. STONE, *supra* note 61, at 353; R. TUCKER, *supra* note 103, at 151.

posing belligerent.[138] The purpose of reprisal is to warn the enemy that the aggrieved state will neither tolerate these violations nor be put at a disadvantage because of them.[139] Theoretically, the objective is not to get revenge but to enforce the laws of war.[140] Accordingly, acts of reprisal are taken as a last resort after other efforts seeking compliance have failed. Reprisal actions must cease when the enemy's illegal acts cease.[141] Although the reprisal need not be identical to the provoking act, it "must not be excessive nor exceed the degree of violation committed by the enemy."[142]

The proportionality requirement is of considerable importance in the doctrine of reprisal, but there are two areas of difficulty in applying proportionality to reprisal situations. First, there is confusion about whether the reprisal must be proportionate to the provoking act or whether it must be proportionate in light of the end sought—for example, the cessation of illegal acts by the enemy.[143] Traditionally, the basis of proportionality in reprisal was the former, but the practicality of the latter basis has gained favor.[144] This latter basis, however, would seem to authorize a degree of force greater than that of the provoking act.[145] Second, reprisal need not be in kind,[146] and consequently it is difficult to assess the proportionality of two different types of violence.[147] Reprisal therefore remains susceptible to abuse and conceivably can lead to escalation of hostilities.[148]

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138. R. TUCKER, *supra* note 103, at 151.

139. M. GREENSPAN, *supra* note 103, at 408.

140. *Id.*

141. R. TUCKER, *supra* note 103, at 151.

142. M. GREENSPAN, *supra* note 103, at 412. The classic examination of the requirements for legal reprisal is in the Naulilla Incident Arbitration, 8 Trib. Arb. Mixtes 409 (1928), *reprinted in* W. BISHOP, *supra* note 70, at 903-04.

143. *See* M. MCDOUGAL & F. FELICIANO, *supra* note 103, at 682-83; R. TUCKER, *supra* note 103, at 153 n.9; O'Brien, *supra* note 103, at 45-46.

144. M. MCDOUGAL & F. FELICIANO, *supra* note 103, at 682.

145. *Id.*

146. *See supra* note 142 and accompanying text.

147. G. SCHWARZENBERGER, THE LEGALITY OF NUCLEAR WEAPONS 41 (1958).

148. F. KALSHOVEN, *supra* note 51, at 112; M. MCDOUGAL & F. FELICIANO, *supra* note 103, at 681; O'Brien, *supra* note 103, at 47. Professor O'Brien observed in 1962 that abuse of the right of reprisal was the chief problem facing the law of chemical and biological warfare, but that it "remains the only really effective sanction for the law of war in a world which does not accept a binding universal norm in international law." O'Brien, *supra* note 103, at 49.

A discussion of weapons which can be employed in reprisal should not address so-called "legal" weapons because any act of reprisal is by its nature unlawful. If CBWs are legal *per se,* then their inclusion in a discussion of reprisal is inappropriate.[149] If CBWs are illegal *per se* or *mala in se,* then their use, even in reprisal, is forbidden.[150] The thesis of this Note asserts that the legal status of CBWs falls between these two extremes. Thus, the use of certain CBWs in reprisal may be legal in certain circumstances.

Using a CBW in response to an opposing belligerent's illegal first use, is a reprisal in kind,[151] and may be legal if the act of reprisal is reasonably proportionate.[152] The legality of using a CBW in reprisal *not* in kind is more uncertain. If proportionality is determined according to the violence of the provoking act, use of a lethal or seriously injurious CBW might be legal in response to some heinous act of provocation. If proportionality is determined considering only what is needed to stop the illegal act (this would imply that an act of greater force than the original illegal act might be authorized), use of a lethal or seriously injurious CBW still may be legal if it is reasonably proportionate.[153] The act of reprisal, however, must not be one of "violence so gross as to have no reasonable relation to the postulated deterrent effect," for then it could be "characterized, not as a legitimate reprisal, but as a new and independent unlawful act."[154]

The present vitality of the reprisal doctrine's justification of force is uncertain. Twentieth century attempts to establish "an international juridical order,"[155] as witnessed in the creation of the League of Nations and the United Nations, have brought with them significant limitations on the permissible extent to which a party can resort to unilateral force.[156] The tendency, however, for

149. *See* THOMAS & THOMAS, *supra* note 20, at 218-19.

150. *See* O'Brien, *supra* note 103, at 47.

151. *See* 2 L. OPPENHEIM, *supra* note 103, at 344.

152. Professor Mallison would require that the retaliatory use be directed and controlled and not involve militarily meaningless mass destruction. Mallison, *supra* note 103, at 328.

153. *See* THOMAS & THOMAS, *supra* note 20, at 221.

154. M. MCDOUGAL & F. FELICIANO, *supra* note 103, at 682.

155. O'Brien, *supra* note 103, at 43 n.121.

156. *Id.* Member states of the United Nations must "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." U.N. CHARTER art. 2, para. 3. They

states subscribing to the international juridical order to deviate from its constraints is sufficient reason for ascribing some present recognition to the principle of reprisal.[157] Nevertheless, the right of reprisal is no justification for the present use of CBWs in Asia. The target insurgent groups have not used CBWs against the Soviets, Vietnamese, or Laotians. Moreover, if any of the insurgent groups have committed a violation of international law so heinous and barbaric as to warrant the use of lethal and seriously injurious CBWs in reprisal, the United Nations should be so apprised.

4. *Self-Defense*

The right of self-defense permits "a political entity, usually a state, to take all measures necessary for its protection when its vital interests are endangered by an aggressive, illegal act of another state. The act of aggression gives the injured party the right to take all counter-measures."[158] Implicit in the concept of legitimate self-defense are the requirements of necessity and proportionality.[159] The necessity may result from an actual act of aggression or from an imminent threat thereof.[160]

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must also "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . ." *Id.* art. 2, para. 4; *see also* J. STONE, *supra* note 61, at 286-87 ("[U]nder the Charter, it is only in the milder cases of international controversy, and only by the milder forms of coercion, applied consistently with paragraph 3 of article 2 in such a way as not to endanger peace and security, that a Member State is now entitled to resort to forcible or coercive procedures.").

157. "In the context of continuing hostilities, and until a comprehensive, centralized, and effective sanctions process is achieved in the world arena, belligerents have to police one another and enforce the laws of war against each other." M. MCDOUGAL & F. FELICIANO, *supra* note 103, at 681-82.

158. O'Brien-1, *supra* note 110, at 112.

159. *See* I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 261-62 (1963); M. MCDOUGAL & F. FELICIANO, *supra* note 103, at 217-18.

The classic formulation of the requirements of legitimate self-defense is set out in the Caroline incident of 1837 by then Secretary of State Daniel Webster. He stated that there first must be "a necessity of self defense, instant, overwhelming, leaving no choice of means and no movement for deliberation," the response to which must be "nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it," *quoted in* J. BRIERLY, *supra* note 24, at 406.

160. This latter is the concept of anticipatory self-defense, which characterized the fact situation of the Caroline incident. It is customarily permitted if "the expected attack exhibit[s] so high a degree of imminence as to preclude effective resort by the intended victim to nonviolent modalities of response." M.

The "international juridical order,"[161] which purports to restrict the unilateral resort to force, may have placed limitations upon the right of self-defense.[162] The United Nations Charter preserves "the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[163] This provision, with its apparent requirement that the initial illegal action be an armed attack, has been the source of much debate regarding whether the provision restricts the customary right of self-defense by establishing a tougher standard of necessity.[164] Commentators have recognized that, given the presence of modern technological weapons and the increasing number of threats taking the form of nonmilitary coercion, a restrictive view of "the inherent right of self-defense" might permit responsive force only after it is too late.[165]

The degree of proportionality required in self-defense depends upon whether the objective of self-defense is to repel or to remove the danger.[166] Presumably, if removal is a legitimate objective, greater force is legally permissible than if repulsion is the only objective. It is thus difficult to place a meaningful limit upon the use of force in self-defense.[167] Professors McDougal and Feliciano offer the most practical approach. Their analysis identifies the objective of self-defense as the termination of "the condition

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McDOUGAL & F. FELICIANO, *supra* note 103, at 231.

161. *See supra* text accompanying note 155.

162. *See supra* text accompanying notes 155-57.

163. U.N. CHARTER art. 51, para. 1.

164. For treatment of the view that article 51 has altered the customary right, see J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 503-04 (7th ed. 1972); J. STONE, *supra* note 61, at 244-47; Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 877-79 (1947); J. BRIERLY, *supra* note 24, at 420-21; I. BROWNLIE, *supra* note 164, at 270-80; M. McDOUGAL & F. FELICIANO, *supra* note 103, at 138-41; R. OSGOOD & R. TUCKER, FORCE, ORDER, AND JUSTICE 296-97 (1967).

165. *See* M. McDOUGAL & F. FELICIANO, *supra* note 103, at 238; R. OSGOOD & R. TUCKER, *supra* note 164, at 296; *see also* THOMAS & THOMAS, *supra* note 20, at 225 ("Presumably the purpose of the Charter's article was to enable nations to protect their essential rights when gravely threatened and not to insure that their epitaph would be able to testify to their lawful behavior.").

166. *See* H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 82 (R. Tucker rev. 2d ed. 1966); R. OSGOOD & R. TUCKER, *supra* note 164, at 300.

167. H. KELSEN, *supra* note 166, at 83.

which necessitates responsive coercion."[168] According to this approach, proportionality requires an analysis of the entire factual context comprising both the elements relating to the initial aggression or threat and those relating to the responsive force.[169] The debate continues however.[170]

The issue concerning the type of force which may be used in self-defense has arisen in the nuclear arms context. If the objective of self-defense is repulsion, then the use of a nuclear weapon might not be a proportionate response to a more conventional threat or attack.[171] If the objective is removal, however, proportionality might permit a greater degree of force.[172] This analysis may apply to the use of a CBW in self-defense unless all use of the CBW in question was banned by convention or custom.[173] Finally, some scholars argue that when one state threatens world domination or the extermination of another state, these threats are so grave that the use of any necessary means, including prohibited weapons of mass destruction, is permitted in defense.[174]

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168. M. McDOUGAL & F. FELICIANO, *supra* note 103, at 242.

169. *Id.* at 243. Indeed, in instances in which sovereign integrity and national well-being are allegedly at stake, a "reasonableness" standard such as that submitted by Professors McDougal and Feliciano makes more sense than a doctrinal limitation upon the right of a state to neutralize a threat either actual or urgently imminent.

170. Kelsen cites three modern examples of the use of force in self-defense: The Israeli attack upon Egypt in 1956; the United States "quarantine" of Cuba in 1962; and the Gulf of Tonkin incident in 1964. In all three instances, the force exerted in self-defense was designed to effect the removal of alleged danger. *See* H. KELSEN, *supra* note 166, at 82 n.74.

171. I. BROWNLIE, *supra* note 159, at 262-63. N. SINGH, *supra* note 108, at 133. Professor Singh concludes that the use of nuclear weapons in self-defense is proportionate only to repel an initial nuclear attack. *Id.* at 136.

172. *But see* G. SCHWARZENBERGER, *supra* note 147, at 40 ("[T]o permit the use of prohibited weapons to a victim of aggression would serve merely to encourage their use by all.").

173. Use of a biological agent that took time to infect, spread, and disable might undermine the necessity requirement of self-defense. This would show that the threat was not so immediate or urgent that noncoercive measures could not have been resorted to first. THOMAS & THOMAS, *supra* note 20, at 224.

174. *See* 2 L. OPPENHEIM, *supra* note 103, at 351 n.2; O'Brien-1, *supra* note 110, at 170. *But see* G. SCHWARZENBERGER, *supra* note 147, at 42 ("As, in a divided world, each side is bound to accuse the other of this ultimate design [world domination], the function of this asserted right or duty . . . is to provide in advance, and indiscriminately, both sides with semi-legal justifications for the use of the 'ultimate deterrent.' ").

The use of lethal or seriously injurious CBWs may be legally justifiable in the following limited instances of self-defense: (1) If repulsion is the object of self-defense, CBW use may be proportionate in the event of threat or attack by nuclear weapon or CBW; (2) if removal is the object, CBW use may be proportionate in the event of threat or attack by conventional or nuclear weapon or CBW; and (3) if extermination or world domination is threatened, the gravity of the threat may justify use of CBWs.

The instant hypothetical does not present a case of self-defense. Superior forces are seeking to neutralize or exterminate resistance groups. Even if the resistance groups could be characterized as "aggressors," the use of lethal and seriously injurious agents against these outnumbered and relatively ill-equipped groups substantially exceeds the proportionality requirement of self-defense.

5. *Summary*

The principle of military necessity and its doctrine of proportionality continue as vital elements of the law of war. Although these principles may not make the use of CBWs *a priori* unlawful, they do operate to render the use of CBWs in Asia unlawful. The principles of reprisal and self-defense may permit the use of CBWs within very limited circumstances, but these circumstances are not present in the instant case.

B. Treaties

1. *Introduction*

International agreements on CBWs have contributed to public international law as "law-making" treaties. Because a significant number of states are signatories, these treaties express a general understanding of the status of CBWs in existing international law or, at the least, represent attempts to establish "a new general international rule for future conduct."[175] Although these "law-making treaties" immediately create law for their signatories,[176] nontreaty states may bind themselves to the stated international legal rules by express or tacit acceptance and conformance.[177] Ar-

175. J. BRIERLY, *supra* note 20, at 58; *see also* 1 L. OPPENHEIM, *supra* note 103, at 26-27.

176. J. BRIERLY, *supra* note 164, at 58.

177. G. HACKWORTH, *supra* note 24, at 17; 1 L. OPPENHEIM, *supra* note 103,

guably, these treaties have created both a general international legal restraint prohibiting the first use of lethal or seriously injurious chemical weapons and a moral restraint prohibiting the use of biological weaponry, even though the treaties may no longer have the force of binding international law.

2. *The St. Petersburg Declaration of 1868*

Recent efforts to impose legal restraint upon the means and methods of warfare usually are traced to the St. Petersburg Declaration of 1868.[178] The Declaration specifically banned explosive and inflammable bullets finding:

> That the only legitimate objective . . . to accomplish during war is to weaken the military forces of the enemy; . . .
> That this objective would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
> That the employment of such arms would, therefore, be contrary to the laws of humanity.[179]

The present force and significance of the Declaration are grounded upon its preambulary enunciation of the principle of military necessity. Also included is a reaffirmation of the distinction between combatants and noncombatants[180] in war,[181] and, more importantly, a recognition of the doctrine of proportionality concerning the use of weapons and wartime objectives.[182] It gener-

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at 27.

178. Declaration Renouncing Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Parry's T.S. 297 (French text) (official source unavailable), *reprinted in* SCHINDLER & TOMAN, *supra* note 27, at 95-97. The Declaration was the product of an international military commission convened to address problems presented by the invention of an exploding bullet. THOMAS & THOMAS, *supra* note 20, at 45.

179. SCHINDLER & TOMAN, *supra* note 27, *reprinted* at 96. The nineteen contracting or acceding parties to the convention agreed to be bound only as between themselves in case of war. *Id.* The obligatory effect was to cease if a nonparty joined a belligerent participant in a war between the parties. *Id.* Most of the states are still considered bound because effectiveness of the Declaration is not dependent upon ratification. *See* O'BRIEN, *supra* note 103, at 17, 18 & n.43.

180. *See supra* note 119 and accompanying text.

181. *See* S. BAILEY, *supra* note 51, at 125.

182. SCHINDLER & TOMAN, *supra* note 27, *reprinted* at 96. It was deemed that small explosive projectiles caused suffering disproportionate to the military advantage gained by using them, whereas larger explosive projectiles caused pro-

ally is agreed that the prohibition in the Declaration forbidding the use of exploding or inflammable bullets no longer has force, but its premable presently binds all states to the extent that it is declaratory of military necessity and proportionality.[183]

Some authorities have discussed the possible derivation of a rule that would apply to CBWs and prohibit the use of weapons exceeding the limits of military necessity and proportionality. Some analysts believe that this exercise in application has not been successful. Professor O'Brien observes that because there are different types of chemical and biological weapons, not all CBWs unnecessarily aggravate suffering or render death inevitable.[184] Consequently, the language of the Declaration has no more relevance to CBWs than to any other kind of weapon.[185] Major Neinast similarly observes that because biological agents tend to affect individuals differently, they do not necessarily "render death inevitable."[186] Thus the Declaration survives primarily as a statement of military necessity and proportionality.[187]

3. *The Hague Gas Declaration*

The First Hague International Peace Conference convened in 1899 and produced the Hague Gas Declaration[188] in another at-

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portionate suffering. S. BAILEY, *supra* note 51, at 124; THOMAS & THOMAS, *supra* note 20, at 45.

183. *See* M. GREENSPAN, *supra* note 103, at 553-55; SCHINDLER & TOMAN, *supra* note 27, at 95; J. STONE, *supra* note 61, at 552; THOMAS & THOMAS, *supra* note 20, at 45; Neinast, *supra* note 20, at 22-23. *See also* O'Brien, *supra* note 103, at 19 (The "status" of the Declaration's preambulary prohibition "as an independent norm is extremely questionable . . . .").

184. O'Brien, *supra* note 103, at 19.

185. *Id.* at 19-20. Professor O'Brien prefers "a discriminatory application of the principle of proportionality to different types of [biological/chemical] weapons in the context of their normal or anticipated employment." *Id.* at 19.

186. Neinast, *supra* note 20, at 24. Neinast finds the prohibition against weapons which "uselessly aggravate suffering" too subjective to be useful. *Id.* at 23. Colonel Brungs also finds that the "render death inevitable" language is not necessarily applicable to biological agents because practical and medical precautions may neutralize their lethal effects. Brungs, *supra* note 20, at 57-58.

187. According to the preamble, the accomplishment of the Military Commission was to have fixed, by common agreement, "the technical limits at which the necessities of war ought to yield to the requirements of humanity . . . ." SCHINDLER & TOMAN, *supra* note 27, *reprinted* at 96.

188. Declaration Concerning Asphyxiating Gases, July 29, 1899, 187 Parry's T.S. 453 (French text) (official source unavailable), *reprinted in* SCHINDLER &

tempt to limit arms proliferation.[189] Inspired by the Declaration of St. Petersburg, the parties agreed "to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases."[190] Like the St. Petersburg Declaration, this treaty has an obligatory effect on its signatories provided that only parties are participants in the conflict.[191]

The present power of the Hague Gas Declaration is questionable. Its proscription of projectiles that exist only to diffuse poisonous gas is too limited in scope to affect significantly the use of modern CBWs.[192] Three parties to the convention—France, Germany, and Great Britain—[193] so completely circumvented this technical provision during World War I, that Professor O'Brien concludes that the Hague Gas Declaration "did not survive the war as an effective conventional restraint on gas."[194]

There is authority, however, for the proposition that the Hague Declaration affirmed the customary rule against the use of poisons in warfare.[195] Nevertheless, the weight of authority maintains that the Declaration is too specific in its prohibitory scope and too contractual in its obligatory effect to have force as a dec-

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TOMAN, *supra* note 27, at 99-101.

189. SCHINDLER & TOMAN, *supra* note 27, at 49.

190. *Id. reprinted* at 99. The Declaration was binding only upon parties who ratified or acceded to it. It would cease to be binding if a nonparty joined a party in a war. *Id. reprinted* at 99-100.

191. Twenty-eight states ratified or acceded with 10 years after the Declaration was signed. *Id. reprinted* at 100-01. The United States did not become a party, objecting that there was both limited knowledge about the use of gas projectiles and doubt whether gas projectiles would be any less humane than other weapons. *See* Bernstein, *The Law of Chemical Warfare,* 10 GEO. WASH. L. REV. 889, 900-01 (1942); Kelly, *supra* note 103, at 22-23.

192. Using "a strict interpretation of the declaration it could be argued that projectiles emitting gases which had other purposes than the diffusion of harmful gases did not come within its scope, nor did gases released into the wind from containers." M. GREENSPAN, *supra* note 103, at 355.

193. The Germans used gas-dispensing stationary cylinders and projectiles not having as their sole function the diffusion of gas, and the French used projectiles containing tear gas which they claimed was not "asphyxiating or deleterious." Bunn, *supra* note 40, at 376.

194. O'Brien, *supra* note 103, at 20.

195. 2 L. OPPENHEIM, *supra* note 103, at 233, 340, 497; N. SINGH, *supra* note 103, at 154-55; J. SPAIGHT, AIR POWER AND WAR RIGHTS 188 (3d ed. 1947) ("The prohibition of the use of poison is one of the oldest and most generally admitted rules of warfare.").

laration of customary international law.[196] The Declaration has a two-fold significance: (1) it preserves the spirit of the St. Petersburg Declaration in its preamble and (2) it represents the first international agreement to place any specific limitation on the employment of chemical weaponry.[197]

4. *The Hague Regulations*

In 1907 at the Second Hague International Peace Conference, the delegates produced a revised Convention[198] and Regulations[199] similar to the agreement[200] and regulations[201] which the delegates at the 1899 Conference produced. The following discussion focuses on the language of the 1907 Convention and Regulations.

The preamble stated that the objectives of the 1907 Convention were to revise "the general laws and customs of war" and "to diminish the evils of war" in a manner consistent with military requirements.[202] The heart of the Convention is the Regulations.[203]

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196. *E.g.*, Fuller, *The Application of International Law to Chemical and Biological Warfare*, 10 ORBIS 247, 250 (1966).

197. *Id.* at 249-50.

198. Final Act of the Second International Peace Conference, Oct. 18, 1907, 205 Parry's T.S. 216 (French text) (official source unavailable) [hereinafter cited as the 1907 Convention], *reprinted in* SCHINDLER & TOMAN, *supra* note 27, at 63-68. Thirty-two states became parties by ratification or accession with only four minor reservations. SCHINDLER & TOMAN, *supra* note 27, at 90-91. The 1907 Convention superseded the 1899 Convention, *see infra* note 200, except the 1899 Convention remained in force for states who were parties to the 1899 Convention but not parties to the 1907 Convention. 1907 Convention, *supra*, art. 4, *reprinted* at 65-66. Like the St. Petersburg and Hague Gas Declarations, *see supra* notes 178, 188, the 1907 Convention is binding only between parties and only during a war in which all the belligerents are parties. *Id.* art. 2, *reprinted* at 65.

199. SCHINDLER & TOMAN, *supra* note 27, *reprinted* at 69-87 [hereinafter cited as 1907 Regulations].

200. Convention Respecting Laws and Customs of Land War, July 29, 1899, 187 Parry's T.S. 429 (French text) (official source unavailable) [hereinafter cited as 1899 Convention], *reprinted in* SCHINDLER & TOMAN, *supra* note 27, at 63-68. Forty-six states became parties to this Convention by ratification or accession with no reservations. SCHINDLER & TOMAN, *supra* note 27, at 88-89.

201. SCHINDLER & TOMAN, *supra* note 27, *reprinted* at 69-87 [hereinafter cited as 1899 Regulations].

202. 1907 Convention, *supra* note 198, at 225-26, *reprinted* at 63-64.

203. *See supra* note 199. The Convention requires each party to issue instructions to its armed forces in conformity with the Regulations. 1907 Convention, *supra* note 198, art. 1, *reprinted* at 65. In addition, a party violating a

Article 22 establishes the principle of limited belligerency.[204] Article 23 specifically forbids a party: "(a) To employ poison or poisoned weapons; (b) To kill or wound treacherously individuals belonging to the hostile nation or army; . . . (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering."[205]

The present force and significance of the 1899 and the 1907 conventions derive primarily from their codification of the principle of military necessity. Both the preamble and article 22 evidence the intent to "diminish the evils of war, as far as military requirements permit."[206] Furthermore, article 23(e)[207] corresponds to the prohibition of the St. Petersburg Declaration on the use of arms which "uselessly aggravate" suffering.[208] The prohibition of treachery in warfare stated in article 23(b) appears only to enunciate the principle of chivalry, no longer particularly relevant to current technological methods of warfare.[209] Article 23(a), which prohibits the use of "poison or poisoned weapons,"[210] is the focus of considerable debate. Although it generally is agreed that this provision codifies international law,[211] it remains uncertain

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Regulation in wartime could incur compensatory liability. *Id.* art. 3, *reprinted* at 65.

204. 1907 Regulations, *supra* note 199, art. 22, *reprinted* at 76.

205. *Id.* art. 23, *reprinted* at 76-77. Articles 22 and 23 of the 1899 Regulations were almost identical. 1899 Regulations, *supra* note 201, *reprinted* at 76-77.

206. 1907 Convention, *supra* note 198, at 225-26, *reprinted* at 63-64.

207. *See supra* text accompanying note 205.

208. *See supra* text accompanying note 179; *see also* M. GREENSPAN, *supra* note 103, at 353; Neinast, *supra* note 20, at 25.

209. *See supra* notes 132-36 and accompanying text.

210. *See supra* text accompanying note 205.

211. *See* 2 L. OPPENHEIM, *supra* note 103, at 342; G. SCHWARZENBERGER, *supra* note 147, at 26-27, 35-36; SCHINDLER & TOMAN, *supra* note 27, at 57; O'Brien, *supra* note 103, at 21; N. SINGH, *supra* note 103, at 155; Fuller, *supra* note 196, at 250; Kelly, *supra* note 103, at 24. Grotius proscribed the use of poison to kill the enemy, the use of poisoned arrows or projectiles, and the poisoning of fountains and wells. H. GROTIUS, RIGHTS OF WAR AND PEACE 327-28 (W. Whewell trans. 1853). He speculated that the rule against the use of poison derived from nobility or royalty, against whom such a secretive device might be the only effective weapon. *Id.* at 327. The use of poisoned weapons, such as arrows or projectiles, although not necessarily secretive were against the Law of Nations, probably because they "doubl[ed] the means of death." *Id.* at 328. Dr. Schwarzenberger notes the two separate aspects of the rule became accepted as part of the law of war among European states by the beginning of the eighteenth

whether it applies to modern weaponry such as CBWs. Article 23(a) arguably maintains broad applicability and prohibits modern nonconventional arms such as nuclear weapons and CBWs.[212] Limited to a strictly literal interpretation, article 23(a) prohibits certain modern nonconventional arms because they can be defined as poison or as having a poisonous effect.[213] A more persuasive approach, however, seeks to ascertain whether the Hague drafters also intended to prohibit then unknown means of conducting hostilities. Various writers agree that the Hague drafters sought to address only those methods of warfare known at the time, such as the use of poisoned bayonets or swords and the secretive poisoning of food and water supplies.[214]

The inclusion of the principle of military necessity in both of the Hague conventions and the subsequent adoption of these conventions by a number of states evidences the establishment of a general international law which continues to serve as a primary limitation on the conduct of hostilities and which may be presently applicable to the use of CBWs.

5. *World War I Peace Treaties*

The Treaty of Versailles[215] concluded the hostilities between the Allies and Germany following World War I. Article 171 of the

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century. G. SCHWARZENBERGER, *supra* note 147, at 30-31. These restraints derived from the principles of chivalry and humanity as applied to the military. *See* J. STONE, *supra* note 61, at 554.

212. M. GREENSPAN, *supra* note 103, at 359 (gas and bacteriological warfare); G. SCHWARZENBERGER, *supra* note 147, at 35-36 (nuclear weapons); N. SINGH, *supra* note 103, at 157-58 (nuclear weapons); Brungs, *supra* note 20, at 58-59 (toxins).

213. *See, e.g.*, Brungs, *supra* note 20, at 58-59 ("[I]t would appear that . . . toxins are covered by the above prohibition . . . for the reason that toxins, although 'poisons produced by living things,' are nevertheless poisons . . . .").

214. Kelly, *supra* note 103, at 44; O'Brien, *supra* note 103, at 21-22. Professor O'Brien concludes that article 23(a) probably does not apply to chemical warfare because the Hague drafters could have addressed it specifically, rather than leave the treatment of gas to the 1899 Hague Gas Declaration. *See supra* note 188. Because the capability of mounting a large scale attack with biological agents was at that time almost nonexistent, Professor O'Brien also concludes that biological warfare is not covered. O'Brien, *supra* note 103, at 22. Because the regulation was drafted before gas was equated with poison, article 23(a) was not meant to apply to the use of poisonous gas. Kelly, *supra* note 103, at 44.

215. Treaty of Versailles, June 28, 1919, 225 Parry's T.S. 188 (official source unavailable).

Treaty addresses the use of gas in warfare stating that "the use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices . . . [and] their manufacture and importation are strictly forbidden in Germany."[216] The treaties between the Allies and Austria, Bulgaria, and Hungary each contain a similar provision.[217] Although the United States never ratified the Treaty of Versailles,[218] the prohibitory provision is incorporated by reference in the Treaty of Berlin,[219] to which the United States was a signatory. The passage of article 171 was a reaction to the deployment of lethal gas by both sides during World War I.[220] Although the article fails to expressly prohibit the use of gas in warfare, it intimates the prior existence of an accepted rule against the use of gas weaponry. This provision represented the broadest conventional prohibition of chemical weaponry at the time, broader in scope than the Hague Gas Declaration of 1899.[221]

Complete disregard of article 171 during World War II seriously undermined its significance. The present viability and force of these peace treaties result from a continued consensus among many nations[222] that some limitation on the use of gas in the conduct of hostilities is necessary.

6. *The Washington Naval Treaty*

Article V of the 1922 Washington Naval Treaty[223] acknowl-

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216. *Id.* art. 171, at 268.

217. Treaty of St. Germain, Sept. 10, 1919, art. 135, 226 Parry's T.S. 8, 47 (official source unavailable) (Austria); Treaty of Neuilly, Nov. 27, 1919, art. 82, 226 Parry's T.S. 332, 350 (official source unavailable) (Bulgaria); Treaty of Treanon, June 4, 1920, art. 119, 3 Redmond T.S. 3539 (official source unavailable) (Hungary), *quoted in* M. GREENSPAN, *supra* note 103, at 356 n.171.

218. The failure to ratify was largely due to provisions establishing the League of Nations. *See* Bunn, *supra* note 40, at 376.

219. Treaty of Berlin, Aug. 25, 1925, United States-Germany, 42 Stat. 1939, 1943 T.S. No. 658.

220. M. GREENSPAN, *supra* note 103, at 355; O'Brien, *supra* note 103, at 23-24.

221. *Cf. supra* text accompanying note 192.

222. Twenty-six of the allied states signed the Paris Peace Treaties. 2 A.V. THOMAS & A.J. THOMAS, JR., DEVELOPMENT OF INTERNATIONAL LEGAL LIMITATIONS ON THE USE OF CHEMICAL AND BIOLOGICAL WEAPONS 72 (1968) (prepared for the U.S. Arms Control and Disarmament Agency) [hereinafter cited as 2 THOMAS & THOMAS].

223. Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, Feb. 16, 1922, 3 Redmond T.S. 3116 (no official source printed), *reprinted*

edges the prohibition and condemnation of the use of gaseous weapons generally accepted by a majority of civilized nations. It further declares that "this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other civilized nations to adhere thereto."[224] Other substantive provisions of the Washington Naval Treaty deal with naval and submarine warfare.[225] Although nine nations, including the United States, the United Kingdom, Japan, and Italy, ratified or acceded[226] to its terms, the Treaty was to take effect only upon ratification by all parties present at the treaty conference.[227] The agreement never became effective because France objected to the submarine warfare limitations and refused to ratify the Treaty.[228]

The significance of the Washington Naval Treaty stems from its reiteration of the broad prohibitory language in the World War I peace treaties. Some of the language in article V may be overstated[229] because it implies that there was no customary international law against gas at the time of its enactment,[230] yet article V does recognize a broad legal constraint on the use of gas by the major powers.[231]

7. *The Geneva Protocol*

The Geneva Protocol (Protocol)[232] is the most significant source of general international law on arms limitation.[233] The Protocol

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in SCHINDLER & TOMAN, *supra* note 27, at 657-59 [hereinafter cited as Washington Naval Treaty]. The Treaty is the product of the conference on the Limitation of Armaments of 1921-22.

224. Washington Naval Treaty, *supra* note 223, art. 5, *reprinted* at 658.

225. *Id.* arts. 1, 3, 4, *reprinted* at 657-58.

226. SCHINDLER & TOMAN, *supra* note 27, at 659.

227. Washington Naval Treaty, *supra* note 223, art. 6, *reprinted* at 658.

228. *See* Bernstein, *The Law of Chemical Warfare,* 10 GEO. WASH. L. REV. 889, 911-12 (1942).

229. Professors Thomas and Thomas point out that "just condemnation" amounts to an opinion rather than to a legal condemnation. 2 THOMAS & THOMAS, *supra* note 222, at 78.

230. *See id.*

231. The Washington Naval Treaty was the first treaty ratified by the United States Senate limiting chemical warfare. Fuller, *supra* note 196, at 252.

232. *See supra* note 27.

233. *See supra* notes 30-70 and accompanying text (discussion of the language of and parties to the Geneva Protocol).

was a product of the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, held at Geneva in 1925 under the auspicies of the League of Nations.[234] The Protocol incorporated the broad prohibitory language found in the World War I peace treaties and article V of the Washington Naval Treaty. Adding to the Protocol's importance is "the slow but continuous increase over the years in the number of states which have ratified or acceded" to it.[235]

Analyses of the Protocol as a source of general international law have focused first on whether and to what extent the Protocol was declaratory of customary international law in 1925. There is limited authority that the Protocol's prohibitions against chemical and bacteriological warfare were declaratory of the customary rule of international law against poison and poisoned weapons which was first codified in the 1899 and 1907 Hague regulations.[236] The weight of authority, however, tends to view the Protocol more skeptically. One authority contends that no customary rules prohibiting chemical or biological weapons existed in 1925 because biological weapons had not been developed and chemical weapons were used extensively in World War I.[237] The argument suggesting that the terms of the Protocol and its many restrictive reservations make the instrument far too contractual to be declaratory of custom remains more persuasive.[238] The Protocol is not a codification of general international law for four reasons. First, the binding effect of an agreement codifying customary rules would not depend on each party's deposit of ratification.[239] Second, a declaratory instrument would not limit its obligatory effect

234. 2 THOMAS & THOMAS, *supra* note 222, at 84-85.

235. 3 SIPRI, *supra* note 36, at 103. About 30 states had ratified or acceded by 1930. *See* SCHINDLER & TOMAN, *supra* note 27, at 111-15 (list of ratifying or acceding countries updated through 1972). By January 1, 1981, this number was 116. *See* TREATIES IN FORCE, *supra* note 28, at 289.

236. G. SCHWARZENBERGER, *supra* note 147, at 38. Professor Tucker states that the Protocol's prohibitions were broader than the customary law in 1925: "The Protocol can be equated with such prior customary law only insofar as it forbids gases and other chemicals that are either poisonous—or even if not poisonous—inflict unnecessary suffering or injury." Tucker, *supra* note 36, at 166-67. Thus, he sees the principle of military necessity as implicit in the Protocol.

237. O'Brien, *supra* note 103, at 29.

238. *See* 2 THOMAS & THOMAS, *supra* note 222, at 93-96; Kelly, *supra* note 103, at 50; Neinast, *supra* note 20, at 29-32; O'Brien, *supra* note 103, at 29-32.

239. 2 THOMAS & THOMAS, *supra* note 222, at 93.

to parties only.[240] Third, many of the parties made reservations which eliminate the reserving state's obligation to adhere to the Protocol once a party or a party's ally violates the Protocol.[241] If the Protocol were declaratory of customary international law, which continues to be binding despite violations, the reservations would seem to "repeal" or have a "retrogressive effect" upon that law.[242] Finally, the Protocol's "extension" of the prohibition against gas and analogous weapons to bacteriological weapons[243] implies that there was no customary or conventional rule prohibiting such weapons in 1925.[244] Thus, the Geneva Protocol constituted a new conventional rule prohibiting first use of lethal or seriously injurious CBWs.[245]

The second focus of debate is the significance and force of the Geneva Protocol today.[246] There is persuasive authority that all the prior conventional prohibitions together with the Protocol's prohibitions created a customary rule against first use of lethal or seriously injurious chemical weapons.[247] Other authorities contend that the Protocol alone is *presently* declaratory of or coextensive with a customary rule.[248] A number of writers have distinguished the present force of the Protocol's bacteriological prohibition from its chemical prohibition.[249] In general, these au-

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240. *See* 2 THOMAS & THOMAS, *supra* note 222, at 94.

241. *See* O'Brien, *supra* note 103, at 29-31.

242. Neinast, *supra* note 20, at 30. Professor O'Brien points out that there was no need for parties to preserve by reservation their right of reprisal because the right of reprisal is fundamental in the law of war. O'Brien, *supra* note 103, at 30. This type of reservation in several cases goes beyond preserving the right of reprisal because its "breach of contract" effect permits unlimited retaliation. *Id.* O'Brien concludes that the Protocol "set up a new rule . . . between participating parties only." *Id.* at 31.

243. M. MCDOUGAL & F. FELICIANO, *supra* note 103, at 637.

244. J. STONE, *supra* note 61, at 557; Neinast, *supra* note 20, at 29.

245. *See* S. BAILEY, *supra* note 51, at 127; F. KALSHOVEN, *supra* note 51, at 91; Mallison, *supra* note 103, at 328; Moore, *supra* note 36, at 454; Neinast, *supra* note 20, at 32. The Protocol has never been interpreted to prohibit research, development, stockpiling, or transfer of the proscribed means of warfare. *See* S. BAILEY, *supra* note 51, at 127; F. KALSHOVEN, *supra* note 51, at 92; Moore, *supra* note 36, at 452.

246. Much of the debate arose over the Protocol's application to chemical agents, herbicides, and tear gas which the United States used in the conflict in Southeast Asia. *See supra* notes 36 and accompanying text.

247. *See* M. GREENSPAN, *supra* note 103, at 354.

248. *See* 3 SIPRI, *supra* note 36, at 34; J. STONE, *supra* note 61, at 556.

249. *See* Mallison, *supra* note 103, at 327-28; O'Brien, *supra* note 103, at 55.

thorities do not perceive the Protocol as having produced a customary rule against the use of biological weapons. Their pre-BWC writings argue that the Protocol's bacteriological weapon proscription retains the same force it had in 1925: the Protocol prohibits the first use of biological weapons only among parties.[250]

Because biological weapons are a more recent technological development than chemical weapons, there is even less evidence of a custom for the use of biological weapons.[251] In contrast, the minority views the Protocol as at least coextensive with a customary rule against the first use of lethal chemical *or* biological weapons.[252] This writer agrees with the authorities who argue that the Protocol is a step in a developmental process—a part of an "accumulation" of conventional efforts which have become both more comprehensive in their prohibitory scope and more specific about the weapons covered in their prohibitions. Presently, the Protocol is coextensive with a customary rule against the first use of chemical weapons, which was the focus of previous conventional prohibitions. Because those conventions did not specifically address bacteriological weapons, the "cumulative effect" of the several agreements would not extend the Protocol's bacteriological prohibition beyond its significance in 1925: a conventional prohibition forbidding the first use of bacteriological weapons among parties to the Protocol, subject to the parties' respective reservations.[253]

8. *The Biological Weapons Convention*

The possessory focus and comprehensive scope of the BWC[254] make it the most forceful of all the conventional efforts to outlaw CBWs.[255] Notwithstanding its own force, the BWC may also be considered a step in the development of a prohibition of biological weapons under general international law. Thus, there may be

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250. *See* M. McDOUGAL & F. FELICIANO, *supra* note 103, at 637; J. STONE, *supra* note 61, at 557; Mallison, *supra* note 103, at 328; O'Brien, *supra* note 103, at 56.

251. *See* J. STONE, *supra* note 61, at 557; O'Brien, *supra* note 103, at 29.

252. 3 SIPRI, *supra* note 36, at 34; *see also* Baxter & Buergenthal, *supra* note 36, at 866-68. The latter writers view the Protocol as reaching beyond the present customary law to proscribe nonlethal agents as well as lethal ones. *Id.*

253. For a discussion of the present application of the "bacteriological" ban contained in the Protocol, see *supra* notes 45-49 and accompanying text.

254. *See supra* note 28.

255. *See supra* notes 87-93 and accompanying text.

a cumulative effect from the Protocol's bacteriological proscription and the BWC's broad biological-bacteriological-toxin proscription. It is uncertain, however, whether this effect expresses a legal restraint or a moral restraint upon biological warfare. First, the BWC has been in effect for a relatively short period of time.[256] Second, the BWC has been and is now being flagrantly violated by states party to it.[257] Thus, the BWC's importance as a source of a general international *legal* restraint on biological weapons is uncertain. Nevertheless, the BWC, together with the Geneva Protocol, does express the belief that biological weapons "have been justly condemned by the general opinion of the civilized world."[258]

9. *Summary*

The international agreements applicable to CBWs are sources of a general international legal rule prohibiting the first use of lethal or seriously injurious chemical weapons. First use of biological weapons is prohibited only among the parties to the Protocol whereas any use of them is prohibited among the parties to the BWC. The status of the BWC as a source of general international law, however, remains uncertain.

C. Custom

1. *Introduction*

The third source of international law to which the ICJ refers in resolving a dispute brought before it is "[i]nternational custom, as evidence of a general practice accepted as law."[259] "Custom is . . . the original source of international law."[260] In the absence of a pertinent treaty, customary law will be applicable.[261]

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256. *See supra* note 101.

257. One of the violating parties, the U.S.S.R., was a chief sponsor. *See infra* text accompanying note 370. The U.S.S.R. was one of 12 members of the United Nations to agree to a draft of the BWC in the Conference of the Committee on Disarmament. *See* Moore, *supra* note 36, at 427.

258. *See* BWC, *supra* note 28, at 586, *reprinted* at 600.

259. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, 1060, T.S. No. 993.

260. 1 L. OPPENHEIM, *supra* note 103, at 25; *see also* H. KELSEN, *supra* note 166, at 438.

261. The Paquete Habana, 175 U.S. 677, 700 (1900) ("[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort

International custom is a practice or usage that is followed because of a conviction that the practice or usage is obligatory.[262] Consequently, two elements are required to form a customary rule—the objective element, practice, and the subjective element, conviction.[263] A practice need not be ancient in origin,[264] but it must be repeated over time;[265] it need not be unanimous or universal, but it must be general.[266] Conviction transforms a simple practice into a recognized custom. The point at which a practice or usage evolves into a custom is a factual determination;[267] evidence of the evolution into custom could be gathered from such diverse sources as official acts, pronouncements and opinions, manuals, and diplomatic correspondence.[268]

In the determination of customary law, three situations demand caution. First, a practice may continue with the appearance of conviction when actually it is followed primarily for moral or political reasons.[269] Second, a country may refrain completely from a practice, making a determination of conviction more difficult; this is particularly true regarding the methods of conducting hostilities.[270] Third, although violations do not necessarily negate

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must be had to the customs and usages of civilized nations."); H. KELSEN, *supra* note 166, at 438.

262. J. BRIERLY, *supra* note 24, at 59. A classic formulation is made by Judge Lauterpacht: "International jurists speak of a *custom* when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to International Law, obligatory or right." 1 L. OPPENHEIM, *supra* note 103, at 25.

263. One scholar has termed the practice element the "material" aspect, and the conviction element the "psychological aspect," or "*opinio juris.*" J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 40-41 (7th ed. 1972). Starke observes "that the *opinio juris* is a matter of inference from all the circumstances." *Id.* at 41-42.

264. Kunz, *The Nature of Customary International Law,* 47 AM. J. INT'L L. 662, 666 (1953).

265. *Id.*

266. *Id.*

267. 1 L. OPPENHEIM, *supra* note 103, at 26. "Wherever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary International Law." *Id.*

268. *See* J. BRIERLY, *supra* note 24, at 61.

269. Kunz states that this phenomenon may be a "norm of international morality or a norm of *courtoisie internationale,*" but not a rule of customary international law. Kunz, *supra* note 264, at 667.

270. "[O]nly if such abstention [from instituting criminal proceedings] were

the existence of a customary rule, the repeated commission of violations may evidence a new and different norm.[271]

Customary rules of the international law of war are binding upon all states under all circumstances.[272] Thus, customary rules apply to states participating in declared wars and in armed conflicts of a less formal and not purely international character.[273] It is generally recognized that customary rules also bind belligerent participants that are not states, including insurgent groups.[274]

Substantially all evidence regarding the behavior of nations indicates that there is a common aversion to the first use of lethal or seriously injurious chemical and biological agents, even among those with strong military capabilities. Lethal or seriously injurious CBWs rarely have been used and in most instances the party employing them either attempted to justify or flatly denied their

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based on their [the states] being conscious of having a duty to abstain would it be possible to speak of an international custom." The S.S. Lotus, 1927 P.C.I.J., ser. A, No. 9, at 28. This observation has led one authority to note that conviction is the more important element in the determination of customary law in the area of weapons use. THOMAS & THOMAS, *supra* note 20, at 136.

271. *See* Kunz, *supra* note 264, at 668.

272. *See* J. STARKE, *supra* note 263, at 517; R. TUCKER, *supra* note 103, at 32.

273. 3 SIPRI, *supra* note 36, at 29-30; J. STARKE, *supra* note 263, at 517. These authorities observe that the customary laws of war have been recognized as applicable in the Vietnam Conflict, which was technically an intrastate conflict with an international character.

274. An insurgent group may be bound by the customary rules if it has been recognized as a belligerent by other states. The traditional rule is that only full sovereign states are legally qualified to make war and thus become belligerents. 2 L. OPPENHEIM, *supra* note 103, at 248. Because entities which are not full sovereign states may have the power, if not the legal qualifications, to make war, it becomes necessary to recognize these entities legally as belligerents when certain conditions of fact are present—

> (1) the existence of a civil war accompanied by a general state of hostilities;
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> (2) occupation and a measure of orderly administration of a substantial part of national territory by the insurgents;
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> (3) observance of the rules of warfare on the part of the insurgent forces acting under a responsible authority;
>
> (4) the practical necessity for third States to define their attitude to the civil war.

Id. at 249. Thus, Oppenheim states that the customary rules bind "belligerents," meaning full sovereign states and entities qualifying as belligerents even though not full sovereign states. *Id.* at 231. The SIPRI writers note that the fact "that no prior explicit acceptance is required for a customary rule allows a somewhat broader interpretation of the concept of a state." 3 SIPRI, *supra* note 36, at 29.

use. Knowledge, or even suspicion, of a nation's use of CBWs rarely fails to stimulate some international criticism. Certainly, no state has ever claimed a right to first use of lethal or seriously injurious CBWs. The following discussion traces the development of custom with regard to CBWs.

2. *World War I*

Germany generally is acknowledged to be the first user of lethal or seriously injurious gas during World War I.[275] Although Germany's use of gas received widespread condemnation,[276] the Allies, which at that time included only Great Britain and France, made no formal protest to the German Government.[277] The German Government defended its use of gas by claiming a reprisal against Allied first use, but the Allies firmly denied this charge.[278] Following these early accusations, the Germans and all the Allies, including the United States, engaged in large scale gas warfare for the remainder of the hostilities.[279] Both the Allies and the Germans considered gas a reprehensible weapon and each justified its own use on the grounds that the enemy's first and continuing use necessitated its retaliation in self-defense.[280] Because

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275. *See, e.g.*, 1 J. GARNER, INTERNATIONAL LAW AND THE WORLD WAR § 180 (1920). This use occurred during the second battle of Ypres, France, on April 22, 1915. *Id.* For a detailed examination of World War I gas warfare, see 1 STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, THE PROBLEM OF CHEMICAL AND BIOLOGICAL WARFARE: THE RISE OF CB WEAPONS 127-41 (1973) [hereinafter cited as 1 SIPRI].

276. The use of gas was denounced in the British House of Lords and in the British and United States press. 1 J. GARNER, *supra* note 275, § 182.

277. Kelly, *supra* note 103, at 37 n.171.

278. Prior to April 1915, both the Germans and French used tear gas, but the Germans were the first to use lethal gas. *See* 2 THOMAS & THOMAS, *supra* note 222, at 157-58.

279. Japan apparently did not use gas during the first World War. *See* Kelly, *supra* note 103, at 42. However, tactical rather than legal considerations may explain Japan's decision not to use gas, for gas warfare was not as adaptable to the Pacific area as it was to the trench warfare of Europe. *Id.*

280. For an insight into the justifications of both sides, see correspondence involving the February 6, 1918, appeal (to all belligerent participants to stop using gas) made by the International Committee of the Red Cross. DEP'T OF STATE, 1918 FOREIGN RELATIONS OF THE UNITED STATES 779-88 (1933) [hereinafter cited as 1918 FOREIGN RELATIONS]. This appeal, which asserted that the use of gas violated the Hague Regulations against the use of poison or poisoned weapons and against the use of means calculated to cause unnecessary suffering, *see supra* text accompanying note 205, was the only formal protest made during

each side recognized that the utilization of gas was a morally suspect method of warfare and because each side felt compelled to legitimize its own use of gas, the major powers must have felt *some* conviction that the use of chemical weaponry was illegal except under the most exigent circumstances. It is possible, of course, that these condemnations and justifications were rooted more in fear of adverse world opinion than in genuine legal conviction.[281] Nonetheless, political considerations may contribute to or even be evidence of a customary norm.[282] The large scale use of gas by both the Allied and Central Powers coupled with the lack of a formal Allied protest against Germany's initial use of gas indicate the weakness of any customary rule then in existence.[283]

World War I against the use of gas. O'Brien, *supra* note 103, at 23 n.61. The French issued a joint Allied reply condemning gas as "cruel" but justified their use of gas as "a means of protection . . . furnishing their armies equal offensive instruments." *See* Telegram from Stovall to the Secretary of State (April 13, 1918), *reprinted in* 1918 FOREIGN RELATIONS, *supra* at 782-83. Germany replied that gas was used because "a feeling of responsibility for its own people made it impossible for the German military headquarters to renounce an effective if dreadful means of warfare for the mere purpose of sparing the enemy sufferings which the enemy itself was at that very time inflicting only too readily." *See* Letter from Stovall to the Secretary of State (Sept. 24, 1918), *reprinted in* 1918 FOREIGN RELATIONS, *supra*, at 788.

281. This conjecture may be especially applicable to the Germans when analyzed in terms of the traditional German theory of military necessity. German military theory (*Kriegsraison*) emphasizes necessity over humanity. *See genrally* O'Brien-1, *supra* note 110, at 117-28. Furthermore, the United States Army interpreted the Hague Regulation article 23 as not including chemical and gas weapons in its proscription of poison or poisoned weapons and weapons which cause unnecessary suffering. *See* 2 THOMAS & THOMAS, *supra* note 222, at 183. Hague Regulation article 23(a) was, however, interpreted to prohibit poison or poisoned weapons when those weapons were "means calculated to spread contagious diseases." U.S. DEP'T OF ARMY, RULES OF LAND WARFARE, para. 177 (April 25, 1914, as corrected to April 15, 1917), *quoted in* Neinast, *supra* note 20, at 19.

Generally, the methods of gas dissemination during World War I did not violate the existing conventional prohibition of gas. The Hague Gas Declaration prohibited projectiles whose sole object was to diffuse gas. *See supra* note 192 and accompanying text. The primary means of gas dissemination was by canister which released a cloud of gas carried by wind to enemy trenches. *See* 1 J. GARNER, *supra* note 275, § 180.

282. *See* 3 SIPRI, *supra* note 36, at 103.

283. "[I]t would seem that the evidence shifts the scales toward a conclusion either than [sic] no such rule was even in being or if it was it did not survive the war. If there was such a rule it did nothing to restrain the use of gas." 2 THOMAS & THOMAS, *supra* note 222, at 162.

3. *Between the World Wars*

As a result of the public condemnation of gas warfare following the First World War, specific prohibitions against chemical weapons were included in three international agreements: the peace treaties,[284] the 1922 Washington Naval Treaty,[285] and the 1925 Geneva Protocol.[286] The language of these agreements suggests that chemical weapons, particularly gas, already were considered illegal.[287] Because the purpose of the World War I peace treaties was to disarm the individual Central Power states,[288] however, the peace treaties may not be indicative of international law on the use of chemical weapons.

The arms limitation conference which produced the Washington Naval Treaty was convened upon the initiative of the United States.[289] Although the Treaty never became effective, no objection to its chemical warfare prohibition was made.[290] The Treaty was ratified by the United States,[291] the United Kingdom, Italy, and Japan.[292] Not long after the Treaty was signed, France sold Japan gas manufacturing equipment and assisted in the initial operation of Japanese plants.[293] Additionally, in 1920 the United States created the Chemical Warfare Service as a part of its army.[294] These two activities may indicate only a desire for

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284. *See supra* text accompanying notes 215-21.

285. *See supra* text accompanying note 223.

286. *See supra* text accompanying notes 35-44.

287. *See* 3 SIPRI, *supra* note 36, at 104.

288. *See* Moore, *supra* note 36, at 431.

289. Bernstein, *supra* note 228, at 911. The initiative was provided by Secretary of State Hughes. *Id.*

290. *See supra* text accompanying note 228.

291. Division of opinion existed among the United States military command and other representatives at the conference on the chemical warfare prohibition. Much controversy focused on whether the treaty's ban would include nonlethal agents, such as tear gas, in addition to lethal agents. The "total prohibition" approach prevailed, and none of the other delegations sought to exclude tear gas from the coverage of article V. It is not certain, however, whether the treaty reflected any conviction about what the law was or what it should be. The United States Senate unanimously ratified the treaty without substantial discussion of the issue of lethal/nonlethal coverage. *See* 2 THOMAS & THOMAS, *supra* note 222, at 184-85; Baxter & Buergenthal, *supra* note 36, at 860; Moore, *supra* note 36, at 432-33.

292. SCHINDLER & TOMAN, *supra* note 27, at 659.

293. Bernstein, *supra* note 228, at 912.

294. *Id.* at 909-10. The service was established despite strong opinion against

preparedness and not a belief in the legality of chemical weapons. Even so, if the major powers believed that chemical weapons were illegal, these practices demonstrate that their conviction may not have been very strong.

The United States delegation to the 1925 Geneva Conference also initiated the adoption process for the Geneva Protocol.[295] Of the major powers represented at the conference, only Japan and the United States failed to ratify the Protocol.[296] It is not clear why Japan did not ratify,[297] but commentators concluded that the United States Senate did not ratify the Protocol for three reasons: (1) it doubted the inhumanness of gas; (2) it feared the Protocol would prohibit the use of tear gas in war; and (3) it was affected by domestic isolationist sentiment.[298]

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gas among the public and some members of the United States military command. Two possible reasons may be the effectiveness of gas as a weapon and the perceived need for preparedness. 2 THOMAS & THOMAS, *supra* note 222, at 184.

295. Secretary of State Kellog instructed the delegation:

> [T]he Department would desire to see an article inserted absolutely prohibiting international trade in asphyxiating, poisonous or other gases for use in war. In this connection you will recall that the Treaty between the United States, Great Britain, France, Italy, and Japan, signed on February 6, 1922, contained in Article 5, a prohibition against the use of such gases. This Treaty, it may be noted, is not yet effective as it has not been ratified by France. However, as this Government and various other governments are clearly committed to the principle that poisonous gases should not be used in warfare, there is every reason for you to press for the inclusion of an article prohibiting the shipment of such gases in foreign trade for possible use in time of war.

1 DEP'T OF STATE, 1925 FOREIGN RELATIONS OF THE UNITED STATES 35-36 (1940). Secretary Kellog recommended a provision which incorporated the language of article V of the Washington Naval Treaty, but also proscribed the export of chemical weapons. *Id.* at 36. These instructions imply that the United States believed chemical weapons should be an illegal means of conducting hostilities, but did not view them as a means already deemed illegal. One early commentator suggested that the Protocol was only an expression of the "sentiment of the delegates." Bernstein, *supra* note 239, at 914; *see also* Baxter & Buergenthal, *supra* note 36, at 861; Moore, *supra* note 36, at 433.

296. Japan eventually ratified the Protocol in 1970. SCHINDLER & TOMAN, *supra* note 27, at 112. The United States ratified the Protocol in 1975. TREATIES IN FORCE, *supra* note 28, at 116.

297. Perhaps Japan thought that ratification of the Protocol was inconsistent with its operation of gas manufacturing plants. *See supra* note 293 and accompanying text.

298. For a full discussion, see Bunn, *supra* note 40, at 378; Fuller, *supra* note 196, at 264; Moore, *supra* note 36, at 433-34. The discussion at the Geneva Con-

Many parties to the Protocol, including the United Kingdom, France, and the Soviet Union, restricted their obligations reciprocally through the use of reservations.[299] Because of these reciprocal restrictions, commentators are hesitant to conclude that the Protocol was declaratory of custom in 1925.[300]

Italy, a nonreserving party to the Protocol,[301] generally is identified as the first country to use lethal gas after the Protocol's adoption. During 1935 and 1936 Italy waged war against Ethiopia, another nonreserving party to the Protocol.[302] Italian armed forces used gas against Ethiopian armed forces and villages.[303] Significantly, Italy did not assert a right to first use. Initially, the Italian Government denied press reports of gas warfare. Later Italy claimed its use of gas was a reprisal against allegedly unlawful Ethiopian acts of war.[304] The Italian Government asserted that it had complied with the Geneva Protocol because the Protocol did not restrict a state's right to reprisal against illegal acts of war.[305] Italy's rationalization of its behavior may have been merely an effort to combat negative world opinion. Italy's excuse is weakened, however, because the Ethiopian armed forces were neither as sophisticated nor as well-equipped as those of Mussolini. Whatever the legal merits of Italy's justification, Italy's attempt to vindicate itself demonstrates that the country recognized at least *some* restraint upon the use of chemical weapons.[306] The ex-

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ference did not focus upon the exact prohibitory scope of the Protocol. *See* Baxter & Buergenthal, *supra* note 36, at 861.

299. *See supra* note 32 and accompanying text.

300. *See, e.g.*, 2 THOMAS & THOMAS, *supra* note 222, at 93-96. Professor O'Brien characterizes the Protocol as having a "strictly contractual caste." O'Brien, *supra* note 103, at 31.

301. *See* SCHINDLER & TOMAN, *supra* note 27, at 112.

302. *Id.* at 111.

303. For a detailed account, see 2 THOMAS & THOMAS, *supra* note 222, at 102-63. The Italians were the first to disseminate poison gas by spraying it from airplanes. *Id.* at 163.

304. *Id.*; 1 SIPRI, *supra* note 275, at 143. The Italian Government charged the Ethiopians with torturing and killing captives, disfiguring wounded and dead Italians, and killing noncombatants. *Id.*

305. 2 L. OPPENHEIM, *supra* note 103, at 344 n.1; 2 THOMAS & THOMAS, *supra* note 222, at 163-64.

306. Indeed, Professor O'Brien notes that the Italian use of gas was an "aberration": "[N]o one seriously contended that the generally condemned act had any relevance to other nations and other wars." O'Brien, *supra* note 103, at 33-34; *see also* 3 SIPRI, *supra* note 36, at 107.

tent to which the Italian Government supported a customary rule against the use of chemical weapons is unclear, because it failed to consider its own use of gas as a violation of the Protocol.[307]

The Soviet Union, Germany, and Japan reportedly began serious research in biological weapons during the 1930s.[308] Japan was accused of using gas and biological warfare against China before and during World War II, but these charges were not fully substantiated. The allegations were framed as violations of international agreements to which Japan was a party, not as violations of international custom.[309]

During the period between the world wars, nations used the customary rules both to justify their use of CBWs and to accuse others of using CBWs illegally. More optimistically, the limited instances of CBW use during this period may evidence a growing inclination to abstain from the use of CBWs and to recognize some customary legal limit permitting CBW use only in special circumstances.

4. *World War II*

There are no conclusive reports establishing the use of CBWs during the Second World War.[310] This lack of conclusive information seems to confirm the growing disinclination to use CBWs. Whether this practice of abstention stemmed from a conviction as to a customary rule is not entirely clear, but some customary legal restraint seems to have emerged.

The abstention did not result from any inability to use CBWs.[311] A joint Anglo-French statement made at the beginning of the war declared the intention of the two states to abide by the

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307. 3 SIPRI, *supra* note 36, at 164. The prohibitions of the Protocol were incorporated in the 1938 Italian War Regulations which state that compliance is dependent upon conventional reciprocity. 2 L. OPPENHEIM, *supra* note 103, at 343 n.3.

308. Neinast, *supra* note 20, at 4.

309. *See* 2 THOMAS & THOMAS, *supra* note 222, at 164-66; Kelly, *supra* note 103, at 13; O'Brien, *supra* note 103, at 33-34 & nn.89 & 90.

Japan was not bound by the Geneva Protocol. Japan may not have felt prohibited from using CBWs by the pre-World War I agreements or by custom.

310. J. SPAIGHT, *supra* note 195, at 193. The reports include the charges against Japan. *See supra* notes 308-09 and accompanying text. For other unsubstantiated reports of the use of gas, see J. SPAIGHT, *supra* note 195, at 193-94.

311. "All of the belligerents stood ready to engage in gas warfare . . . ." O'Brien, *supra* note 103, at 34-35.

provisions of the Geneva Protocol, but reserved the right to take any action necessary if the enemy did not also abstain.[312] Germany replied with a similar pledge,[313] but Japan replied without pledging compliance.[314] Churchill responded to reports that the Germans were prepared to use gas by repeatedly warning that if the Germans used gas, the British would retaliate with large scale gas warfare.[315] The United States, having begun biological warfare research in 1941,[316] also indicated it was prepared to retaliate in kind,[317] if the enemy used gas.[318] After Germany surrendered,

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312. J. SPAIGHT, *supra* note 195, at 193. The declaration was issued on September 2, 1939. *Id.*

313. *Id.*

314. Bunn, *supra* note 40, at 382.

315. J. SPAIGHT, *supra* note 195, at 194-95. Churchill did not phrase his threat in terms of legitimate reprisal. He once spoke of inflicting "tenfold retaliation" upon Germany in the event the latter used gas. *Id.* at 195. Churchill was convinced that the threat of retaliation kept the Germans from using gas. *Id.*

316. Brungs, *supra* note 20, at 68. The United States Army manual of 1940 repeated the 1914 manual's provisions that Hague Regulation article 23(a), *see supra* text accompanying note 205, extended to the "use of means calculated to spread contagious disease." UNITED STATES DEP'T OF THE ARMY, FIELD MANUAL 27-10, RULES OF LAND WARFARE, para. 28 (1940), *quoted in* Brungs, *supra* note 20, at 19. The British Manual of Military Law of 1929 contained a similar provision. *Id.* at 20.

317. *See* Bernstein, *supra* note 289, at 914-15.

318. J. SPAIGHT, *supra* note 195, at 195; Bunn, *supra* note 40, at 382. Roosevelt avoided mentioning the Protocol because the United States and Japan were not parties. The following is an excerpt from a June 8, 1943, statement:

> Use of such weapons [poisonous or noxious gases or other inhumane devices] has been outlawed by the general opinion of civilized mankind. This country has not used them, and I hope that we never will be compelled to use them. I state categorically that we shall under no circumstances resort to the use of such weapons unless they are first used by our enemies.
>
> . . .
>
> We promise to any perpetrators of such crimes [resort to the use of poisonous or noxious gases or other inhumane devices of warfare] full and swift retaliation in kind. . . . Any use of gas by any Axis power, therefore, will immediately be followed by the fullest possible retaliation upon munition centers, seaports, and other military objectives . . . .

Roosevelt, *Use of Poison Gas*, 8 Dep't St. Bull. 507, 507 (1943). This may be the origin of a United States policy of "no first use" of CBWs. Kelly, *supra* note 103, at 35; O'Brien, *supra* note 103, at 35. The United States Army's 1940 manual stated: "The practice of recent years has been to regard the prohibition against the use of poison [Hague Regulation article 23(a)] as not applicable to the use of toxic gases." UNITED STATES DEP'T OF THE ARMY, *supra* note 316, at 7, *quoted in* Kelly, *supra* note 103, at 44 n.202. The "practice" referred to may have been the

the United States considered and rejected the use of gas or antiplant bacteriological warfare against the Japanese to bring the war to a swift conclusion.[319]

The general abstention from using gas warfare by all the belligerent participants may be attributed to the fear of retaliation.[320] Hitler's personal objection to the use of chemical weapons resulted from his exposure to gas as a soldier in World War I and is also cited as a reason for Germany's abstention.[321] Tactical considerations also may have induced abstention.[322] Certainly, both sides anticipated that world opinion would condemn the first party to use CBWs. Finally, all those participating in the war, except for the United States and Japan, were parties to the Geneva Protocol. Thus, the Protocol also may have served as a restraint against the use of gas. Compliance with the Geneva Protocol in such a major conflict is significant,[323] especially considering two of the major powers were not parties. Because the only sanction for violation of the Protocol was the risk of retaliation, compliance may have been based more upon fear than upon conviction as to a legal restraint.[324] Even so, a practice which results

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use of gas by Italy or its alleged use by Japan. *See supra* notes 303, 309-10 and accompanying text.

319. *See* Brungs, *supra* note 20, at 69 & n.122; Bunn, *supra* note 40, at 382. Professor Bunn attributes the ultimate rejection of the idea largely to "[p]ersonal and institutional distaste . . . among military men . . . ." *Id.*

320. J. SPAIGHT, *supra* note 195, at 195-96; 2 THOMAS & THOMAS, *supra* note 222, at 168-69.

321. 2 THOMAS & THOMAS, *supra* note 222, at 168. *But see* S. SEAGRAVE, *supra* note 40, at 230:

> Although it was Adolph Hitler's personal revulsion for poison gas, as much as anything else, that kept Germany from using its nerve gases . . . , the constant readiness of the British and American chemical corps . . . did much to convince the German general staff and Hitler that the Allies also had nerve gas and were prepared to use it on Germany in retaliation.

Indeed, Hitler's repugnance for lethal chemical agents was not strong enough to prevent him from killing millions of civilian noncombatants with gas.

322. Unfavorable climate in Africa, Italy, and Russia; difficult physical terrain; and great distances between production centers and employment locations were considerations which may have reduced the tactical advantage of using CBWs. *See* 2 THOMAS & THOMAS, *supra* note 222, at 168-69.

323. Professors Thomas and Thomas deem this fact "astonishing." *Id.* at 169. Professor O'Brien calls it "remarkable." O'Brien, *supra* note 103, at 36.

324. Professor Stone comments that the abstention was probably primarily "due to a special combination of circumstances rendering threat of reprisals unusually efficacious." J. STONE, *supra* note 61, at 556.

from the threat of legal sanction is no less significant legally than a practice observed because of "a deep respect for the law."[325] Whatever their motivation, the actions of states during World War II may evidence the emergence of a customary rule against first use of CBWs.

5. *The Korean Conflict*

None of the belligerent participants in the Korean Conflict used CBWs.[326] The United States military was capable of using chemical weapons, but refrained from doing so, despite the potential tactical advantage which might have been achieved.[327] China and North Korea accused the United States of employing germ warfare, but these charges were denied[328] and never substantiated.[329] In June 1952 the United States again declined to become

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325. O'Brien, *supra* note 103, at 36 (discussing legal sanctions). This may be particularly appropriate in the case of the law of war, in which custom is often overtly evidenced by abstention. As Professor Tucker observes:

> It is of course true that in the absence of a system of international inspection and control of prohibited weapons, the effectiveness of the rule forbidding poisonous or asphyxiating gases must depend largely upon the expectation of states that resort to these weapons will provoke retaliation in kind from an opponent. It is not easy to understand, however, why this fact should be considered as an argument against the position that resort to poisonous or asphyxiating gases is now prohibited in law. The threat of retaliation, or reprisal, must provide a decisive factor in leading to the observance of the whole of the law regulating the conduct of war. Yet it has seldom been contended that to the extent that this law is dependent for its observance upon the threat of reprisal it is thereby deprived of its validity.

R. TUCKER, *supra* note 103, at 53 (footnotes omitted).

326. *See, e.g.*, Moore, *supra* note 36, at 437.

327. The use of gas may have been tactically advantageous because the front was fairly narrow and the United States was better prepared to employ chemical weapons than North Korea or China. 2 THOMAS & THOMAS, *supra* note 222, at 170; Kelly, *supra* note 103, at 14; Moore, *supra* note 36, at 437. Some United States frontline commanders requested but were refused permission to use gas to flush enemy soldiers from fortifications. 2 THOMAS & THOMAS, *supra* note 222, at 170; Bunn, *supra* note 40, at 383; Moore, *supra* note 36, at 437.

328. "We will not commit aggression with chemical weapons or bacteriological weapons, which we have been falsely and slanderously accused of using." Acheson, *Achieving the Goals of the Charter*, 27 DEP'T ST. BULL. 639, 641 (1952) (statement by Secretary of State Dean Acheson before the U.N. General Assembly on Oct. 16, 1952).

329. In 1952 the United States invited the International Committee of the Red Cross (ICRC) to investigate the charges. North Korea and China would not

a party to the Geneva Protocol.[330] This restraint, exercised even though the United States had no obligation to do so under the Protocol, may evidence an United States conviction for a customary rule against CBWs.[331] The United States policy during the Korean Conflict appears to continue Roosevelt's "no first use" policy.[332] Use of this policy in Korea can be traced to a combination of considerations: fear of retaliation in kind from the Soviet Union, fear of escalation, fear of adverse international reaction to a first use, scrutiny by the United Nations, and the limited objectives of the conflict.[333] Nevertheless, the obvious restraint[334] from using CBWs during a conflict of considerable proportion demonstrates some conviction that first use would invite legal sanctions. Even if the abstention was based largely on political considerations, the practice may indicate a continuation of a developing customary rule against CBW first use.[335]

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cooperate so no inquiry was made. *See* 10 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 461-62 (1968). Subsequently, the Soviet Union blocked by veto a United Nations Security Council draft resolution requesting the ICRC to investigate the charges and report to the Security Council. *Id.* at 465. In 1953 the United Nations General Assembly adopted a resolution proposing that a multistate commission investigate and report back to the General Assembly. The investigation was contingent upon acceptance by all of the governments involved. North Korean communist authorities and China refused to accept. *Id.* at 465-66.

330. The Soviet Union proposed in June 1952 that the Security Council adopt a resolution calling upon all states not yet members to ratify or accede to the Protocol. The resolution focused upon the condemnation of bacterial warfare. *Id.* at 463. The United States representative responded by pointing out the inadequacies of the Protocol: the restrictive Soviet reservation, the Protocol's failure to prohibit production or stockpiling, and the need for agreement upon elimination of weapons of mass destruction. *Id.* at 463-64. The resolution failed despite the Soviet Union's emphasis on the Protocol's "binding power." *Id.* at 465. During the following month the People's Republic of China formally recognized as binding the China's 1929 accession to the Protocol.

331. The United States was bound by the 1907 Hague Regulations, which were interpreted by the 1940 Army manual to prohibit the spreading of contagious diseases. *See supra* note 316; SCHINDLER & TOMAN, *supra* note 27, at 91.

332. *See supra* notes 318 & 328 (Secretary Acheson's statement that the United States would not commit "aggression" with CBWs).

333. *See* Kelly, *supra* note 103, at 14; Moore, *supra* note 36, at 438.

334. One authority states that the United States fear of retaliation was based upon speculation that the Soviet Union would supply North Korea and China with CBWs. 1 SIPRI, *supra* note 275, at 158.

335. *See supra* notes 323-25 and accompanying text. The emphasis placed by the Soviet Union upon the Geneva Protocol, however, undermines the notion of a customary rule in the 1950s. This emphasis on a conventional restraint could

During the years following the Korean Conflict, the United States seemed to indicate it was changing its position concerning the use of CBWs, an issue the United States appeared to address as a policy matter rather than as a legal concern. A 1956 army manual pointed out the binding effect of Hague Regulation article 23(a) on the United States,[336] but declared that "the United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or nontoxic gases, of smoke or incendiary materials, or of bacteriological warfare."[337] Hints of possible changes in United States CBW policy led Congressman Kastenmaier to introduce in the House of Representatives a resolution affirming an official "no first use" policy.[338] The resolution failed.[339] Although the language in the army manual and the re-

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be a manifestation of the Soviets' skepticism regarding custom and their preference for convention: "In contemporary conditions the principal means of creating norms of international law is a treaty. This is the point of view held by a great majority, if not by all, of the Soviet authors who have treated this subject." Tunkin, *Co-existence and International Law,* [1958] 3 RECUEIL DES COURS 5, 23.

336. UNITED STATES DEP'T OF THE ARMY, FIELD MANUAL 27-10, LAW OF LAND WARFARE, para. 37 (1956), *discussed in* Kelly, *supra* note 103, at 44 n.202.

337. UNITED STATES DEP'T OF THE ARMY, FIELD MANUAL 27-10, LAW OF LAND WARFARE, para. 38 (1956), *reprinted in* W. BISHOP, *supra* note 70, at 969. The manual notes that two pertinent treaties, the Washington Naval Treaty and the Geneva Protocol, were not binding because the former failed to become effective and because the latter failed to receive United States ratification. *See id.* The Navy manual included a similarly worded disclaimer and went on to express doubt about the existence of a customary rule:

> Although the use of such weapons [gas or bacteriological] frequently has been condemned by states, including the United States, it remains doubtful that, in the absence of a specific restriction established by treaty, a state legally is prohibited at present from resorting to their use. However, it is clear that the use of poisonous gas or bacteriological weapons may be considered justified against an enemy who first resorts to the use of those weapons.

UNITED STATES NAVAL WAR COLLEGE, LAW OF NAVAL WARFARE, para. 612b (1955), *reprinted in* R. TUCKER, *supra* note 103, at 410.

338. H.R. Res. No. 433, 86th Cong., 1st Sess. (1959), *reprinted in* 105 CONG. REC. 10,824 (1959).

339. *See* 2 THOMAS & THOMAS, *supra* note 222, at 195. The Departments of State and Defense stressed the defense needs and implied that such a policy might not be judicious without conventional agreements and controls. *Id.* Partial responsibility for the failure of the resolution stems from President Eisenhower's official opposition. When President Eisenhower was asked at a January 1960 press conference about a possible change in United States policy regarding

jection of the resolution seem to indicate little United States conviction for a customary rule, the United States never asserted, even in the army and navy manuals, a right to first use,[340] and the Roosevelt "no first use" policy was never altered explicitly.[341] Whatever change did take place might be attributed to Cold War distrust, which likely inhibited the growth of a genuine conviction for a customary rule.

Despite these later developments, the Korean Conflict period strengthened the custom that emerged from World War II. The facts remain that CBWs were not employed during the Korean Conflict, and no state asserted a right to first use.

6. *The Yemen Civil War*

The United Arab Republic (UAR) was charged with using lethal gas against royalist villages and troops during the Yemen Civil War.[342] Press reports accused the UAR of using gas and speculated that the Soviet Union was behind the operation.[343] Although the International Committee of the Red Cross (ICRC)[344] confirmed this use of gas, the UAR denied the charges.[345] Two hundred members of the British House of Commons signed a motion deploring the UAR's use of gas and requesting the British Government to bring the issue before the United Nations.[346] The

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CBWs, he replied that "no official suggestion has been made to me, and so far as my own instinct is concerned, it is not to start such a thing first." 1960-1961 PUB. PAPERS 29 (1961), *reprinted in* Moore, *supra* note 36, at 439.

340. *See* Neinast, *supra* note 20, at 8. British, French, and West German law of war manuals during the 1950s mentioned only the Geneva Protocol without any indication that a customary rule operated independently to proscribe CBW use. *See generally* Brungs, *supra* note 20, at 74-75.

341. In 1960 Major Kelly wrote that "the policy of retaliation enunciated by Roosevelt is yet with the United States." Kelly, *supra* note 103, at 36.

342. *See* N.Y. Times, July 9, 1963, at 7, col. 1. A United Nations observer team failed to find evidence of gas attack. *Id.*, July 16, 1963, at 13, col. 2. Royalist officials and the Saudi Arabian Government, which was backing the royalists, accused the UAR of using lethal gas in 1967. *See id.*, Jan. 14, 1967, at 4, col. 3; *id.*, Jan. 24, 1967, at 4, col. 5.

343. *See* 2 THOMAS & THOMAS, *supra* note 222, chap. VI, n.110.

344. An ICRC investigating team confirmed this use of lethal gas and appealed to both sides to discontinue its use. *See id.*, July 28, 1967, at 1, col. 3; 10 M. WHITEMAN, *supra* note 329, at 474-75 (reprints the ICRC statement of June 2, 1967).

345. N.Y. Times, July 30, 1967, at 6, col. 1.

346. N.Y. Times, July 27, 1967, at 5, col. 1.

United States stated that the use of poison gas is a violation of international law and requested that the matter be brought to the attention of the United Nations.[347]

The use of gas in Yemen was never brought before the United Nations due to the Arab-Israeli situation.[348] The condemnations by the United States and the United Kingdom may have resulted more from the states' earlier vote to adopt a United Nations resolution reaffirming the Geneva Protocol[349] than from their convictions for a customary rule. Nevertheless, the adoption of the resolution, the condemnation of first use by two major powers, and the denial by the accused state, which had voted for the resolution, manifested an agreement that the UAR's use of gas was a condemnable deviation from a longstanding practice of no first use.[350] Any customary rule against the use of CBWs was clearly weakened by the UAR's violation and the failure of other states to seek enforcement of the rule.[351] Because of the nearly unani-

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347. The United States Ambassador to the United Nations, Arthur Goldberg, expressed these sentiments in a letter to Congressman Wolff, who had requested investigation of the charges against the UAR. Letter from Ambassador Goldberg to Congressman Wolff (July 24, 1967), *reprinted in* 10 M. WHITEMAN, *supra* note 329, at 476-77. Ambassador Goldberg stated that the United States position on gas use "corresponds to the stated policy of almost all other governments throughout the world as reflected in the voting (91 in favor and 4 abstentions) on [United Nations General Assembly] Resolution 2162B of 1966 which condemned the use of poison gas in warfare." 10 M. WHITEMAN, *supra* note 329, *reprinted* at 476. This resolution, adopted on December 5, 1966, by the United Nations General Assembly, "calls for strict observance by all States of the principles and objectives of the [Geneva] Protocol . . ., condemns all actions contrary to these objectives" and invites all States to accede to the Geneva Protocol. 3 SIPRI, *supra* note 36, at 166. No state opposed the resolution, and only four states abstained (Albania, Cuba, France, and Gabon). *Id.* Ambassador Goldberg stated that the "use of poison gases is clearly contrary to international law . . . ." 10 M. WHITEMAN, *supra* note 329, at 476.

348. The United States did not bring the matter before the United Nations because of the delicate status of United States-UAR relations after the Six Day War. The same event prevented Saudi Arabia from pursuing the matter. *See* 2 THOMAS & THOMAS, *supra* note 222, at 176.

349. *See supra* note 347.

350. Whether the UAR considered itself bound by the Protocol is not certain. Egypt was a party at the time, but Syria and Yemen were not. *See* SCHINDLER & TOMAN, *supra* note 27, at 111, 114-15. For a discussion of this issue, see 2 THOMAS & THOMAS, *supra* note 222, at 100-02. The Protocol by its terms only applies between parties. *See supra* text accompanying note 30.

351. *See* 2 THOMAS & THOMAS, *supra* note 222, at 176. The international society's failure to respond may reflect the emergence of Third World power and

mous United Nations resolution adopted the year before, the UAR persisted in its denials, realizing that any substantiation of the charges would bring along some type of sanction. That realization was evidence that the customary rule against first use of CBWs was not significantly harmed by the rule's violation in Yemen.

7. *The Vietnam Conflict to the Present*

Increased CBW disarmament during and after the Vietnam Conflict demonstrated the increased strength of the customary rule against CBWs. Although the United States admitted using tear gas and herbicides in the Vietnam Conflict,[352] it repeatedly maintained that the use of those agents was proscribed by neither international law nor the Geneva Protocol.[353] The United Nations

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the power of the oil-producing states, who were aligned against Israel and behind the UAR. If the Soviet Union was behind the UAR's use of gas, the Soviets naturally would not have voiced condemnation, nor would allies or proxy states have sought enforcement of international law against the UAR.

352. Communist authorities early in the conflict charged the United States with the use of chemical agents. *See* N.Y. Times, July 31, 1964, at 2, col. 5. On March 23, 1965, Secretary of Defense Robert McNamara issued a statement explaining that South Vietnamese police and military forces were equipped with riot control agents similar to those used by police and military forces all over the world. Statement of Robert McNamara (July 31, 1964), *reprinted in* 10 M. WHITEMAN, *supra* note 329, at 470. The next day Secretary of State Dean Rusk explained that riot control agents such as tear gas were being used in Vietnam to flush enemy forces in order to avoid injury to noncombatants. *Id., reprinted* at 470-73. Secretary Rusk prefaced his explanation:

> We are not embarking upon gas warfare in Viet-Nam. There has been no policy decision to engage in gas warfare in Viet-Nam. We are not talking about agents or weapons that are associated with gas warfare in the military arsenals of many countries. We are not talking about gas that is prohibited by the Geneva convention of 1925 or any other understandings about the use of gas.

Id., reprinted at 470-71.

The United States used antiplant agents, or herbicides, primarily for defoliation of dense jungles. For a full discussion, see Moore, *supra* note 36, at 439-44; 1 SIPRI, *supra* note 275, at 162-85. In 1966 Hungary submitted a draft resolution in the United Nations General Assembly, calling for "absolute compliance" with the Geneva Protocol by all states, citing United States activities in Vietnam as a recent example of violation. Statement by the Hungarian Representative Csatorday to the First Committee of the General Assembly, Use of Chemical and Biological Weapons (Nov. 11, 1966), *reprinted in* UNITED STATES DEP'T OF STATE, DOCUMENTS ON DISARMAMENT 734-40 (1966).

353. *See, e.g.*, Statement by United States Arms Control and Disarmament

General Assembly adopted a resolution in late 1966 calling for "strict observance by all States of the principles and objectives of the Protocol."[354] The United States supported the resolution, but made it clear that it did not interpret the Protocol as prohibiting riot control and herbicide agents.[355] At the Geneva Disarmament Conference of 1969, the Soviet Union stressed the need for uni-

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Director Foster to the First Committee of the General Assembly (Nov. 14, 1966), *reprinted in* UNITED STATES DEP'T OF STATE, DOCUMENTS ON DISARMAMENT 740-47.

> The Geneval Protocol does not apply to all gases, and it certainly does not prohibit the use of simple tear gas where necessary to avoid injury to innocent persons. It is unreasonable to contend that any rule or international law prohibits the use in military combat against any enemy of non-toxic chemical agents that Governments around the world commonly use to control riots by their own peoples. . . . Reference was also made to the use of herbicides in Viet-Nam. These materials involve the same chemicals and have the same effect as those commonly used in the United States and a great many other countries to clear weeds and control vegetation. Contrary to the insinuations of the representative of Hungary, they are not bacteriological weapons; nor is their use contrary to international law.

Id., reprinted at 742, 743-44.

354. United Nations General Assembly Resolution 2162B (XXI), adopted Dec. 5, 1966, *reprinted in* 3 SIPRI, *supra* note 36, at 166-67. The resolution was an amended version of the draft introduced by Hungary. *See supra* note 352. Deputy United States Representative Nabut explained that the United States supported the amended resolution because the amendments removed "tendentious language which was too easily subject to contention, misinterpretation, and distortion." Statement by United States Representative Nabut to the General Assembly, Use of Chemical and Biological Weapons (Dec. 5, 1966), *reprinted in* UNITED STATES DEP'T OF STATE, DOCUMENTS ON DISARMAMENT 800-02 (1966) [hereinafter cited as Nabut Statement]. Ambassador Nabut was referring to the language of the Hungarian draft which required "absolute compliance," compared with "strict observance." *See supra* note 352.

355. Nabut Statement, *supra* note 354, *reprinted* at 801. Ambassador Nabut also recounted the United States practice of abstention since World War I and quoted President Roosevelt's "no first use" policy. *Id., reprinted* at 801-02.

Two letters indicate United States convictions on what the customary rule was. The first is a letter from Ambassador Goldberg to Congressman Wolff in which Ambassador Goldberg stated: "The use of gas is clearly contrary to international law . . . ." *See supra* note 347. The second letter, dated December 22, 1967, from Assistant Secretary of State William B. Macombe to Congressman Rosenthal, in which Macombe stated that the "rule" of the Protocol "has been so widely accepted over a long period of time that it is now considered to form a part of customary international law." Letter from Assistant Secretary Macombe to Congressman Rosenthal (Dec. 22, 1967), *quoted in* Bunn, *supra* note 40, at 384-85.

versal acceptance of the Protocol,[356] and the United Kingdom submitted a draft of a treaty banning biological weapons.[357] On November 25, 1969, President Nixon redefined United States CBW policy by announcing that the United States:

> (1) Reaffirms its . . . renunciation of the first use of lethal chemical weapons.
> (2) Extends this renunciation to the first use of incapacitating chemicals.
> (3) Renounces the use of lethal biological agents and weapons and all other methods of biological warfare.
> (4) [W]ill confine its biological research to defensive measures, such as immunization and safety measures.[358]

President Nixon also announced that he would submit the Geneva Protocol to the Senate for ratification and that the United States would support the United Kingdom's draft of the biological weapons treaty.[359] Furthermore, on February 14, 1970, President Nixon extended the United States' ban on biological weapons to toxins.[360]

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356. N.Y. Times, July 4, 1969, at 4, col. 1.

357. *Id.*, July 11, 1969, at 10, col. 4. The British representative at the conference explained that the United Kingdom was pursuing a ban on biological weapons but not on all CBWs because an agreement on the former was "more urgent" and would be easier to obtain. *Id.*

358. Nixon, *Chemical and Biological Defense Policies and Programs,* 61 DEP'T ST. BULL. 541, 541 (1969) (statement by President Nixon). The President justified his "no use" policy for biological weapons by stating: "Biological weapons have massive, unpredictable, and potentially uncontrollable consequences. They may produce global epidemics and impair the health of future generations." *Id.*

359. *Id.; see also* N.Y. Times, Nov. 26, 1969, at 16, col. 1.

360. *U.S. Renounces Use of Toxins as a Method of Warfare,* 62 DEP'T ST. BULL. 226, 226-27 (1970). The announcement attempted to clear up some of the confusion over the classification of toxins. The British felt that although their draft biological weapon treaty did not specifically cover toxins, toxins were banned because the draft banned the production and possession of bacteria from which toxins could be produced. N.Y. Times, Dec. 17, 1969, at 20, col. 1. Defense Secretary Laird and the State Department interpreted toxins to be a chemical warfare agent. *Id.* The announcement of February 14, 1970, categorized toxins as biological agents when recognizing that although toxins are "chemical substances" and not contagious or capable of reproducing, "the production of toxins in any significant quantity would require facilities similar to those needed for the production of biological agents." *U.S. Renounces Use of Toxins as a Method of Warfare,* 62 DEP'T ST. BULL. 226, 226 (1970); *see also* N.Y. Times, Feb. 15, 1970, at 1, col. 8. The United States representative at the 1970 Geneva

On December 16, 1969, the United Nations General Assembly adopted a resolution which interpreted the Geneva Protocol to embody "the generally recognized rules of international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare, regardless of any technical developments."[361] The resolution was adopted by a vote of eighty to three, with thirty-six absentions.[362] The United States opposed the resolution because it included riot control and herbicide agents within the Protocol's prohibition and because it erroneously interpreted the Protocol to be a "no use" as opposed to a "no first use" rule.[363]

Secretary of State William P. Rogers recommended[364] that President Nixon submit the Geneva Protocol to the Senate with a reservation permitting retaliatory use of chemical agents.[365] President Nixon sent the Protocol with Secretary Rogers' reservation

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Disarmament conference proposed that the United Kingdom's drafted biological weapon ban include toxins. N.Y. Times, July 1, 1970, at 4, col. 4.

361. United Nations General Assembly Resolution 2603A (XXIV), *reprinted in* SCHINDLER & TOMAN, *supra* note 27, at 125-26.

362. *See* SCHINDLER & TOMAN, *supra* note 27, at 126-27. The United States, Portugal, and Australia were opposed. The states in favor included Afghanistan, Ethiopia, Yemen, the UAR, the Soviet Union, the Iron Curtain states, and the majority of Third World states. *Id.* The states abstaining included China, France, Israel, Italy, Japan, Laos, and the United Kingdom. *Id.*

363. *See* Moore, *supra* note 36, at 445.

364. *Geneva Protocol on Gases and Bacteriological Warfare Submitted to the Senate*, 63 DEP'T ST. BULL. 273, 273-75 (1970).

365. *Id.* at 274. Secretary Rogers stated:

> [T]he said Protocol shall cease to be binding on the Government of the United States with respect to the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, in regard to an enemy State if such State or any of its allies fails to respect the Prohibitions laid down in the Protocol.

Id. Unlike the restrictive reservations of France, the United Kingdom, and the Soviet Union, Secretary Rogers' recommended reservation does not limit the applicability of the Protocol only to parties and does not reserve the right to retaliate with bacteriological agents. *Id.* According to the United States, the Protocol's bacteriological method ban covers all biological agents including toxins. *Id.* In summary, Secretary Rogers recommended that the United States become a party "*to strengthen the general prohibitions on the use of chemical warfare and biological warfare* and to facilitate our participation in the formulation of new arms control provisions in this area." *Id.* (emphasis added). Also, the United States interpretation of the Protocol would permit the use of riot control and herbicide agents in war. *Id.* at 274.

to the Senate on August 19, 1970.[366] After considerable debate,[367] the Senate unanimously consented to ratification of the Protocol with the reservation on December 16, 1974.[368] Thus, the United States was the last major power to become a party to the Geneva Protocol.[369]

At the 1971 Geneva Disarmament Conference, a twelve state committee that included the United States, the United Kingdom, and the Soviet Union, agreed on a revised draft of the BWC which banned biological weapons.[370] The United Nations General Assembly commended the draft[371] and urged the Geneva Conferees to negotiate a similarly comprehensive ban on chemical weapons.[372] Additionally, the United Nations requested all member states to refrain from further development, production, or stockpiling of lethal chemical agents until such an agreement could be reached.[373] The Soviet Union also wanted the BWC to include a

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366. *Id.* at 273.

367. *See* Moore, *supra* note 36, at 423-26. The debate focused chiefly on whether the United States would interpret the Protocol to permit the use of riot control and herbicide agents in war. *Id.* Ratification was made possible when the Ford Administration's Director of the Arms Control and Disarmament Agency, Dr. Fred C. Iklé, offered a compromise interpretation: (1) renunciation of first use of herbicides in war except to clear landing strips and military perimeters, and (2) renunciation of first use of riot control agents except in "defensive military roles to save lives." N.Y. Times, Dec. 13, 1974, at 1, col. 1.

368. 120 CONG. REC. 40,068 (1974); *see also* N.Y. Times, Dec. 17, 1974, at 7, col. 1. President Ford signed the ratification papers on January 22, 1975. *Id.*, Jan. 23, 1974, at 2, col. 4.

369. The United States deposited its instrument of ratification on April 10, 1975. *See* Ford, *Geneva Protocol of 1925 and Biological Weapons Convention,* 72 DEP'T ST. BULL. 576, 577 n.2 (1975) (statement of President Ford); TREATIES IN FORCE, *supra* note 28, at 289.

370. *See* Leonard, *Geneva Disarmament Conference Agrees on Draft Text of Bacteriological Weapons Convention,* 65 DEP'T ST. BULL. 504, 504 (1971); N.Y. Times, Sept. 29, 1971, at 1, col. 1.

371. United Nations General Assembly Resolution 2826, Dec. 16, 1971, *reprinted in* Bush, *U.N. Commends Biological Weapons Convention and Requests Continued Negotiation on Prohibition of Chemical Weapons,* 66 DEP'T ST. BULL. 102, 107-08 (1971). This resolution was adopted by a vote of 110 to 0, with France the only abstention. Moore, *supra* note 36, at 427.

372. United Nations General Assembly Resolution 2827A, *reprinted in* 66 DEP'T ST. BULL. 108-09 (1971) (adopted by a vote of 110 to 0, with one abstention).

373. United Nations General Assembly Resolution 2827B, *reprinted in* 66 DEP'T ST. BULL. 109 (1971) (adopted by a vote of 101 to 0, with 10 abstentions).

ban on chemical weapons,[374] but its proposal never received sufficient support.[375] The BWC opened for signature on April 10, 1972,[376] and entered into force on March 26, 1975.[377] Subsequently, in the Geneva Disarmament Conference of 1976, the United States proposed a chemical weapons ban similar to the BWC ban on biological weapons, but with stronger verification provisions.[378] Negotiations ensued, but no agreement resulted.[379]

Despite the development of conventional restraint, the definition of individual national policy regarding CBWs, and the United Nations focus on CBWs, there has been a greater use of these weapons during the last several years than during any period since World War I. United States Department of State officials have characterized the use of CBWs in Asia by the Soviet

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374. *See* N.Y. Times, Feb. 18, 1970, at 6, col. 3. For a brief history of the BWC, see Special Report of the Conference of the Committee on Disarmament, 10(1) U.N. GAOR Supp. (No. 2) at 11, U.N. Doc. A/S-10/2 (1978) [hereinafter cited as Special Report-2 (1978)].

375. The United States opposed the proposal. The Geneva Conference representative argued that there was a distinction between chemical and biological agents: chemical agents were tactical or relatively controllable; biological agents could directly threaten population centers. N.Y. Times, Feb. 18, 1970, at 6, col. 3.

376. *See* TREATIES IN FORCE, *supra* note 28, at 265.

377. *See* Ford, *supra* note 369, at 577 n.2. United States Arms Control and Disarmament Agency Director Dr. Fred C. Iklé urged the Senate to consent to ratification, noting that "the convention is entirely consistent with United States policy concerning biological and toxin weapons . . . ." Iklé, *Administration Urges Senate Approval of the Geneva Protocol of 1925 and Biological Weapons Convention of 1972, id.*, 93, 94 (1975). Dr. Iklé identified the limited verification provisions as the weakness of the BWC but stated that "it is in the best interest of the United States to enter into this convention." *Id.* The Soviet Union opposed provisions for on-site inspection and verification of compliance procedures. N.Y. Times, Mar. 22, 1972, at 3, col. 1. Dr. Iklé warned, however, "that the limited verifiability of this convention should not be misconstrued as a precedent for other arms limitation agreements. . . ." Iklé, *supra*, at 95. The Senate unanimously consented to ratification, and President Ford signed the instrument of ratification on the same dates as the Geneva Protocol. *See supra* note 368.

378. N.Y. Times, Apr. 14, 1976, at 6, col. 1 (Geneva Disarmament Conference of 1976).

379. *See* N.Y. Times, Apr. 27, 1979, at 8, col. 3. For a more complete discussion, see Special Report (1978), *supra* note 374, at 17-19; Special Report of the Conference of the Committee on Disarmament, 10(2) U.N. GAOR Supp. (No. 2) at 28-30, U.N. Doc. A/S-10/2 (1978).

Union and its allies[380] as a violation of the Protocol, the BWC, and customary international law.[381] The recent violations have weakened the customary rule, especially because there have been limited efforts to investigate those violations and compel compliance with the rule.[382] Additionally, the emphasis upon policy, particularly by the United States, and upon the need for conventional restraint is actually evidence of a weak customary rule. The Soviet Union and its allies not only deny using CBWs themselves, they also deny that any CBWs have been used at all.[383] The fear of *some* sanction, whether it be United Nations scrutiny or adverse political reaction, prevents the Soviet Union and its allies from either confirming that lethal CBWs have been used or cooperating in an international inquiry. The Soviet fear may stem from a desire to avoid stigma as a violator of the treaties that it so strenuously supported. The fear also may originate from a recognition that, unlike the Soviet Union, the majority of states still observe the customary rule of no first use which emerged from World War II and has continued through the Korean and Vietnam conflicts to the present.

8. *Summary*

Few states have expressed officially a conviction that a customary legal restraint inhibits CBW use. Instead, restraint has resulted from fear of retaliation, world scrutiny, and ostracism. Nevertheless, no state has ever asserted a right of first use of lethal CBWs. Every state accused of using CBWs has either relied

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380. *See supra* notes 1-2.

381. *See supra* notes 1-2 and accompanying text.

Defense Secretary Weinberger has characterized Soviet use of chemical weapons as a violation of the "no first use of chemical weapons" agreement. *Moscow A-Tests Questioned,* N.Y. Times, Aug. 30, 1982, at 4, col. 5. At the same time, however, President Reagan has announced a resumption of production of chemical weapons to meet the chemical weapons capability of the Soviet Union. *See* TIME, Apr. 5, 1982, at 23. Congress, however, has impeded the President's plan. *See Stopping Poison Gas,* N.Y. Times, Aug. 30, 1982, at 16, col. 1 (noting congressional deletion of bill amendment which authorized the funds to produce chemical weapons).

382. Indeed, Gary B. Crocker of the State Department's Bureau of Intelligence and Research warned that the use of chemical weapons may become acceptable if not met with an appropriate response now. Dunlap, *U.S. Aide Warns of Rising Chemical Warfare,* N.Y. Times, May 16, 1982, at 48, col. 1.

383. *See supra* notes 1-2 and accompanying text.

upon a legal or semilegal justification or, more recently, has flatly denied the charge. Thus, a customary, if unacclaimed, rule against first use of CBWs presently exists, binding all belligerents in all circumstances.

Determining the custom regarding the use of weapons causing mass destruction, including chemical, biological, and nuclear weapons, is complicated by the difficulty of ascertaining conviction. Because of widespread fear regarding the large scale use of these weapons, states tend to act in a manner which taints any evidence that normally would indicate the extent of their conviction. The tainted evidence has been typified by pronouncements condemning the possession and use of these weapons made at the same time that the pronouncing state is researching, developing, stockpiling, preparing, or using these weapons. Even after a technologically capable state has ceased development and production of a weapon, the state remains fearful of the absolute and horrifying devastation these weapons can cause in the hands of an enemy. Perhaps the special potential of these weapons for unlimited destruction and the unique fear they evoke warrant an analysis to ascertain customary law that requires less evidence of conviction and relies more heavily upon objective indicators such as the practice of abstention.

E. Judicial Decisions

Judicial decisions are another source of law applied to disputes before the ICJ.[384] Although a judicial decision absolutely binds only those parties to the decision,[385] it may provide a subsidiary or indirect source for the development of international law.[386]

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384. "The Court . . . shall apply . . . subject to the provisions of Article 59, judicial decisions . . . as [a] subsidiary means for the determination of rules of law." Statute of the International Court of Justice, art. 38(d), 59 Stat. 1055, 1060, T.S. No. 993, 1 U.N.T.S. at xvi, *reprinted in* BASIC DOCUMENTS, *supra* note 101, at 33-34.

385. *Id.*, art. 59, *reprinted* at 37. "Precedents are not therefore binding in international law . . . ." J. BRIERLY, *supra* note 24, at 64.

386. 1 L. OPPENHEIM, *supra* note 103, at 29.

> [J]udges, statesmen, and lawyers dealing with questions of international law inevitably give weight to the work of their predecessors and colleagues . . . . Decisions of the courts play an important part in the development of customary law. They help to form international custom, and they show what the courts, national or international, have accepted as international law.

Only a few judicial decisions have adjudicated the legality of using CBWs. The decision cited most frequently is *Kiriadolou v. Germany*,[387] a 1930 decision by the German-Greek Mixed Arbitral Tribunal concerning the deaths of Greek nationals in a 1916 German conventional air bombardment of Bucharest. Many writers have focused on dictum in which the court applied the Hague Regulation that requires warning prior to air bombardment of population centers with poison bombs.[388] The tribunal stated: "The dispensation from preliminary notification would enable aeroplanes and dirigibles to poison the non-combatant population of an enemy town by permitting them to drop, by night and without warning, bombs filled with asphyxiating gas, spreading death and causing incurable diseases."[389] Although this dictum has been interpreted as a judicial condemnation of gas warfare,[390] the meaning and significance of the opinion are uncertain.[391]

In *The Hostage Case*,[392] a Nuremberg Tribunal case, a German military commander was charged with exceeding the demands of military necessity when he implemented a "scorched earth" policy in the Norwegian province of Finmark.[393] The commander or-

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W. BISHOP, *supra* note 70, at 39. Judicial decisions are becoming an increasingly important source of international law as more international matters are referred to judicial bodies. *See* J. BRIERLY, *supra* note 24, at 64.

387. 10 Trib. Arb. Mixtes 100 (1921), 1929-30 Ann. Dig. 516 (No. 301), *discussed in* N. SINGH, *supra* note 103, at 186; KELLY, *supra* note 103, at 52; Neinast, *supra* note 20, at 37.

388. *See* 2 THOMAS & THOMAS, *supra* note 222, at 282.

389. *Id.* (quoting *Kiriadobou v. Germany*).

390. *See* Kelly, *supra* note 103, at 52.

391. *See* 2 THOMAS & THOMAS, *supra* note 222, at 282; Neinast, *supra* note 20, at 37. The following questions are raised by Neinast:

> Were the "incurable diseases" mentioned in connection with the lingering effects of gas, or was biological warfare the reference? Would "causing incurable diseases" have been allowed against non-combatants? Would "causing incurable diseases" have been allowed against non-combatants after a preliminary notification? Could incurable diseases be spread by means other than bombardment? These questions were not answered by the Tribunal.

Id. Major Neinast notes that the opinion was written five years after the signing of the Geneva Protocol and that the Protocol may have had some influence on the decision because Greece, Germany, and Rumania were parties at the time. *Id.*

392. United States v. List, II TRIALS OF WAR CRIM. BEFORE THE NUREMBERG MIL. TRIB. 757 (1947-49) (Case No. 7., Mil. Trib. V).

393. *Id.* at 770-72 (Count Two, para. 9).

dered all citizens evacuated and all buildings, residences, bridges, communication and transportation facilities, livestock, and natural resources burned.[394] The Tribunal found that military necessity justified the actions because the commander was seeking to impede the advance of superior Russian forces.[395] It is possible, however, that the Tribunal would not have found military necessity if the German commander had combined a "scorched earth" policy with the use of chemical or biological weapons that rendered the land uninhabitable for long periods.[396]

In the Tokyo War Crimes Trial[397] Japan was charged with using poison gas against China.[398] The indictment alleged a violation of the Hague Gas Declaration, Hague Regulation article 23(a) (the "no poison" rule), and article 171 of the Treaty of Versailles.[399] The decision relied upon conventional prohibitions including those encompassed by the Treaty of Versailles, even though the Treaty did not apply to Japan. This reliance indicates the absence of conviction as to a customary rule.[400] In December 1949, however, a Soviet military tribunal in Khaburovsk convicted twelve Japanese military officers of preparing and employing bacteriological agents, including typhoid, cholera, anthrax, and plague, against the Mongolian People's Republic in 1939 and against China from 1940 to 1942.[401] Because Japan was not then a party to the Geneva Protocol, the conviction may indicate Soviet support for an independent customary rule against bacteriological

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394. *Id.*

395. *Id.* at 1296-97.

396. 3 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1808 (2d rev. ed. 1945).

397. The Tokyo War Crimes Trial (Nov. 1948) (official source unavailable), *reprinted in* 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1029, 1033 (L. Friedman ed. 1972) [hereinafter cited as L. FRIEDMAN]. "Count 55 charges the same accused with having recklessly disregarded their legal duty by virtue of their offices to take adequate steps to secure the observance and prevent breaches of the laws and customs of war." *Id.*

398. Tokyo War Crimes Tribunal, app. D, § 9, *reprinted in* O'Brien, *supra* note 103, at 34 n.90.

399. *Id.*

400. *See* 2 THOMAS & THOMAS, *supra* note 222, at 283; *see also* O'Brien, *supra* note 103, at 34 n.90 ("[The charge] appears to have been lost in the enormous number of counts and specifications.").

401. *See* M. GREENSPAN, *supra* note 103, at 358 n.148; 2 L. OPPENHEIM, *supra* note 103, at 343 n.2; Brungs, *supra* note 20, at 84 n.184; Neinast, *supra* note 20, at 5 n.18; O'Brien, *supra* note 103, at 34 nn.89 & 90.

warfare.[402] The significance of the judgment, however, is reduced because the decision may have been determined more by political considerations than by legal reasoning.[403]

In *The Shimoda Case*,[404] a case evaluating the legality, according to international law, of the atomic bombing of Hiroshima and Nagasaki, a Japanese national court briefly addressed the legality of CBWs.[405] The court found that the atomic bombings violated international law because they caused disproportionate or "unnecessary suffering."[406] The court noted that poisonous gas and bacteria were prohibited weapons,[407] compared these weapons to

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402. *See 2* THOMAS & THOMAS, *supra* note 222, at 283; O'Brien, *supra* note 103, at 34 n.90. This conclusion, however, is not consistent with the prevailing Soviet preference for treaty law over customary law. *See supra* note 335.

403. Colonel Brungs notes that United States officials suspected at the time that the charges were made to "obscure the fate of Japanese prisoners of war still held then by the Russians." Brungs, *supra* note 19a, at 84 n.184. In 1950 the Soviet Union proposed that an international military tribunal be appointed to try several Japanese generals and the Emperor of Japan on similar charges, but the proposal was never acted upon. 2 L. OPPENHEIM, *supra* note 103, at 343 n.2; Brungs, *supra* note 20, at 84 n.185.

404. Ryuichi Shimoda v. State (1963) (official source unavailable), *reprinted in* L. FRIEDMAN, *supra* note 397, at 1688-1702.

405. This case was an action by residents of Hiroshima and Nagasaki for losses, injuries, and suffering due to the atomic bombing of those cities. The plaintiffs sued the Japanese Government because the Government had waived, in the 1951 Treaty of Peace, the right of Japanese citizens to make claims against the United States. L. FRIEDMAN, *supra* note 397, *reprinted* at 1688. The court held that the individual plaintiffs were not entitled under international law to claim damages and were precluded by the doctrine of sovereign immunity from claiming damages under municipal law. *Id.*, *reprinted* at 1689.

406. *Id.*, *reprinted* at 1694. Rejecting the notion that total war removed any distinction between military and nonmilitary objectives, the court, presuming that Hiroshima and Nagasaki were primarily population centers and not legitimate military targets, concluded that their destruction was militarily unnecessary. *Id.*, *reprinted* at 1691-1694. The court stopped short, however, of forming a per se rule on this basis when stating: "[I]t is not permissible to extend this argument so as to prove that the atomic bomb must necessarily be prohibited because it has characteristics different from other conventional weapons in the inhumanity of its effects." *Id.*

407. *Id.*, *reprinted* at 1695. Interestingly, the court had first attempted to determine whether atomic bombing was prohibited by the Hague Gas Declaration, Hague Regulation article 23(a) (the "no poison or poisoned weapons" rule), and the Geneva Protocol, all of which the court viewed as proscribing gas and bacteria. *Id.* Recognizing a lack of agreement among international jurists when comparing those materials with atomic bombs, the court implied that the former materials are outlawed because they cause unnecessary suffering, and concluded

atomic weapons, and concluded the latter must also be illegal because "the use of means of injuring the enemy which cause injury at least as great or greater than these prohibited materials is prohibited by international law."[408] Thus, the court held the atomic bombings violated international law because the acts themselves violated the principle of military necessity. The court also seemed to hold that the atomic bomb itself was illegal because its destructive power was inherently disproportionate.[409] The opinion makes the questionable assumption that CBWs are *per se* disproportionate and that atomic bombs are *per se* at least disproportionate.[410] Although the opinion cites conventional restraints for support, it does not mention any customary rules.[411]

These judicial decisions provide little guidance as statements of the law, but each decision tends to recognize some conventional or customary legal restraint. Moreover, because these cases encompass situations in which the defendant is alleged to have been the first to use CBWs, the decisions may be viewed as contributing to the development of a customary restraint upon the first use of CBWs.

F. Writings of Publicists

The last source of international law the ICJ may draw upon is "the teachings of the most highly qualified publicists of the various nations."[412] These teachings, like judicial decisions, are a "subsidiary means for determination of rules of law,"[413] and serve as "useful evidence" indicating what constitutes international law.[414]

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that atomic bombs are illegal because they caused more unnecessary suffering than poisonous gas.

408. *Id.*

409. For a full discussion of the Japanese court's analysis, see Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759, 774-76 (1965).

410. It is possible to use a chemical agent or a nonepidemic biological agent with tactical and technical controls that render its use reasonably proportionate. Conversely, an epidemic biological agent may ultimately cause more suffering than any one nuclear weapon. *See supra* notes 123-28 and accompanying text.

411. *See supra* note 407.

412. Statute of the International Court of Justice, art. 38(d), 59 Stat. 1055, 1060, T.S. No. 993, *reprinted in* BASIC DOCUMENTS, *supra* note 101, at 34.

413. *Id.*, *reprinted* at 33-34.

414. J. BRIERLY, *supra* note 24, at 65. "Such works are resorted to by judicial

Many scholars have addressed the legal implications of manufacturing and using CBWs, and many authors agree that a universally binding customary rule exists prohibiting first use of chemical, but not biological, weapons. Several publicists argue that the customary rule against the use of poisons or poisoned weapons, as embodied in Hague Regulation article 23(a),[415] also prohibits the use of CBWs. Dr. Schwarzenberger of the United Kingdom reasons that the Protocol's prohibitions are "merely declaratory of international customary law,"[416] and the Indian scholar Nagendra Singh asserts that the Hague Resolution prohibits all chemical or biological weapons.[417] Professors Greenspan and Tucker agree that a customary rule exists,[418] and Tucker adds that the customary rule developed from the belief that poisonous gas and biological weapons cause unnecessary suffering.[419] Colonel Brungs includes biologically produced chemical poisons within the "no poison" rule, but asserts that modern biological warfare is too recent a development to have been contemplated by the drafters of article 23(a).[420]

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tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." The Paquete Habana, 175 U.S. 677, 700 (1900) (Gray, J.). *But cf.* 1 L. OPPENHEIM, *supra* note 102, at 31 ("[W]ith the growth of international judicial activity and of the practice of States evidenced by widely accessible records and reports, it is natural that reliance on the authority of writers as evidence of International Law should tend to diminish.").

415. *See supra* notes 210-14 and accompanying text.

416. G. SCHWARZENBERGER, *supra* note 147, at 201.

417. N. SINGH, *supra* note 103, at 153-54.

418. M. Greenspan, *supra* note 103, at 359.

419. H. KELSEN, *supra* note 166, at 117 (R. Tucker ed. 1966); R. TUCKER, *supra* note 103, at 53. Professor Tucker cites treaties, drafts of treaties, and wartime and peacetime pronouncements as examples of states' practice, evidencing a belief that CBW use is inhumane and forbidden. H. KELSEN, *supra* note 166, at 117. Professor Tucker implies that the practice of states points to a conviction that CBWs are inherently disproportionate, *see id.* at 116-17, an assertion with which Professors McDougal and Feliciano would disagree. *See* M. McDOUGAL & F. FELICIANO, *supra* note 103, at 632-40.

420. Brungs, *supra* note 20, at 58-59. While writing specifically on biological warfare, Colonel Brungs states that large-scale biological research is too recent for the Geneva Protocol's bacteriological warfare prohibition to be declaratory of custom. *Id.* at 90. Thus, the Geneva Protocol's biological prohibition operates only between parties. Brungs notes that when the Geneva Protocol and the "no poison" rule do not apply, the principle of military necessity may operate to prohibit the use of biological weapons. *Id.* at 91.

Another view is that the accumulated declarations and treaties forbidding the use of poisons have become consolidated into a customary prohibition against CBWs. Judge Lauterpacht, a British authority, believes that customary law and international agreements form a general international legal prohibition of chemical warfare.[421] The Australian scholar Julius Stone agrees, but believes that no rule prohibits the use of poisonous gas in retaliation against a first use.[422] The SIPRI writers argue that adoption of the United Nations General Assembly Resolution 2162B (XXI), which calls for "strict observance by all States of the principles and objectives of the [Geneva] Protocol,"[423] demonstrates "acceptance by almost all states of the consolidation of the conventional prohibition of CBW into a rule of customary law."[424] Finally, Professor Bunn suggests that a customary rule proscribing first use of poison gas and "germ weapons" emerged from the Geneva Protocol.[425]

A third group of publicists, including Professors O'Brien and Mallison assert that the first use of chemical weapons is prohibited by custom and convention, but that first use of biological weapons is prohibited only by convention, the Geneva Protocol.[426] Professors Thomas and Thomas hesitantly propose that a customary rule has emerged prohibiting first use of both chemical and biological weapons.[427]

Finally, skeptics believe there is little or no customary or gen-

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421. 2 L. OPPENHEIM, *supra* note 103, at 344 (H. Lauterpacht ed. 1952). Judge Lauterpacht apparently believes that an insufficient accumulation of evidence constitutes a similar prohibition on bacteriological warfare and therefore only the Protocol, operating between parties, prohibits it. *Id.* at 343.

422. J. STONE, *supra* note 61, at 556.

423. U.N. General Assembly Resolution 2162B (XXI), *reprinted in* 3 SIPRI, *supra* note 36, at 166-67.

424. 3 SIPRI, *supra* note 36, at 24-25.

425. Bunn, *supra* note 40, at 387-88.

426. Mallison, *supra* note 103, at 328; O'Brien, *supra* note 103, at 59. Professor Mallison focuses on the juridical criteria that restrain weapons use which are based upon the principle of military necessity. For instance, he asserts that the illegal first use of a weapon may be "justified juridically" when used in proportionate, legitimate reprisal. Mallison, *supra* note 103, at 328.

427. 2 THOMAS & THOMAS, *supra* note 222, at 288. These writers warn that evidence of this customary rule is "far from overwhelming." *Id.* They also note that no rule exists that prohibits production or possession of CBWs. *Id.* at 292. The writers conclude that international law regarding CBWs is in "a chaotic state." *Id.*

eral legal restraint upon CBWs other than conventional proscriptions. According to Professors McDougal and Feliciano and Major Kelly, the principle of military necessity and its doctrine of proportionality are the only customary restraints upon the use of CBWs.[428] The most skeptical writer, Major Neinast, concludes that the Protocol parties' preparedness to wage biological warfare indicates there is no customary legal restraint against biological weapons.[429] Finally, Joseph Kunz suggests the only way to effectuate a "restriction or prohibition of chemical, bacteriological, and atomic"[430] weapons is by "international agreement to which at least all militarily important states are parties."[431]

A slight majority of publicists recognize a customary prohibition against chemical weapons, but a few limit the scope of the rule to first use and permit reprisal in kind. Several writers claim a similar rule applies to biological weapons but others believe only conventional restraint exists for biological weapons. The following are the only conclusions that can be drawn with any confidence from the publicists:

(1) First use of chemical weapons is prohibited for all states by custom;
(2) First use of biological weapons is prohibited for parties to the Geneva Protocol;

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428. Major Kelly concludes that custom prohibits using gas directly against noncombatants, or against a legitimate military target if its use would cause disproportionate suffering or destruction. Kelly, *supra* note 103, at 64. Professors McDougal and Feliciano, who use the phraseology "minimum destruction of values" in their treatment of the principle of military necessity and the doctrine of proportionality, eschew the notion of per se customary rules. They observe that there are many different types of biological agents, of varying effect and controllability, and some are very humane when compared with alternative conventional weapons. Thus, they adhere to a view that only conventions, such as the Geneva Protocol, and military necessity and proportionality may operate as legal restraints upon CBWs. M. McDOUGAL & F. FELICIANO, *supra* note 103, at 59-67, 632-40.

429. Neinast, *supra* note 20, at 32. Because of the many restrictive reservations to the Geneva Protocol, Major Neinast concludes that the Protocol is "merely an agreement among the Contracting Powers not to be the first to use biological weapons in a war involving Contracting Powers." *Id.*

430. Kunz, *The New U.S. Army Field Manual on the Law of Land Warfare,* 51 AM. J. INT'L L. 388, 396 (1957).

431. *Id.* When this piece was written, about 45 states were parties to the Protocol. *See* SCHINDLER & TOMAN, *supra* note 27, at 111-15. Two important military and industrial powers, the United States and Japan, were not yet parties. Perhaps this is at the heart of Dr. Kunz' despair.

(3) Parties to the BWC are forbidden to use any biological weapons; and,
(4) Second use of chemical or biological weapons (reprisal) may be limited by military necessity and proportionality.

The current validity of these conclusions is suspect, however, because the previously mentioned works were written at least nine years ago,[432] and several were written even earlier.

G. Summary

When viewed together, sources of public international law—treaties, customs, judicial decisions, and scholarly writings—often reflect the acceptance of an international legal norm. Conventional restraints combine to prohibit first use of lethal or seriously injurious chemical weapons. The Geneva Protocol and the BWC ban any use of lethal or seriously injurious biological weapons; this, coupled with an almost universal abhorrence of using disease and sickness as a weapon seems to limit the practice of biological warfare, and may indicate the acceptance of a new rule. At least one writer, however, argues that biological warfare is too new for development of a customary rule concerning its use.[433]

The scholars' commentaries and analyses support a rule against first use of chemical weapons. If these same scholars were to reassess the state of the law today, they probably would perceive a stronger legal restraint upon CBWs resulting from the increased acceptance of the Protocol and the promulgation of the BWC. These scholars would conclude that international law disallows first use of lethal or seriously injurious chemical and biological weapons thus rendering clearly illegal the use of chemical and biological weapons in Asia.

The fundamental principles of the law of war apply independently of international legal norms. These principles are more useful in specific instances of weapons use and contribute little to the development of a general norm for specific weapons. They operate to determine the legality of using a weapon when that use is not covered by a conventional or general legal restraint.[434] Be-

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432. *See* F. KALSHOVEN, *supra* note 51; 3 SIPRI, *supra* note 36.

433. *See* Brungs, *supra* note 20, at 75 ("Custom develops from practice, but biological warfare in the present sense is simply too new for a pattern of practice to have developed.").

434. Thus, a second use of biological weapons by a state not a party to the BWC would be analyzed to determine whether it was necessary and

cause the use of lethal and seriously injurious CBWs in Asia is neither in self-defense nor reprisal, the principle of military necessity governs, and, conventional restraints aside, the use of these weapons in Asia is clearly disproportionate.

IV. The Modern Law of Armed Conflict and International Humanitarian Law

A. Introduction

Having ascertained the extent to which general international law restrains the particular parties in this hypothetical case from using CBWs, it follows that a determination of the extent to which these restraints apply to the instant conflicts is necessary. The general international law of war is applicable in this case because the law governs conflicts not purely interstate, and because emerging international humanitarian law applies to internal conflicts.

B. The Modern Law of Armed Conflict

The international laws of war initially developed when wars generally were declared and fought between states.[435] The laws were applied to disputes concerning different states and, in civil wars, to insurgent groups qualifying as recognized belligerents.[436] Armed conflicts in this century, particularly since World War II, often have not met these traditional formal requirements. The revolutionary or "liberation" character of these recent disputes has made guerilla warfare "the pervasive mode of contemporary conflict."[437] Nevertheless, these disputes generally have exhibited some degree of international character and have resulted in extensive violence.[438] Consequently, the rules of war frequently are

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proportionate.

435. *See* F. Kalshoven, *supra* note 51, at 9; *see also* Instructions for the Government of Armies of the United States in the Field, General Orders 100, art. 20 (Apr. 24, 1863) ("Public war is a state of armed hostility between sovereign nations or governments."), *reprinted in* Schindler & Toman, *supra* note 27, at 6; 2 L. Oppenheim, *supra* note 103, at 202 ("War is contention between two or more States through their armed forces . . . ."). *See generally* J. Bond, The Rules of Riot: Internal Conflict and the Law of War, 15-31 (1974).

436. *See supra* notes 61-63 and accompanying text.

437. J. Bond, *supra* note 435, at 33. *See generally* Kelly, *A Legal Analysis of the Changes in War,* 13 Mil. L. Rev. 89 (1961).

438. There have been significant civil wars in Spain, Korea, Yemen, Viet-

recognized to apply in less formal and less purely international armed conflicts.[439] Two principle reasons brought about this recognition.

First, although international and internal armed conflicts "may differ in some important respects,"[440] "they certainly hold in common other basic features which are inherent in the very idea of armed conflict."[441] Thus, it is reasonable to apply law concerning the use of weapons to both types of conflicts.[442] The use of a CBW prohibited by law would remain unlawful regardless of whether the conflict is purely intrastate.

Second, the phenomenon of "internationalization" of internal conflicts occurs when an insurgent group in a civil war achieves

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nam, Laos, and Cambodia. Fritz Kalshoven suggests that "declarations of war are practically out of fashion" because states wish to avoid being identified as aggressors, because states seek to avoid the negative effect on relations with other states caused by such declarations, and because they fear losing the element of surprise. F. KALSHOVEN, *supra* note 51, at 10. Also, the "war may not be a sudden affair at all but may develop imperceptibly out of a situation of slowly increasing violence." *Id.*

439. For instance, states generally viewed the law of war as applicable to the Spanish Civil War and the Korean and Vietnam Conflicts. *See* Cassese, *The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts,* in CURRENT PROBLEMS OF INTERNATIONAL LAW 287-88 (A. Cassese ed. 1975).

440. F. KALSHOVEN, *supra* note 51, at 13. In international conflicts, the parties are of equal legal status. In a noninternational conflict, the parties, one of whom is an insurgent group, do not start out as legal equals. The government is defending its legitimacy as sovereign, and the insurgents are subject to the national law of treason or rebellion until the government or a third state accords the insurgents recognition as a belligerent or government. *Id.*

441. Kalshoven, *Applicability of Customary International Law in Non-International Armed Conflicts,* in CURRENT PROBLEMS OF INTERNATIONAL LAW 267, 273 (A. Cassese ed. 1975). Common "basic features" in both types of conflict include armed forces conducting hostilities with similar weapons and methods of combat. F. KALSHOVEN, *supra* note 51, at 13. Kalshoven comments,

> [I]t would be very strange indeed if completely different codes of conduct, or standards of civilization, would apply according as the conflict would have to be classified as international or noninternational. This is all the more so when account is taken of the increasing difficulty to determine whether particular armed conflicts belong in one or the other category.

Kalshoven, *supra,* at 272.

442. 3 SIPRI, *supra* note 32, at 31. The reason for this proposition is that rules relating to weapons are of a humanitarian nature and originate in "general standards of civilization." *Id.*

belligerency status, thereby equalizing the status of the parties[443] and triggering application of the rules of war. There is authority that internationalization may occur even if the legitimate government or a third state never formally recognizes the belligerency.[444] Internationalization of an essentially internal armed struggle also may occur through intervention by one or more foreign states.[445] A prime example is the Vietnam conflict,[446] during

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443. *See supra* note 440.

444. Cassese, *supra* note 439, at 287-88. Professor Cassese maintains that the Spanish Civil War is an example of this phenomenon. *Id.* at 288. Cassese argues the states had a general conviction that basic rules and principles of warfare applied, although General Franco's group was never formally accorded belligerent status. *Id.* "According to the practice of States," *id.*, a noninternational conflict must meet two primary requirements to fall within the basic rules of warfare: (1) The conflict must be large-scale—the insurgents are organized and in control of a portion of the state's territory; and (2) the hostilities between the insurgents and the legitimate government must "reach a considerable degree of intensity and duration." *Id.* at 288. Conflicts not reaching this threshold do not merit extension of international law. *Id.* According to Professor Cassese, the Spanish Civil War met these criteria and was "regarded as a conflict belonging to a *tertium genus,* intermediate between mere 'civil wars' and those civil wars where the contending parties are recognized as belligerents." *Id.* at 291.

445. "Intervention is dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things." 1 L. OPPENHEIM, *supra* note 103, at 272.

Kalshoven notes considerable opinion on whether intervention by a foreign state has an internationalizing effect, and considerable disagreement on whether this effect results from intervention on behalf of the government or intervention on behalf of the insurgent group. F. KALSHOVEN, *supra* note 51, at 15. A complete discussion of intervention and its effects is beyond the scope of this paper. Professor Kalshoven would find internationalization when the intervention takes the "form of direct and significant participation of foreign armed forces, as that will incontestably deprive the armed conflict of its original character as a purely intestine affair." *Id.* at 15. Professor Farer would find internationalization when a foreign state has provided armed forces for either side, when the United Nations has entered an armed force, and possibly when a foreign state provides the insurgent group with military arms and supplies. Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of International Armed Conflict,* 71 COLUM. L. REV. 36, 72 (1971). Hans-Peter Gasser, head of the Legal Division of the ICRC, discusses a category he terms "international non-international armed conflict," defined as "a civil war characterized by the intervention of the armed forces of a foreign power." Gasser, *International Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon* 31 AM. U.L. REV. 911, 911 (1982).

446. The SIPRI writers characterize the Vietnam Conflict as one that is "international in character . . . without being exclusively inter-state." 3 SIPRI,

which evidenced a belief that customary and conventional rules should apply.[447] The difficulty presented by the internationalization approach is the subjectivity inherent in determining when an armed conflict becomes "international in character."[448] The alternative, however, is to exempt these conflicts from any application of international legal principles. Given the prevalence of limited armed conflicts in which foreign states are involved, directly or indirectly, and in which the potential for large-scale violence and destruction is present, this alternative is untenable. The laws of war must be adapted to modern circumstances. Thus, the term "law of armed conflict," is more appropriate because it applies to a broader range of circumstances.

The conflict in Afghanistan is similar to the Vietnam conflict to the extent that an outside nation intervened on behalf of governments it supported. The Soviet Union has committed substantial military resources in Afghanistan and now faces organized guerilla opposition. Because of the nature of Soviet participation, the rules of CBWs apply in Afghanistan. The conflicts in Kampuchea and Laos, however, cannot be categorized so readily. In each state, government forces seek to crush insurgent groups. Although these groups may be too isolated and disorganized to internationalize the conflicts, the efforts of Vietnam and the Soviet Union to help the governments of Kampuchea and Laos defeat the insurgents may lend sufficient "international character" to the conflicts to invoke the rules of war.[449]

C. International Humanitarian Law

The emergence of an international humanitarian law can be traced to the four 1949 Geneva Conventions.[450] The purpose of

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supra note 36, at 30.

447. *Id.* The Korean Conflict was similarly treated. *See supra* notes 328-29 and accompanying text.

448. F. KALSHOVEN, *supra* note 51, at 17.

449. The SIPRI writers suggest that customary prohibition of CBWs applies to essentially internal conflicts. 3 SIPRI, *supra* note 36, at 31. *But see* Gasser, *supra* note 445, at 917-21. Gasser notes that consent given by the new governments in Afghanistan and Kampuchea to foreign troop involvement in those countries may vitiate any internationalization and make uncertain any application of the international law of armed conflict. *Id.*

450. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition

these instruments is to minimize the suffering of combatants placed *hors de combat* by injury, illness, or capture, and to ensure as much protection as possible for noncombatants. The significant feature of the four 1949 Conventions is Common Article 3, which places at least minimum humanitarian restraints on both parties to "an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[451] Thus,

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of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 13, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.S.T. 287. The four Conventions were the culmination of efforts to revise and supplement the two 1929 Geneva Conventions (themselves the culmination of attempts to revise and supplement earlier Geneva instruments dating from 1864). *See* SCHINDLER & TOMAN, *supra* note 27, *passim.*

451. *E.g.,* Convention (III) Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3316, 3318-19, T.I.A.S. No. 3364, 75 U.N.T.S. 136-39. Article 3 states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provi-

even the status of rebellion invokes the protection of some humanitarian rules.[452]

An important development in international humanitarian law occurred at the adoption of Protocol (II) Additional to the 1949 Geneva Conventions.[453] This instrument is intended "to supplement and develop Common Article 3 of the Geneva Conventions."[454] One noted authority has interpreted the Protocol as an instrument from which insurgents may derive rights and obligations according to "their willingness to abide by its provisions."[455] Thus, the status of insurgents would be enhanced with respect to

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sions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Id. In addition, common article 2 prescribes application of the conventions to situations besides formal, declared war:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Id., 65 U.S.T. at 3318, T.I.A.S. No. 3364, 75 U.N.T.S. at 136-37.

452. *See generally* Farer, *supra* note 445. Afghanistan, Kampuchea, Laos, the Soviet Union, and Vietnam are all parties to the four 1949 Conventions. *See* TREATIES IN FORCE, *supra* note 28, at 232-34.

453. J. BOND, *supra* note 435, at 209-29 (app. B) (draft of the Protocol), *discussed in* Cassese, *The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts*, 30 INT'L & COMP. L.Q. 416, 416-20 (1981). The significance of the 1977 Protocol has been attributed in some degree to a "consolidation" of the "Law of Geneva" with the "Law of the Hague"—the international law of armed conflict. Geraldson, *What Is International Humanitarian Law? The Role of the International Committee of the Red Cross: Introduction*, 31 AM. U.L. REV. 817, 817-18 (1982). *See generally Conference: The American Red Cross—Washington College of Law Conference: International Humanitarian Law, id.* at 805-977 (1982).

454. Cassese, *supra* note 453, at 417. Only states that are parties to the 1949 Conventions may sign and ratify, or accede to the 1977 Protocol. *Id.* at 418. As of June 1980, ten states had ratified or acceded. *Id.* at 418 n.4. None of the states involved in this hypothetical have ratified.

455. *Id.* at 428.

their opposition governments and third states and, therefore, international law in general.[456] Another authority suggested that Protocol (II) "partly 'codified' and partly 'progressively develop[ed]'" international humanitarian law.[457] Even states not yet parties to the 1977 Protocol, therefore, would be bound by its basic humanitarian rules. Thus, regardless if the conflicts in Kampuchea and Laos are "international in character," Common Article 3 affords the rebels protection. It is uncertain, however, whether the utilization of CBWs violates article 3. The evidence indicates that there is great suffering and horrible death following the use of CBWs, but this fact alone does not amount to inhumane treatment without evidence of circumstances rendering the particular use a violation of humanitarian law.

The Laotian government's use of CBWs on the Hmong tribe exemplifies a circumstance indicating violation of humanitarian law. The Laotian government has used CBWs on the Hmong tribe in an extermination campaign launched because the tribe sided with the United States during the Vietnam conflict. This motive would violate the Genocide Convention of 1948[458] as well as fundamental principles of international law. According to the Convention, "acts committed with intent to destroy, in whole or in part, a national, ethical, racial or religious group"[459] will constitute a crime. The Hmong clearly qualify as such a group. Consequently, the Laotian government, especially the military officials responsible for the extermination attempts, and any Soviet or Vietnamese officials involved have all violated humanitarian law.[460]

International humanitarian law imposes legal constraints on the conduct of belligerents even when traditional international law does not apply, including conflicts characterized as exclu-

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456. *Id.* at 429.

457. Kalshoven, *supra* note 441, at 268.

458. United Nations, Dec. 20, 1948, *reprinted in* 1 THE LAW OF WAR, A DOCUMENTARY HISTORY 692-96 (L. Friedman ed. 1972) [hereinafter cited as 1 L. FRIEDMAN].

459. 1 L. FRIEDMAN, *supra* note 458, at 692 (art. 2).

460. The Convention provides that genocide, conspiracy to commit genocide, attempt to commit genocide, and complicity in genocide are punishable. 1 L. FRIEDMAN, *supra* note 458, at 693 (art. 3). Persons charged with any punishable act may be tried by "such international tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." *Id.* (art. 6).

sively internal. Certainly, the Genocide Convention applies to the Hmong in Laos. Nevertheless, the international humanitarian law of the Geneva Conventions probably does not make the use of CBWs in Asia *per se* illegal.

D. Summary

Because conflicts that are not purely interstate have become so prevalent, the international law of war must now be applied to a broader range of armed conflicts. The law of war, more appropriately termed the law of armed conflict, may be extended to the conflicts in Afghanistan, Kampuchea, and Laos. This extension is based first on the recognition that the first use of CBWs, prohibited in interstate conflicts by international law, is illegal in other types of armed conflicts as well. The rationale behind the general international legal prohibition forbidding the first use of CBWs is equally compelling in an internal conflict as it is in an international conflict. Second, because the insurgent groups are identifiable and Soviet and Vietnamese armed forces are participating, these conflicts have become internationalized and are appropriately governed by international law.

The emergence of international humanitarian law has accorded international legal rights and obligations to insurgent groups, including those in Afghanistan, Kampuchea, and Laos. Even if the conflicts in these states are internal, basic humanitarian principles protect the insurgent groups. It is doubtful, however, that the mere use of CBWs, without further inhumane treatment, violates the basic protections afforded insurgents by international humanitarian law. Nevertheless, efforts by Laos, Vietnam, and the Soviet Union to exterminate the Hmong tribes in Laos violate the Genocide Convention.

V. Conclusion

A. Findings

In the instant hypothetical, the Soviet Union, Vietnam, Kampuchea, and Laos were charged with violating international law. Based on the foregoing analyses, the ICJ should make the following disposition of the charges:

(1) The Soviet Union and Vietnam have not violated their obligations under the Geneva Protocol because the wording of the Protocol itself and the reservations of the two states require only that the Soviet Union and Vietnam refrain from first use of CBWs

against other states who are parties to the Protocol.[461] Because the insurgent groups are not parties, the Protocol's prohibitions do not apply in the instant case.

(2) The Soviet Union, Vietnam, and Laos are violating the BWC, to which they are nonreserving parties.[462] Although the BWC prohibits possession of toxins for any nonpeaceful purpose,[463] these nations not only possess but are using deadly toxins in Southeast Asia. Kampuchea, only a signatory,[464] has no legal obligation to follow the BWC and, therefore, is not violating the agreement.

(3) General international law prohibits first use of lethal or seriously injurious CBWs.[465] Because this international principle of restraint is binding on all states and governments, all of the accused states, regardless of their treaty commitments, have violated this international norm.

(4) Apart from general international legal prohibitions, the use of CBWs contravenes the principle of military necessity. The utilization of CBWs against inferior insurgent forces clearly causes suffering disproportionate to the military advantages sought. Although CBWs may satisfy controllability parameters,[466] the same military advantage could be attained by use of alternative conventional weaponry, and the results would be closer to a "minimum destruction of values."[467]

(5) Although limited use of lethal or seriously injurious CBWs may be lawful if used in cases of legitimate reprisal[468] or legitimate self-defense,[469] there is no evidence that either justification applies to the conflicts at issue.

(6) The general international law of armed conflict prohibiting the use of CBWs applies to the conflicts in Afghanistan, Kampuchea, and Laos, even though they are not purely international in nature. The rationale for weapons regulation—the need to reduce unnecessary suffering—is valid in any violent armed conflict.[470] Moreover, the conflicts at issue have been internationalized by the involvement of the Soviet Union and Vietnam.[471]

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461. *See supra* notes 31-34 and accompanying text.
462. *See supra* text accompanying note 72.
463. *See supra* notes 75-86 and accompanying text.
464. *See supra* notes 73-74 and accompanying text.
465. *See supra* text accompanying note 245.
466. *See supra* notes 122-26 and accompanying text.
467. *See supra* note 117.
468. *See supra* notes 151-54 and accompanying text.
469. *See supra* notes 171-74 and accompanying text.
470. *See supra* notes 441-42 and accompanying text.
471. *See supra* notes 444-47 and accompanying text.

B. Observations

Given the extent to which international law has been violated during the conflicts at issue, particularly the flagrant violations of the BWC toxin ban, a thorough international investigation of CBW use in Asia is mandated. The violations of the BWC dramatically demonstrate that the Convention's failure to provide for compliance verification or outside supervision[472] is fatal to its effectiveness. A similar treaty ban on chemical weapons should not be promulgated unless it contains provisions ensuring rigid enforcement.[473] The Soviet Union was involved in the promulgation of the BWC[474] and has encouraged a similar ban on chemical weapons.[475] The Soviet government, however, opposed inclusion of provisions for on-site inspection and compliance verification procedures in the BWC.[476]

Recently, considerable attention has been given to the possibility of significant United States-Soviet negotiations to limit nuclear weapons.[477] Considering the ample evidence of flagrant Soviet violations of existing international law,[478] the value of such negotiations is questionable. For example, evidence indicates that Soviet violations of the BWC date back to 1975,[479] the year the Convention went into effect.[480] If there are nuclear weaponry ne-

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472. *See supra* notes 94-96 and accompanying text.

473. The BWC's provision for a complaint mechanism is obviously inadequate. *See supra* note 95 and accompanying text. Arms Control and Disarmament Agency Director Dr. Fred C. Iklé had warned that the BWC's lack of verification procedure should not be considered a "precedent" for future instruments. *See supra* note 377.

474. *See supra* note 370 and accompanying text.

475. *See supra* note 374 and accompanying text.

476. *See supra* note 377.

477. *See, e.g., Thinking About the Unthinkable,* TIME, Mar. 29, 1982, at 10-26; *First Things First,* Wall St. J., Apr. 2, 1982, at 14, col. 1.

478. "Many people do indeed shy away from attempting to explain Moscow's actions because the issue does strike at the heart of arms limitations talks." N.Y. Times, Mar. 16, 1982, at 22, col. 3 (Letter to the Editor from Senator Dan Quayle, Indiana).

479. *See supra* note 2.

480. *See supra* note 101. Indeed, the editors of the Wall Street Journal forcefully comment:

> A vital preliminary to further arms negotiations thus becomes a U.S. demand that the Soviets answer our charges of past violations, specifically the use of yellow rain. This demand must be pressed at the UN, at the Helsinki Accord talks, in the existing arms negotiations and at a special

gotiations, let us hope that the United States representatives have learned the lesson taught at the cost of thousands of Afghan, Kampuchean, and Laotian lives.

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emergency meeting of the signatories of the 1972 Convention. It simply is not responsible for American leaders to negotiate arms agreements when there is such powerful evidence of Soviet disregard for past commitments. *First Things First*, Wall St. J., Apr. 2, 1982, at 14, col. 2.