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## When Smoke Gets in Your Eyes: Proposed Ratification by the United States of the Geneva Protocol on Chemical-Biological Warfare

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# WHEN SMOKE GETS IN YOUR EYES: PROPOSED RATIFICATION BY THE UNITED STATES OF THE GENEVA PROTOCOL ON CHEMICAL-BIOLOGICAL WARFARE

## INTRODUCTION

In May, 1974, the Subcommittee on National Security Policy and Scientific Developments of the Foreign Affairs Committee of the House of Representatives opened hearings on the chemical and biological warfare policy of the United States. The future direction of this policy has been a matter of considerable national and international attention since November, 1969, when President Nixon announced the unilateral renunciation by the United States of the production and stockpiling of biological weapons and toxins, and the intention of the United States to ratify the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Although Mr. Nixon's announcement was seen as a major breakthrough for chemical-biological disarmament, its promise has not yet been fulfilled. When in August, 1970, the President submitted the Geneva Protocol to the Senate for its advice and consent to ratification, he did so with the "understanding" that the prohibition of the Protocol did not extend to tear gases and herbicides which at that time were being used extensively by United States forces in Vietnam. The Senate Foreign Relations Committee, after holding lengthy hearings on the Geneva Protocol and the military and political significance of the use of tear gas and herbicides, disagreed with this interpretation. In April, 1972, Senator Fulbright, Chairman of the Foreign Relations Committee, wrote to the President asking him to reconsider the desirability of an "understanding" with respect to tear gas and herbicides, and requested that several studies on the use of these chemicals in Vietnam be made available to the Committee. To date no substantive response has been received from the Administration, and the issue appears stalemated.

In the meantime, other developments at home and abroad have made imperative the swift resolution of this conflict in interpretation. On April 10, 1972, a Convention for the Prohibition of Development,

Production, and Stockpiling of Bacteriological and Toxin Weapons was concluded under which all signatory nations agreed not to develop, produce, stockpile or retain biological weapons, and to destroy within nine months of accession any existing stocks; on August 10, 1972, the Convention was submitted to the Senate. Since the United States is one of the depository nations, its ratification is necessary for the Convention to enter into effect; but as yet the Senate Foreign Relations Committee has not taken any action. This is apparently because of its disagreement with the Administration over the interpretation of the scope of the Geneva Protocol's chemical warfare prohibition.

Important talks on chemical disarmament are also currently underway in Geneva at the United Nations Conference of the Committee on Disarmament (hereinafter referred to as CCD). The negotiations there are stalled primarily because of disagreement between the United States and the Soviet Union over proposed methods of disarmament verification and the question of which chemicals should be considered weapons.<sup>1</sup> One commentator has suggested that there is such pessimism about the sincerity of the United States' commitment to disarmament that "if an agreement imposing meaningful restrictions in the area of chemical warfare is not soon achieved the existence of the organization will be threatened."<sup>2</sup> Part of this distrust of the United States' intentions is the result of a recent Department of Defense announcement that it is seeking funds for the production of binary chemical weapons—weapons composed of two nonlethal gases which combine in flight to produce a lethal nerve gas. The feeling on the part of many nations is that while an intensive review by the Administration of the United States' chemical warfare policy is now underway, with one possible option presumably being the complete phasing out of all the United States' chemical warfare capability, the decision to add to an already large stockpile of chemical weapons cannot be taken as a sign of any serious commitment to disarmament. The position of the Pentagon that it should push ahead with production of the binaries, even though the review of the United States' chemical warfare policy

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1. *Hearing on United States Chemical Warfare Policy Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 93d Cong., 2d Sess. 26 (1974) [hereinafter cited as *House Hearings*].

2. *Id.* at 19.

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is expected to be completed within a few months, is considered particularly disheartening.

Finally, on April 30, 1974, Japan put forward a new proposal at the Conference of the Committee on Disarmament for a phased program of disarmament. The suggested plan involves "link[ing] a particular type of prohibition, such as prohibiting production of lethal agents only, or agreeing on abolishing stockpiles, to separate verification agreements . . . [since] the problems of verification differ, depending on what is being limited or banned."<sup>3</sup> It proposes that organophosphorous nerve gases be the first chemical weapons banned because they are the most lethal; and then that steps toward complete disarmament be taken as agreement on effective verification measures can be reached.<sup>4</sup> During the May, 1974 hearings of the Subcommittee on National Security Policy and Scientific Developments of the House Committee on Foreign Affairs, the Japanese proposal was mentioned repeatedly, and it appears that the Administration is giving serious attention to it.

In light of the Japanese proposal, the current disarmament talks, the Administration's review of the United States' chemical warfare policy, the Defense Department's request for appropriations for production of binary weapons, and the as yet unratified Convention on Bacteriological Weapons and Toxins, it seems more important than ever for the Senate to give its advice and consent to the ratification of the Geneva Protocol. Since the dispute between the Administration and the Senate Foreign Relations Committee is over the interpretation of the scope of the Protocol's chemical warfare prohibition, it seems particularly appropriate at this time to determine whether or not the use of tear gas in war is prohibited by the Geneva Protocol. This is the focus of the Comment that follows.

### I. THE MEANING OF THE PROTOCOL

The Geneva Protocol was drawn up against the backdrop of world revulsion to the use of chemical warfare in World War I. It was drafted at the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War (con-

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3. *Id.* at 197.

4. *Id.* at 198.

vened to consider the possible limitation of the international arms trade), and was offered as a separate protocol. The United States was the initial proponent of the Protocol, but because of Secretary of State Kellogg's failure to enlist the participation of key senators in the Geneva negotiations, and the active opposition to ratification of the American Chemical Society and the United States Chemical Warfare Service, the Senate refused to give its advice and consent to ratification. The Protocol provides in relevant part:

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;

Whereas the prohibition of such use has been declared in Treaties to which the majority of 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 the practices of nations;

DECLARE:

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.<sup>5</sup>

There has been considerable controversy over whether tear gas is included within the scope of the gas warfare prohibition. In clarifying an ambiguous treaty provision it is necessary to look at its terms in accordance with the ordinary meaning which would be given the words in their context and in light of the treaty's purpose.<sup>6</sup> Subsequent agreements of the parties to the treaty as to its interpretation, and subsequent practice which indicates the parties' attitude toward its interpretation are also to be considered.<sup>7</sup> If there is still ambiguity as to meaning, one may look at the *travaux préparatoires* and the circumstances of the treaty's conclusion.<sup>8</sup> To satisfy this inquiry, the following may be examined: the treaties preceding the Geneva Protocol which

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5. 94 L.N.T.S. 65, 69 (1929), *opened for signature* June 17, 1925.

6. Convention on the Law of Treaties, art. 31, ¶ 1, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969).

7. *Id.* ¶ 3(a), (b).

8. *Id.* art. 32.

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shed light on the meaning of the language used in the Protocol—the Treaty of Washington of 1922 and the Treaty of Versailles of 1919, the negotiating history of the Protocol itself, and the subsequent conduct of the parties to the treaty which indicates a definite interpretation of the Protocol. There are two caveats which must be borne in mind throughout the forthcoming analysis. The first is that “the Geneva Protocol is not a tax statute or a deed for the transfer of land,” and the narrow approach to interpretation which would be appropriate for that type of legal document is not appropriate for a treaty in which the signers’ intent plays a very large role.<sup>9</sup> Second, one must at all times distinguish the evidence which is relevant to the interpretation of the Geneva Protocol itself and that evidence which is determinative of the customary international law prohibition of gas warfare. “If one is guided by this principle in analyzing the chemical warfare prohibitions of the Geneva Protocol, many of the doubts regarding its intended scope disappear.”<sup>10</sup>

### A. *Treaty of Versailles*

Primarily because of Senate objections to the provisions for the League of Nations contained therein, the United States did not become a party to the Treaty of Versailles. However, the United States did participate in the negotiations leading up to the Treaty which included a ban on chemical warfare. Article 171 of the Versailles Treaty stated that “the use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany.”<sup>11</sup> The question of whether tear gas is included within the scope of this prohibition is raised by the discrepancy between the French and English texts, since the French text uses the word “similaires” in place of “other.” Proponents (notably the United States government)<sup>12</sup> of the view that this difference is significant have suggested that the

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9. *Hearings on the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases and of Bacteriological Methods of Warfare Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 61 (1972) [hereinafter cited as *Senate Hearings*].

10. Baxter & Buergenthal, *Legal Aspects of the Geneva Protocol of 1925*, 64 AM. J. INT’L L. 853, 856 (1970).

11. *Id.* at 857.

12. *Id.*

French text requires that all gases prohibited have effects similar to those of poison and asphyxiating gases, and that therefore tear gas, which is much less deleterious than these gases and therefore dissimilar, is excluded. Other writers have suggested that the discrepancy between "similaires" and "other" is not significant, noting that in Article 172 of the Treaty, which requires Germany to inform the Allies of "the nature and mode of all explosives, toxic substances or other like chemical preparations used by them in the war," it is the English version which is more narrow, and the French "*autres préparations chimiques*" which is broadly prohibitory.<sup>13</sup> There are several conclusions which can be drawn from this ambiguity. The first is that "[s]ince both languages are authentic, it would be impossible to say which is the correct interpretation."<sup>14</sup> Another, perhaps more tenuous, is that in light of the fact that both the British and French texts used broadly prohibitive language at least once, the prohibition should be interpreted broadly, in the absence of any concrete indication to the contrary, and in light of the fact that tear gases were used heavily in World War I. A third view is that

the term "*similaires*" might have been meant to qualify the broad prohibition against the use of all gas "in war" to prohibit only the use of gas in any form as a weapon against man . . . but not to prohibit other uses of gas "in war" such as the use of helium in barrage balloons.<sup>15</sup>

Another argument against a restrictive interpretation of the French text is that "the phrase '*gaz toxiques*' includes, as a matter of French usage, all chemical weapons that are employed for their toxic effect on living organisms. It thus applies to such irritant chemicals as tear gas."<sup>16</sup> Yet this reading has been questioned, since "if *gaz toxiques* was meant initially to be an all inclusive category, the specific companion prohibitions of *gaz asphyxiantes* . . . ou *similaires* would seem superfluous."<sup>17</sup>

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13. *Id.* at 858 (emphasis in original).

14. SUBCOMM. ON NATIONAL SECURITY POLICY AND SCIENTIFIC DEVELOPMENTS OF THE HOUSE FOREIGN AFFAIRS COMM., CBW: U.S. POLICIES AND INTERNATIONAL EFFECTS, 91st Cong., 1st Sess. 16 (1970) (including an appended study, C. Gellner & L. Wu, The Use of Tear Gas in War, *id.* at 11) [hereinafter cited as HOUSE REPORT].

15. Moore, *Ratification of the Geneva Protocol on Gas and Bacteriological Warfare*, 58 VA. L. REV. 419, 455-56 (1972); see discussion on Washington Treaty in text accompanying notes 26-28 *infra*.

16. Baxter & Buergenthal, *supra* note 10, at 856 n.16.

17. Moore, *supra* note 15, at 455.

Another argument against a broad interpretation of the prohibition which Article 171 of the Treaty imposes is that that article states that the use of "asphyxiating, poisonous or other gases" is already prohibited, and an examination of earlier gas treaties discloses no mention of tear gas.

[T]he Hague Gas Declaration of 1899 . . . prohibited "the use of . . . asphyxiating or deleterious gases." However, both the British and the French believed that this language did not include tear gas. [n. In 1913 the British considered that the lachrymatory gas was permitted by the wording of the declaration, "although contrary to its spirit."] The Versailles "being prohibited" language most likely referred to the 1907 Hague Convention rules against "poison or poisoned weapons," against killing or wounding "treacherously," and against employing war material calculated to cause "unnecessary suffering . . . ." [N]o authority has been found for the proposition that [the Hague Convention prohibits] the use of tear gases in war. . . . Therefore, [the Treaty of Versailles] probably did not prohibit tear gases to Germany.<sup>18</sup>

This argument seems weakened by its questionable reliance on the British statement regarding lachrymatory gases, and by the heavy use of tear gas in World War I. Since tear gas was known and used by the Allies drafting the treaty, it seems at least arguable that had the drafters meant to exclude tear gas from the new prohibition they were drawing up, or felt that it did not fall within the scope of the Hague Declarations, they would have said something to this effect.

### B. *The Washington Treaty*

The Treaty on the Use of Submarines and Noxious Gases was drawn up at the Washington Arms Conference of 1922. At the suggestion of the American delegation, the provision of the treaty governing chemical warfare incorporated the language of the Versailles Treaty because of the previous acceptance of that wording by many nations. Article Five provided that:

The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties,

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18. Bunn, *Banning Poison Gas and Germ Warfare*, 1969 WIS. L. REV. 375, 398-99 (citations and footnotes omitted).



The Signatory Powers, to the end 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.<sup>19</sup>

The Treaty was ratified by the United States, but failed to come into effect because of France's failure to ratify due to objections to certain of the provisions governing submarine warfare. A study of the *travaux préparatoires* indicates that the question of inclusion of tear gas within the scope of the chemical warfare prohibition was discussed; unfortunately, it is not conclusive as to the ultimate disposition of the issue. The technical subcommittee of the Committee on Limitation of Armaments declared that "[t]he kinds of gases and their effects on human beings can not be taken as a basis for limitation . . . . [T]he only limitation practicable is to wholly prohibit the use of gases against cities and other large bodies of non-combatants. . . . There could be no limitation on their use against the armed forces of the enemy, ashore or afloat."<sup>20</sup> Both the Advisory Committee of the United States Delegation and the General Board of the Navy disagreed. Their reports were read into the record of the Committee on Limitation of Armaments by Secretary of State Hughes, head of the United States delegation. The Advisory Committee's report stated that regardless of the experts' opinions, the "conscience" of the American public demanded "the total abolition of chemical warfare, whether in the Army or the Navy, whether against combatant or noncombatant."<sup>21</sup> Indicating its desire to prohibit the use of tear gas in warfare, the Advisory Committee stated that "there can be no actual restraint of the use by combatants of this new agency of warfare, *if it is permitted in any guise*."<sup>22</sup> Accordingly, it introduced a resolution declaring that "chemical warfare, including the use of gases, whether toxic or nontoxic, should be prohibited by international agreement . . . ."<sup>23</sup> The General Board

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19. Treaty on the Use of Submarines and Noxious Gases, art. 5 (1922), *cited in* Baxter & Buergenthal, *supra* note 10, at 858.

20. CONFERENCE ON THE LIMITATION OF ARMAMENT, S. Doc. No. 126, 67th Cong., 2d Sess. 384-85 (1922).

21. *Id.* at 386.

22. *Id.* at 385 (emphasis added).

23. HOUSE REPORT 17.

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of the Navy concurred, suggesting that although the use of tear gas might not be strictly outlawed by the rules of war,

there will be great difficulty in a clear and definite demarcation between the lethal gases and those which produce unnecessary suffering as distinguished from those gases which simply disable temporarily. . . . [T]he General Board believes it to be sound policy to prohibit gas warfare in every form and against every objective, and so recommends.<sup>24</sup>

Secretary Hughes, in suggesting a final version of the provision of this treaty banning gas warfare, stated that

despite the conclusions reached by the [technical subcommittee] . . . the American delegation, in the light of the advice of its advisory committee . . . and of the specific recommendation of the General Board of the Navy, felt that . . . the use of asphyxiating or poison gas [should] be absolutely prohibited.<sup>25</sup>

It may be questioned, whether the fact that the language of the Versailles Treaty was used, rather than words indicating a broad prohibition of both toxic and nontoxic gases, is significant in view of the fact that the United States delegation specifically relied on and referred to the reports of the Advisory Committee and the General Board of the Navy in its recommendation. Professors R. R. Baxter and Thomas Buergenthal suggest that in light of the facts above it is "most unlikely that a government which believed that Article 5 did not outlaw all forms of chemical warfare would have failed to state its views to the Conference."<sup>26</sup> This conclusion is borne out by the Senate debate on the scope of the prohibition on gases, which was limited to the question of whether the use of gases such as helium and hydrogen for balloons would be prohibited, and did not discuss the possible inclusion or exclusion of tear gas.<sup>27</sup>

Professor George Bunn, however, suggests that statements made by Senator Elihu Root, also a member of the American delegation, argues to the contrary:

Root, who submitted the text to the conference, said it was drafted in the language of the Treaty of Versailles . . . because "between

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24. Baxter & Buergenthal, *supra* note 10, at 859.

25. *Id.* at 859-60.

26. *Id.* at 860.

27. *Id.* at 858.

thirty and forty powers" had already agreed to that language, "so that there was not much further to go in securing . . . general consent . . . ." Root understood the Versailles Treaty's "declaration against the use of poison gases to be a statement of the previous rules which had been adopted during the course of the Hague conferences." As we have seen, these probably were never intended to apply to tear gases.<sup>28</sup>

Again, as in the Treaty of Versailles, the language of the prohibition is ambiguous, and the negotiating history is not conclusive. However, it may be suggested that a strong case can be made for a broad interpretation of the provision on gas warfare, which would include tear gas within its prohibition.

### C. *Western Hemisphere Attempts*

Of some significance for the customary international law reach of the chemical warfare prohibition may be two actions of Western Hemisphere nations indicating their concurrence in the outlawing of chemical warfare. On February 7, 1923, a convention similar to that embodied in the Washington Treaty was agreed to by the Central American Republics. Also, in 1923, eighteen American nations, including the United States, adopted a recommendation at the Fifth International Conference of American States at Santiago that all the participating nations "reiterate" the biological and chemical warfare prohibition of the Washington Treaty.<sup>29</sup> However, the precedential value of these agreements as evidence of customary international law seems arguably slight. The lack of military significance of most of the American states, the fact that the Washington Treaty never came into effect, and the fact that the action taken at the Santiago conference was only a recommendation to "reiterate" and not a binding agreement, all combine to impart minimal impact to these 1923 actions.

### D. *The Geneva Protocol*

The records of the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of

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28. Bunn, *supra* note 18, at 400; *see* text accompanying notes 16-18 *supra*.

29. O'Brien, *Biological/Chemical Warfare and the International Law of War*, 51 GEO. L.J. 1, 25-26 (1962).

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War, at which the Geneva Protocol was drafted, show no evidence of discussion of the possible inclusion or exclusion of tear gas within the scope of the Protocol's chemical warfare prohibition. Originally it was the aim of the United States to prohibit the exportation from the territory of the Contracting Parties of "all asphyxiating, poisonous, or other gases, and of all analogous liquids, materials or devices," but this proposal was defeated because many of the chemicals involved had important peaceful uses, and the practical problems of distinguishing between chemicals intended for war use and those intended for industrial use would render enforcement difficult.<sup>30</sup> Therefore, the United States proposed that the chemical warfare prohibition adopt the language of the Washington Treaty, which in turn embodied the ambiguous language of the Treaty of Versailles.

In spite of the lack of discussion of tear gas at the Conference itself, however, it is significant to note that in the 1926 Senate debate on ratification of the Geneva Protocol at least some of the Senators interpreted the Protocol as prohibiting the use of tear gas in warfare. One of the main objections to ratification voiced was that the Geneva Protocol would prohibit the use of tear gas, allegedly a more humane method of warfare, and a method which United States domestic police employed. In a debate between Senators Borah and Reed, Senator Reed stated:

This treaty would stop us from using [tear] gas against the next savage race with which we find ourselves in war, and would compel us to blow them up, or stab them with bayonets, or riddle them and sprinkle them with shrapnel, or puncture them with machine-gun bullets, instead of blinding them for an hour or so until we could disarm them. This is the "humanity" that is attempted to be worked out by the Geneva Protocol.<sup>31</sup>

Also significant is the fact that Congressman Theodore Burton, the United States representative to the Geneva Conference, said that the Protocol was "in accordance with our settled policy," and explained that policy by reference to the reports of the General Board of the Navy and the United States Advisory Committee to the Washington Arms Conference, both of which recommended a broad prohibition of all chemical gases.<sup>32</sup> Similarly, Mr. Philip Noel-Baker, who par-

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30. Baxter & Buergenthal, *supra* note 10, at 861.

31. HOUSE REPORT 41.

32. Moore, *supra* note 15, at 433-34; *see* text accompanying notes 19-27 *supra*.

ticipated as a British representative at the Conference, stated in a 1969 letter to *The New York Times*:

What does the Geneva Protocol on Chemical and Biological Warfare really mean? Does it allow the use in war of tear gas and herbicides?

When I hear this question, I recall a talk I had in Geneva while the Conference of 1925 was going on . . . with a young French colleague, Henri Bonnet, later . . . Ambassador to the United States.

"Oh yes," he said, "the form of words they've got is good. It prohibits every kind of chemical or bacterial weapon that anyone could possibly devise. And it has to. Perhaps someday a criminal lunatic might invent some devilish thing that would destroy animals and crops."

In 1925 everyone in the Conference agreed with Henri Bonnet. It was their purpose to ban all C.B. weapons; and they were satisfied that the Protocol would do that.<sup>33</sup>

There seemed to be no doubt at the time of the Conference that the Geneva Protocol was broadly prohibitory, and that all forms of chemical and biological warfare, whether or not known at the time the Protocol was drawn up, were to be banned. It was only later, when there was a substantial shift in American policy from an active advocacy of all disarmament efforts to a policy of "prohibition with preparation,"<sup>34</sup> that any question was raised as to a possible limitation on the scope of the Protocol's prohibition.

## II. PRACTICE SINCE 1925

### A. Preparatory Commission—1930

In 1930 the Preparatory Commission for the General Disarmament Conference of the League of Nations met to draft preliminary disarmament resolutions. One of the issues discussed was chemical-biological warfare, and a draft convention was drawn up based on the French version of the Geneva Protocol which outlawed "*similaires*," rather than "other" gases as in the English version. This language

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33. *Senate Hearings* 263.

34. F. BROWN, *CHEMICAL WARFARE* 109 (1968).

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prompted the British to state that it was their opinion that tear gas was prohibited by the Geneva Protocol, and to request a statement of interpretation from other signatory nations.<sup>35</sup> France responded:

All the texts at present in force or proposed in regard to the prohibition of the use in war of asphyxiating, poisonous or similar gases are identical. In the French delegation's opinion, they apply to all gases employed with a view to toxic action on the human organism, whether the effects of such action are more or less temporary irritation of certain mucous membranes or whether they cause serious or fatal lesions. . . .

The French government therefore considers that the use of lachrymatory gases is covered by the prohibition arising out of the Geneva Protocol.<sup>36</sup>

Of the sixteen other nations who were members of the Preparatory Commission, ten concurred with the Franco-British interpretation. Eight of these nations—Canada, China, Italy, Rumania, Spain, Turkey, Yugoslavia, and the USSR—were also at that time parties to the Geneva Protocol. Czechoslovakia became a party in 1938, as did Japan in 1970, although the Japanese ratification was accompanied by an informal understanding that tear gas was not prohibited by the Protocol. The six other members of the Preparatory Commission who were also parties to the Geneva Protocol did not respond.<sup>37</sup> The United States was the only member of the Preparatory Commission which expressly objected to the British and French interpretation of the Geneva Protocol, although because the United States was not a party to the Protocol its spokesman, Hugh Gibson, couched his objections in terms of the parameters that a future chemical warfare prohibition should take on. He stated:

I think there would be considerable hesitation on the part of many Governments to bind themselves to refrain from the use in war, against an enemy, of agencies which they have adopted for peace-time use against their own populations, agencies adopted on the ground that, while causing temporary inconvenience, they cause no real suffering or permanent disability, and are thereby more clearly humane than the use of weapons to which they were formerly obliged to resort to in times of emergency.<sup>38</sup>

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35. Baxter & Buergenthal, *supra* note 10, at 863.

36. Moore, *supra* note 15, at 460-61.

37. *Id.* at 461.

38. Baxter & Buergenthal, *supra* note 10, at 863.

This line of reasoning, first voiced in the 1926 Senate debate on the Protocol, has been the continuing basis of the United States' refusal to ratify the Protocol. Because of this divergence of opinion, the Preparatory Commission announced in 1931 that "it was unable to express a definite opinion on this question of interpretation."<sup>39</sup>

B. *The League Disarmament Conference—1932-33*

The language of the Geneva Protocol was not discussed at the subsequent Disarmament Conference. However, the wording of the resolution proposed by the Special Committee on Chemical-Biological Warfare, and accepted by the United States, suggests a settled view that the use of tear gas in war should be prohibited. The ban outlawed

all natural or synthetic noxious substances, whatever their state, whether solid, liquid or gaseous, whether toxic, lachrymatory, irritant, vesicant, or capable in any way of producing harmful effects on the human or animal organism, whatever the method of their use . . . .<sup>40</sup>

There were several reasons advanced for the inclusion of tear gas within this broad prohibition. The most important was that the term "lachrymatory substances" does not define a chemical group, but refers instead to the physiological effects of certain chemicals, and that serious, even lethal, injuries could result if gases normally only irritating were used in sufficiently concentrated form. In addition, it was noted that some lachrymatory substances had multiple uses. Thus benzyl bromide, used by French police as an irritant agent, was also the chemical most often employed for charging asphyxiating shells during World War I.<sup>41</sup> It was also "feared that, if the use of lachrymatory substances were permitted, those used in war would not be the harmless substances employed in most countries for police purposes, but highly poisonous gases."<sup>42</sup> Further, it was thought that even if mildly irritating lachrymatory gases were used, they might lead to the use of sternutatory (sneeze-inducing) gases against which more elabo-

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39. Department of State Report of the Preparatory Commission for the Disarmament Conference 45 (1931), *cited in* Moore, *supra* note 15, at 461.

40. HOUSE REPORT 19.

41. 4 STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, THE PROBLEM OF CHEMICAL AND BIOLOGICAL WARFARE 154 (1971) [hereinafter cited as SIPRI].

42. *Id.*

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rate protective devices would be required.<sup>43</sup> The rationale underlying all these objections was that since a clear-cut definition of lachrymatory agents could not be put forth, to establish a limited exception for these substances would create possibilities for abuse, an invitation to escalation, and would weaken the whole structure of disarmament.<sup>44</sup>

Yet in spite of the breadth of this chemical warfare prohibition, and the significance of the United States' acceptance of it, it is important to remember that no general disarmament agreement ever came into effect. This was due to a number of factors, the most significant being the German withdrawal from the League of Nations and subsequent rearmament, and the generally increasing impotency of the League. In addition, one commentator has suggested that the widespread revulsion to chemical warfare after World War I, which was capitalized upon by pacifist publicists, resulted in an overestimation of the importance to national security of chemical weaponry.<sup>45</sup> Because of this misconception, shared by the public at large and high government officials of all nations, the question of chemical-biological disarmament became much more difficult.

In a situation where CB weapons were regarded as of rather doubtful military value, a less than perfect disarmament scheme might have been acceptable; but in the present context this would not do. The conference debate about the difficulties of verifying the observance of chemical disarmament agreements, which reverted again and again to the question of convertibility [of peacetime chemical industries to military use] without ever resolving it, has left its mark on all subsequent discussions of the problem.<sup>46</sup>

Since no final disarmament agreement ever came into force, the question arises as to the weight which should be accorded the Disarmament Conference resolution in interpreting the Geneva Protocol. One recent source stresses the importance of the notice aspect of the Preparatory Commission and the Disarmament Conference.<sup>47</sup> Its authors conclude that because no then-party to the Geneva Protocol entered an objection to the Franco-British interpretation in 1930, and no party which has subsequently become a party has entered a reservation excluding

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43. *Id.*

44. *Id.* at 19-20.

45. 1 *id.* 51-54.

46. *Id.* at 254.

47. Baxter & Buerghenthal, *supra* note 10, at 864.



tear gas from the Protocols' scope, its prohibition of tear gas must be considered to be extremely clear. The fact that Japan felt it necessary to ratify the Protocol with an informal understanding that it did *not* include tear gas supports this position. On the other hand, "while the intent to include tear gas in the prohibition on gases in the Disarmament Convention was unmistakable, it is often stressed that these negotiations were not attempting to interpret the Geneva Protocol, but rather, were seeking a new and separate disarmament agreement,"<sup>48</sup> and that therefore the Disarmament Convention has no evidentiary value for the Protocol.

C. *The Late 1930's*

In the late 1930's, allegations were made of the use of poisonous and tear gases in three conflicts: by the Italians against Ethiopia in 1935 and 1936,<sup>49</sup> by both sides in the Spanish Civil War in 1936 and 1937,<sup>50</sup> and by Japan against China in 1938-1941.<sup>51</sup> The allegations were substantiated in the first and last instances, while no conclusive evidence exists as to the Spanish Civil War. The Japanese freely admitted the use of irritant gases, but stated that they did not consider the use of such gases to be contrary to international law because they did not cause death or permanent injury.<sup>52</sup> The League of Nations failed to move effectively against Italy and Japan. Although some economic sanctions were applied against Italy they were inadequate and came too late, and by the time allegations of Japanese aggression against China were made the international situation had so far deteriorated that it was "impossible for the League to give even moral assistance to China."<sup>53</sup>

D. *World War II*

The precedent set by the ineffective response of the League of Nations to the use of chemical weapons by Italy seemed ominous. In April, 1936, the British Prime Minister queried:

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48. HOUSE REPORT 20.

49. 4 SIPRI 175-89.

50. 1 *id.* 258-59.

51. 4 *id.* 189-91; Kelly, *Gas Warfare in International Law*, 9 MIL. L. REV. 1, 13 (1965).

52. 1 SIPRI 148.

53. 4 *id.* 191.

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If these allegations of the use of poison gas be true—and I have every reason to believe that they are true—the peril I see to the world is this: if a great European nation, in spite of having given its signature to the Geneva protocol against the use of such gases, employs them in Africa, what guarantee have we that they may not be used in Europe?<sup>54</sup>

Thus, it is somewhat surprising that during World War II there was complete abstention from the use of chemical weaponry including tear gas. There have been a number of reasons advanced for this, primary among them being the fear of reprisal. Hitler and Roosevelt had a strong personal aversion to the use of gas in military combat, the former because he had been gassed during World War I, and there were many military men in all nations who did not understand chemical warfare and were generally distrustful of it. The active publicity campaign mounted by pacifist groups during the interwar period had greatly exaggerated the destructive potential of chemical warfare; this misconception was compounded by a generous overestimation by all belligerents of the quality and quantity of their enemies' chemical warfare stockpiles. Finally, there were only a limited number of situations in which the use of chemical weapons would have provided a decisive military advantage; these were more than counterbalanced by the uncertainty of retaliation, and the fear that "a chemical mortar action in some distant combat theatre, even with irritant-agent projectiles, might be met by the gas bombing of a capital city."<sup>55</sup> The legal constraints against use of chemical warfare were generally quite irrelevant to the decision made not to use gas, because of the overriding practical constraints of "lack of military interest . . . fear of retaliation and lack of material capability."<sup>56</sup> But the legal constraints were significant "because of their influence in retarding acceptance of gas as a standard weapon of war, and hence in their contribution to the belligerents' overall unpreparedness to wage CW, and their leaders' unwillingness to authorize it."<sup>57</sup>

Thus, when the war broke out, Britain, France, Germany, and Italy all pledged to observe the Geneva Protocol; Japan responded ambiguously. A State Department suggestion that the United States advise Japan that we would adhere to the terms of the Geneva Protocol

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54. *London Times*, Apr. 20, 1936, at 8, col. 2.

55. 1 SIPRI 335.

56. *Id.* at 321.

57. *Id.* at 322.

on the basis of reciprocity was rejected in February, 1942, by Secretary of War Stimson because of his concern over our lack of preparedness to retaliate if Japan used gas warfare.<sup>58</sup> However, in June, 1942, President Roosevelt, responding to pressure from the Chinese, stated that we would retaliate heavily against Japan if she continued to use gas against China or any other American ally, and in June, 1943, issued the following statement in response to rumors of imminent German use of gas:

From time to time since the present war began there have been reports that one or more of the Axis powers were seriously contemplating use of poisonous or noxious gases or other inhumane device of warfare.

. . . .

*Use of such weapons 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.

[A]cts of this nature committed against any one of the United Nations [the Allies] will be regarded as having been committed against the United States itself and will be treated accordingly. We promise to any perpetrators of such crimes full and swift retaliation in kind.<sup>59</sup>

In neither his 1942 nor his 1943 declaration did Roosevelt refer to the Geneva Protocol.

Toward the end of the Pacific war the use of poison gas was urged by some members of the military as a way to reduce American casualties in the island campaigns. However, Admiral Nimitz decided that "the United States should not be the first to violate the Geneva Convention."<sup>60</sup> Similarly, a memo concerning the possible use of herbicides prepared by General Myron Cramer, the Judge Advocate General of the Army, for the Secretary of War stated:

The United States is not bound by any treaty which specifically excludes or restricts the use of chemicals, whether toxic or non-toxic in time of war. . . . An exhaustive study of the source materials, however, warrants the conclusion that a customary rule

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58. Bunn, *supra* note 18, at 382.

59. 8 DEP'T STATE BULL. 507 (1943) (emphasis added).

60. Moore, *supra* note 15, at 436.

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of international law had developed by which *poisonous gases and those causing unnecessary sufferings* are prohibited . . . . The United States has officially announced that it will observe this principle . . . .<sup>61</sup>

Both these statements indicate an implicit recognition of the major disadvantages of a change in the only recently declared United States policy of no first use of chemical weapons. "To reverse this within so short a time would not be in keeping with U.S. aspirations for moral leadership of the world in the coming post-war years."<sup>62</sup>

### E. *The Korean War and Beyond*

During the Korean War the United States used tear and vomiting gases to suppress rioting prisoners of war, apparently on the theory that this was not a use in war but was analogous to domestic riot control.<sup>63</sup> Allegations were made by China and North Korea that the United States was using germ warfare, but a United States denial and suggestion that an international investigatory commission be set up was rejected. One commentator has speculated that "[a]lthough not decisive, our failure to use gas in Korea and our defense against the germ warfare charge are evidence that we believed the use of poison gas and germ warfare to be wrong."<sup>64</sup>

After the Korean War a perceptible alteration in State and Defense Department attitudes toward chemical warfare became evident: "U.S. military authorities were beginning to move away from the doctrine of massive retaliation to one of flexible response, and a case [was] made that, in the absence of a first-use prohibition, CB weapons were suited to this new doctrine."<sup>65</sup> Responding to this change, Congressman Robert Kastenmeir introduced a resolution which affirmed "the longstanding policy of the United States that in the event of war the United States shall under no circumstances resort to the use of biological weapons or the use of poisonous or noxious gases unless

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61. 10 INT'L LEGAL MATERIALS 1300, 1305 (M. Righini ed. 1971) (emphasis in original). The memo goes on to suggest that herbicides are not within the scope of the prohibition.

62. 1 SIPRI 331.

63. HOUSE REPORT 27.

64. Bunn, *supra* note 18, at 383.

65. 5 SIPRI 127.

they are first used by our enemies.”<sup>66</sup> In January, 1960, President Eisenhower was questioned about a possible policy change; his reply was that “no such official suggestion has been made to me and so far as my own instinct is concerned, is to not start such a thing as that first.”<sup>67</sup> However, both the State and Defense Departments lobbied heavily against the Kastenmeir resolution enunciating the necessity of retaining presidential discretion. The Chemical Corps, formerly the Chemical Warfare Services, launched an active publicity campaign to increase public acceptance of chemical weaponry, and in Congressional testimony painted a picture of “war without death” by showing, *inter alia*, a film of a cat which had been given LSD cowering in front of a mouse. The result was a five-fold increase in the Chemical Corps budget and a greatly enlarged stockpile of nerve gases and biological weapons.<sup>68</sup> The tone and intensity of the debate suggested that the concern of the State and Defense Departments was focused on the “propriety of using chemical and biological weapons generally rather than the wisdom of imposing less restrictive controls on the use of riot-control or anti-plant agents.”<sup>69</sup>

#### F. Vietnam

That the United States was considering a major change in its chemical warfare policy was borne out by its practice in Vietnam. Between 1964 and 1969, 13.7 million pounds of tear gas were used by United States forces there.<sup>70</sup> While North Vietnam and the Viet Cong also used tear gas, they did not initiate its use. The three principal types of “riot-control” agents used by the United States were DM (adamsite), CN (chloroacetophenone), and CS (ortho-chlorobenzal-malononitrile). The use of DM, a vomiting gas, by United States forces was apparently eliminated sometime in the late 1960's. CN is the major type of tear gas used by United States domestic police, while CS, which is simultaneously the most irritating and the least toxic, was the “riot-control agent” most used in Vietnam. CS-1 and CS-2 are forms of CS which are made more persistent by coating particles of

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66. Decker & Dunlap, *War, Genetics and the Law*, 1 *Ecology L.Q.* 795, 813 (1971).

67. Moore, *supra* note 15, at 439.

68. 5 SIPRI 127-28.

69. Moore, *supra* note 15, at 439.

70. *Senate Hearings* 13.

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CS with silicone so that they are able to produce irritating fumes for as long as forty-five days after the initial spraying.

The original justification for the use of tear gas in Vietnam was that it would save the lives of innocent civilians who were being used by enemy soldiers as human shields; by rendering the enemy and civilians helpless, tear gas would enable the enemy to be captured and the civilians to be set free.<sup>71</sup> In practice, however,

[a]s the effectiveness of these riot-control agents in reducing casualties became increasingly evident in such situations as suppression of hostile firepower and clearance of fortified positions and underground facilities, American commanders at all levels began to see other ways in which the use of the riot-control agents, particularly the new agent CS, could save many *American and allied* lives. As a result, its applicability to [normal combat] operations spread among U.S. units in Vietnam.<sup>72</sup>

A twofold shift in emphasis became apparent: an increasing concern for the lives of American and South Vietnamese troops as opposed to those of innocent civilians or the Viet Cong, and an acceptance of the use of tear gas for purposes dissonant with the notion of humane weaponry.

[L]arge numbers of tear gas grenades [were] dropped on Viet Cong strongholds from helicopters which were followed by B-52's dropping high-explosive or anti-personnel-fragmentation bombs. The purpose of such an attack would appear to be to flush out those hiding in tunnels, to incapacitate them with gas, and then to wound or kill them with bombs. This seems wholly inconsistent with the humanitarian justification given by the United States.<sup>73</sup>

Another aspect of the United States' use of "riot-control agents" in Vietnam was that while tear gas does not ordinarily have any deleterious effects, the generally poor health of the Vietnamese people, especially the young, old, and pregnant, made them much more susceptible to negative, and even fatal, effects from tear gas. Reports from a Canadian doctor and others in Vietnam indicate that a number of children and adults were killed by tear gas attacks on the cave or

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71. Statement of J. Nabrit, United States Deputy Representative to the United Nations, HOUSE REPORT 22.

72. Statement of Rear Admiral William E. Lemos, *Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the House Foreign Affairs Comm.*, cited in *Senate Hearings* 54 (emphasis added).

73. Bunn, *supra* note 18, at 405-06.

bunker in which they were hiding. Those that were not killed developed a "chronic bronchitic [condition] complicated by infections."<sup>74</sup> "[R]epeated respiratory disease as a complication of parasitosis is very common in Vietnamese children," and tuberculosis is "a common disease among peasants in Asia."<sup>75</sup> Since both these conditions are easily aggravated by exposure to any irritating gas, it appears likely that a concentration of tear gas even moderately higher than normal could cause serious injury or death. Thus, weaponry which was humane for domestic police enforcement became significantly less humane in a combat situation.<sup>76</sup>

#### G. Other Developments Since 1960

From 1963 to 1967 a number of allegations were made of Egyptian chemical warfare attacks on Royalist villages in the Yemini Civil War. Only three of the allegations are well substantiated, but these three indicate that tear gases were used first in 1963, and that later, in 1967, mustard gas and phosgene were used. The United Nations did not take any action on these allegations, other than attempting to verify them. One explanation put forward for this inaction was that no nation was willing to push publicly for sanctions, that the conflict was inter-Arab, and that by the time well-documented allegations were received, promising negotiations were underway between the United Arab Republic and Saudi Arabia, who were the backers of the rival Yemini factions.<sup>77</sup>

In February, 1970, Great Britain announced a change in its previously broad interpretation of the chemical warfare prohibition of the Geneva Protocol. Its new position is "that although the British government [has] not changed its position that tear gases are prohibited by the [Geneva] Protocol, it [does] not interpret this ban as extending to CS—the principal tear gas relied on . . . by Great Britain in Northern Ireland."<sup>78</sup> Great Britain explained this apparent inconsistency by noting that CS is "not significantly harmful to man in other

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74. 1 SIPRI 206.

75. *Id.* at 207.

76. For a general survey of United States practice in Vietnam, see *Senate Hearing* 12-15, 54-55, 270-73; *HOUSE REPORT* 3-5, 28-32; Bunn, *supra* note 18, at 394, 405-06; Moore, *supra* note 15, 439-41.

77. 1 SIPRI 159-61; 4 *id.* at 243-47; 5 *id.* at 225-38.

78. Moore, *supra* note 15, at 464.

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than wholly exceptional circumstances . . . . CS is in fact less toxic than the screening smokes which the 1930 statement specifically excluded.”<sup>79</sup> Although the British position is not wholly logical, it seems distinguishable from that of the United States because Britain’s use of CS is still confined to traditional riot-control situations, while United States use in Vietnam extended to full-scale warfare.

As noted above, when Japan acceded to the Geneva Protocol in 1970, it did so under an informal understanding that the Protocol did not prohibit tear gas. According to recent testimony before the Subcommittee on National Security Policy and Scientific Developments, “no state party to the [Geneva] [P]rotocol has officially objected to the Japanese interpretation of that instrument.”<sup>80</sup>

### H. *United Nations Action*

Responding to the United States’ use of tear gas and herbicides in Vietnam, the United Nations General Assembly, beginning in 1966, passed a series of resolutions condemning the use of gas in warfare. On November 7, 1966, Hungary introduced a resolution demanding strict compliance by all nations with the terms of the Geneva Protocol, stressing that it had become binding international law through the customary adherence of nations to its principles, and that the United States had violated this rule of customary international law by its practice in Vietnam.<sup>81</sup> The United States responded that neither the Geneva Protocol nor any subsequent rule of customary international law prohibited the use of tear gas in warfare. Echoing the 1926 debate on ratification of the Protocol, the United States Deputy Representative to the United Nations stated:

The Geneva Protocol of 1925 . . . was framed to meet the horrors of poison gas warfare in the first World War and was intended to reduce suffering by prohibiting the use of poisonous gases such as mustard gas and phosgene. It does not apply to all gases. It would be unreasonable to contend that any rule of international law prohibits the use in combat against an enemy, for humanitarian purposes, of agents that Governments around the world commonly use to control riots by their own people.<sup>82</sup>

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79. *Id.* at 464-65.

80. *House Hearings* 192.

81. *HOUSE REPORT* 21.

82. Moore, *supra* note 15, at 444-45.



Because of an inability to agree on the scope of either the Geneva Protocol or the customary international law prohibition, an amended resolution, for which the United States voted, was drafted.

[It] merely "calls for strict observance by all States of the principles and objectives of the Geneva Protocol . . . and condemns all actions contrary to those objectives," and invites all States which have not done so to accede to the Protocol. No reference is made which might be construed as an interpretation of the wording of the protocol, particularly with regard to tear gas and herbicides.<sup>83</sup>

In 1967, Malta suggested in a resolution to the First Committee of the United Nations that the language of the Geneva Protocol be revised because of technical developments which now made the language of the Protocol exclude some seriously deleterious agents (such as psychochemicals, which are neither "gaseous" nor "liquid" and can have effects neither "asphyxiating" or "poisonous"), while including less harmless chemicals "because their basic characteristics and effects were included in the language of the ban."<sup>84</sup> The USSR opposed this resolution because it felt that to change the Geneva Protocol would eliminate its status as "a universally acknowledged norm of contemporary international law binding on all powers,"<sup>85</sup> and supported a new broadly prohibitive Hungarian resolution. Because of inability to negotiate a compromise resolution, both the Maltese and Hungarian resolutions were dropped.

A December, 1968 United Nations resolution set up a scientific study group to determine the nature and effects of chemical-biological weaponry and to prepare a report giving their findings. While dealing mainly with chemical and biological agents other than tear gas, and concluding that the likelihood of the latter's having lethal effects was extremely small, the report did suggest that

even though these substances may be less toxic than most other chemical agents, their ill-considered use, or use for military purposes could turn out to be highly dangerous . . . . Once any chemical or bacteriological (biological) weapon had been used in warfare, there would be a serious risk of escalation, both in the use of more dan-

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83. HOUSE REPORT 22.

84. *Id.*

85. *Id.*

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gerous weapons belonging to the same class and of other weapons of mass destruction.<sup>86</sup>

In November, 1969, Sweden introduced a resolution which stated that "the Geneva Protocol embodies 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,"<sup>87</sup> and that the prohibition of the Geneva Protocol included "any chemical agents of warfare . . . which might be employed because of their direct toxic effect on man, animals, or plants." The latter language was clearly intended to include tear gas.<sup>88</sup> There have been varying interpretations given to the vote on this resolution, which was 80 in favor, 36 abstentions, and 3 against (the United States, Portugal, and Australia). Many of the abstentions were on the ground that the United Nations General Assembly was an inappropriate forum for treaty interpretation, and that such interpretation should be left to the parties of the treaty. This was the position of many abstaining NATO nations who were signatories of the Protocol, and also of the United States.<sup>89</sup> It is likely that one reason for the high number of abstentions among NATO nations was a desire not to offend the United States regardless of their actual beliefs concerning the scope of the Protocol. Different sources have used the statistics of the voting on this resolution to support somewhat different conclusions. Gellner and Wu state that "more than one-third of the parties and signatories to the protocol neither favored nor opposed the protocol. These facts could prevent the resolution from being an undisputed legal interpretation of the Geneva Protocol."<sup>90</sup> Baxter and Buerghenthal, on the other hand, emphasize that

[a]lthough the vote cannot be regarded as a resounding affirmation of the proposition that irritant chemicals fall under the prohibition of the Protocol, the large number of states voting in favor of the resolution indicates that there is a very substantial amount of support for that view.

These few dissenting voices and thirty-six states whose silence

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86. *Chemical and Bacteriological (Biological) Weapons and the Effects of Their Possible Use* (1968), cited in HOUSE REPORT 23.

87. G.A. Res. 2603, 24 U.N. GAOR Supp. 30, at 16, U.N. Doc. A/7630 (1969).

88. HOUSE REPORT 24.

89. *Id.* at 25.

90. *Id.*

supports neither one construction nor the other do not evidence any strong enthusiasm for a restrictive interpretation of the Protocol.<sup>91</sup>

### III. OPTIONS AND CONCLUSIONS

The ongoing negotiations at the Conference of the Committee on Disarmament, the Convention for the Prohibition of Development, Production and Stockpiling of Bacteriological and Toxin Weapons (which requires ratification by the United States to enter into effect), and the recent appropriations request by the Pentagon for production of binary nerve gases all point to the urgency of United States ratification of the Geneva Protocol as the basic document prohibiting chemical and biological warfare. What continues to divide the Administration and the Senate and prevent Senate advice and consent to ratification is the question of the inclusion of tear gas and herbicides within the scope of the Protocol's prohibition. As has been shown above, the negotiating history of the Protocol, and of the Washington and Versailles treaties which preceded it, is not conclusive on the issue of tear gas although there is strong evidence supporting an interpretation of the Protocol that is broadly prohibitive. In addition, the subsequent statements and practice of nations, with the exception of the United States, evidence nearly unanimous concurrence in the view that the use of tear gas in war is prohibited by the Geneva Protocol. Given, then, an ambiguous negotiating history and a current climate of world opinion which, with the exception of Japan and Britain, is strongly in favor of a total ban on the use of gas in warfare, what are the present options of the United States?

One option is to ratify the Protocol with the single reservation and the informal understanding proposed by the Administration. The proposed reservation states: "That the 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."<sup>92</sup> Its effect is to turn the Prohibition into a "no-first-use" prohibition in regard to chemical warfare, and is similar

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91. Baxter & Buergenthal, *supra* note 10, at 865-66.

92. 63 DEP'T STATE BULL. 274 (1970).

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in this respect to reservations made by almost every other signatory nation. It is, however, dissimilar to reservations made by most nations in that it does not limit the obligations of the United States to other parties to the Protocol, and in that it renounces absolutely the use in war of biological and toxin weapons.

The understanding to which the Administration would like the Senate to agree is that the Protocol "does not prohibit the use in war of riot-control agents and chemical herbicides."<sup>93</sup> The problem with this "understanding" is that it offers only meretricious advantages and provides no real legal protection to the United States or any addition to its national security. Because the "understanding" is only a "whisper in the ear of the Senate" and is not to be formally deposited with the ratification,

[t]he danger . . . is that if one state such as the United States . . . where to say that tear gas is permissible and were to use it, the other side would then say that there has been a clear violation of the Geneva protocol [because it prohibits the use of all gas in war], will feel liberated from the obligations of the protocol, and will consider itself entitled to resort to any sort of gas or herbicide that it may think proper to employ . . .<sup>94</sup> [I]f the matter were ever to be litigated or discussed in any forum which could reach a decision on the question, the U.S. pronouncement would be simply "one man's opinion" and would carry no international legal effect.<sup>95</sup>

There is some disagreement on this point. Another international lawyer has suggested that

[g]iven the ambiguities in the text of the protocol, the statement would most likely be accepted as an interpretation of an ambiguous provision, rather than a reservation [going to the heart of the protocol, which it clearly is not] . . . . Thus we would become a party to the Protocol with a clear understanding on tear gas and herbicides as far as most parties were concerned.<sup>96</sup>

A second alternative is to ratify the Geneva Protocol with an explicit reservation of the right to use tear gas and herbicides in war. This has the advantage of making clear our position, and allowing the exact definition of the legal relations between the United States

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93. *Id.*

94. *House Hearings* 107.

95. *Id.* at 128.

96. Bunn, *supra* note 18, at 411.

and other parties to the Protocol. The law governing treaties and reservations thereto being "very much like the law of offer and counteroffer," any nation that did not voice objection to the reservation would be presumed to have accepted it.<sup>97</sup> If a country did object to the United States' reservation, something which has not happened with any other reservation made to the Protocol, then two results are possible: Either the particular provision affected by the reservation would not enter into force between the objecting and the reserving state, or the treaty as a whole would not come into effect.<sup>98</sup> The latter seems much more likely because the Geneva Protocol

is so short and so highly integrated an instrument that it is very difficult to think of segregating out the provision which is affected by a reservation and saying that this will not be in force but that all the rest of the protocol will be. The reservation actually goes to the very guts of the obligation—the type of chemical agents which are covered by the protocol.<sup>99</sup>

Even if the United States' reservation were accepted, there would be the problem of definition, of specifying exactly what is a riot-control or lachrymatory agent or a chemical herbicide. As noted above in the discussion of the 1932 Disarmament Conference, it is very difficult to determine which chemicals fall within the lachrymatory category and there is always the risk that, intentionally or otherwise, a newly developed chemical weapon would be labeled a riot-control agent when in fact its effects were much more deleterious and long-lasting. If this were to occur, the Protocol would be effectively scuttled. That is why it has always been felt so important—whether today, at the 1932 Disarmament Conference, and at least arguably, at the time of the drafting of the Geneva Protocol itself—that the prohibition on chemical warfare be absolute.

On the other hand, ratification with a formal reservation has two advantages over ratification with an undeposited "understanding." Even if a number of important states objected to the United States' ratification of the Geneva Protocol with such a reservation thereby preventing the Protocol from coming into effect between the United States and the objecting nation, the United States would know exactly where it stood legally, and would have the opportunity to reconsider

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97. *House Hearings* 127.

98. *Id.*

99. *Id.*

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in the face of such a strong and unequivocal statement of world opinion the importance, militarily and politically, of retaining the right to first use of tear gas and herbicides. It then might decide to ratify without reservation.

The third option open to the United States is to ratify the Protocol with only the limited "no-first-use" reservation proposed by former Secretary of State Rogers, without any "understanding" of a limitation on the scope of the Protocol. The advantages to this approach are several. Ratification in this manner would make the legal position of the United States very clear, and leave no possibility of difficult questions of interpretation arising in times of conflict. But most important, ratification without reservation as to the scope of the prohibition would help ensure the fulfillment of the basic purpose of the Protocol—the outlawing of all forms of chemical and biological warfare. Ratification without reservation would certainly produce a favorable world reaction. Furthermore, it would establish the momentum needed for the ratification of the Convention for the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons, and for substantial progress at the Conference of the Committee on Disarmament.

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