

GAS AND GERM WARFARE: INTERNATIONAL LEGAL HISTORY AND PRESENT STATUS

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Introduction.—Modern biological agents have never been used in war, although brave Lord Geoffrey Amherst is reported to have caused blankets from the deathbeds of smallpox victims to be given to a hostile Indian tribe.

On the other hand, chemical weapons have been used in modern war. Poison gas was used by both sides in the First World War, by the Italians against the Ethiopians in the mid thirties, and probably by the Japanese against the Chinese in the early part of the Second World War. Poison gas was used again recently in the conflict in Yemen. Tear gases and chemical defoliants are in use in Viet Nam today.

Man has made many attempts to ban gas and germ warfare. Only one success stands out. That is the Geneva Protocol of 1925 which prohibits the use of gases and bacteriological methods of warfare. More than 80 countries have ratified this treaty, many in recent years. The United States, the one country most responsible for the drafting of the treaty, has still not become a party to it.

It is my purpose today to review the attempts to prevent gas and germ warfare, to set forth the current efforts to deal with the problem, and, in particular, to focus on the role of the United States in all of this.

*History of Protocol.*¹—The first treaty dealing specifically with poison gas was an 1899 Hague Gas Declaration which contained an agreement “to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.” Twenty-seven nations became parties to this declaration, including all participants in the conference except the United States. The American representative, Navy Captain Mahan, refused to agree because gas projectiles were not yet in practical use or fully developed.

The language of this declaration was so limited that it had little if any effect on gas warfare during the First World War. Probably the first use of gas was by French policemen who brought tear gas containers, which they had been using in police work, to the Front when they were first called to arms. Later, large quantities of tear gases were used by both sides, the French having taken the view that it was not an “asphyxiating or deleterious” gas within the meaning of the declaration. In the first attack of lethal gas, at Ypres in 1915, the chlorine used by the Germans came from large cylinders, not from the “projectiles” described in the declaration. Similarly, a projectile which was used by Germany did not have “as its sole object” the diffusion of poison gas because, the Germans argued, it was also used for shrapnel. With these and other arguments, the existing limitations on poison gas were brushed aside in the First World War. One of the important jobs of my profession has always been to find loopholes, and there were plenty in the language of this Declaration.

The Allies blamed the Germans for initiating gas warfare. The Treaty of

Versailles—the peace treaty with Germany—therefore made clear that the use, manufacture, or importation of “asphyxiating, poisonous or other gases” by Germany was prohibited. Whether “other” meant “all other” or “similar other” has been a matter of controversy ever since. The same phrase appears in the Geneva Protocol of 1925, which is still in effect. If “other” means “all other,” then the use of tear gas in war, as in Viet Nam, is prohibited. If “other” means “similar other,” it may not be.

As luck would have it, the negotiating history of the Treaty of Versailles is unclear. Quite possibly, since tear gas was even then being used for riot control, the drafters did not intend to prohibit German police from using it on German civilians, and therefore did not intend to prohibit Germany from making or importing it. If so, the “other” in the Versailles treaty would not include tear gas.

The Treaty of Versailles also contains the seeds of the present dispute over whether the use of chemical defoliants in war violates the 1925 Protocol. The Versailles Treaty contains broad language, later repeated in the Protocol, prohibiting the use in war not only of gases but “all analogous liquids, materials, or devices . . .” This would seem inclusive enough to cover chemical defoliants, but they were unknown at that time.

By 1921 an anti-war atmosphere, much like that of today, existed in this country. In the Senate, there was a major debate over the military budget. It was naval ships, not an ABM, which were the subject of attack by the doves led by old Bob LaFollette. As the Senate’s concern for the cost of naval ship-building became clear, Senator Borah of the Foreign Relations Committee proposed an amendment requesting the President to invite Great Britain and Japan to a conference to seek an agreement to reduce the ship-building program of each country. This amendment was adopted, President Harding convened the conference, and the 1922 Washington Treaty on Submarines and Noxious Gases resulted. It contained, among other things, a prohibition on gas warfare in the language of the Treaty of Versailles, adopted at the suggestion of the American delegates. The support for the treaty was so great in this country that the Senate approved it without a dissenting vote.

The conference records contain no recorded discussion of the possibility of using chemicals to destroy the crops of the enemy. There was, however, a discussion of tear gas. A citizen’s advisory committee felt that, unless *all* gases were prohibited, there would be a danger of escalation from tear gases to more injurious gases. The Navy also pointed to the difficulty of drawing any line unless all gases were prohibited. At the suggestion of Senator Elihu Root, however, the conference adopted the Versailles language because so many countries had already agreed to it. As we have seen, that language leaves room for doubt.

The 1922 Treaty never came into force because the French refused finally to agree to its provisions on submarines. In 1924, the League of Nations appointed a committee of experts to study the problem again. This group discussed tear gases, saying they caused no permanent disablement and were in use by police departments. They also discussed possible damage to crops from chemical or bacteriological agents. They were aware of no agents then existing which would destroy crops. However, Professor Cannon of Harvard’s Medical School did not entirely concur in this opinion since he admitted “the possibility

of aeroplanes disseminating over wide areas parasites capable of ravaging the crops.”

Because the 1922 treaty did not come into effect, in 1925 the United States again proposed a ban on germ and gas warfare, and the Geneva Protocol resulted. Again, the Versailles language was used, a ban on bacteriological warfare being added.

The Protocol of 1925 prohibits (1) the first use in war of “asphyxiating, poisonous, or other gases, and of all analogous liquids, materials or devices” and (2) the first use “of bacteriological methods of warfare.” It does not prohibit research, development, testing, production, or stockpiling of gas or germ weapons. It does not prohibit the use of such weapons *in reprisal* against their first use by the enemy. It does not prohibit the *domestic* use of tear gases or herbicides, whether or not it prohibits their use in war. It does not prohibit the use in war of chemicals used for concealment “smokes” or of flame throwers, napalm, or other incendiary weapons.

Probably because of the ease with which the 1922 Treaty had sailed through the Senate, President Coolidge and Secretary of State Kellogg did not make the effort to gain support for the 1925 Protocol that had been made in 1922. The Army’s Chemical Warfare Service was not prevented from mobilizing opposition to the protocol. It enlisted the American Legion, the Veterans of Foreign Wars, the American Chemical Society, and segments of the chemical industry. Senator Wadsworth, Chairman of the Military Affairs Committee, led the Senate opponents of the protocol. He argued that it would be torn up in time of war and that poison gas was, in any event, more humane than bombs and bullets. Senator Borah, Chairman of the Senate Foreign Relations Committee, finally withdrew the treaty from Senate consideration, apparently because he could not muster the necessary two-thirds vote.

Later in the twenties the Protocol came into force without the United States. In 1930, the British convened a conference to resolve the differences over whether it barred tear gases. Twelve countries including the British, the French, and the Russians agreed that it did, many of them making clear that they did so because of the difficulty of drawing a line between lethal gases and incapacitants. Only the United States disagreed with this view. We did so because we were unwilling to bind ourselves “to refrain from the use in war, against any enemy, of agencies which [had been] . . . adopted for peacetime use against . . . [our] own population, agencies adopted on the ground that, while causing temporary inconvenience, they cause no real suffering or permanent disability . . .”

No agreement was reached on this point, and the conference report recognized that the question remained open. The focus of discussion at Geneva later turned to the drafting of new treaties to regulate not only the use of gas and germ weapons but also their production, importation, and stockpiling. A consensus was achieved that, in such a treaty, tear gas should be prohibited for use in war but not for use domestically on a country’s own population to control riots. The United States finally agreed. However, no treaty to this effect ever went into force. The Geneva discussions of the thirties ultimately broke up in failure after the Germans withdrew and the storms of war began to gather.

Many persons credit the Geneva Protocol of 1925 with a major role in prevent-

ing gas warfare in Europe during World War II. It symbolized the abhorrence for gas which even military men had after World War I. This abhorrence contributed to restraints imposed by both civilian and military leaders. If fear of retaliation was the primary sanction acting to deter the use of poison gas and germs, the Protocol established the norm of conduct. Unlike World War I, no gas warfare occurred among the industrial states of Europe in World War II.

At the beginning of our participation in World War II, the State Department became concerned that the Japanese, not being parties to the Geneva Protocol, would engage in chemical warfare. The British, French, Italian, and German Governments had exchanged pledges to observe the Protocol; the British had made the same offer to Japan, but it had replied evasively. The Chinese charged that the Japanese had used gas in China. President Roosevelt therefore announced that we condemned the use of poison gas as "outlawed by general opinion of civilized mankind." He said we would not be the first to use these weapons and threatened swift retaliation by the United States if such gases were used against any of our allies. The Japanese replied privately that they would refrain from the use of gas if we and our allies would do so.

The Joint Chiefs gave consideration to using gas toward the end of the island war in the Pacific, but they never asked President Truman for authority to do so. No gas, even tear gas, was used by U.S. forces in World War II or in the Korean War, although field commanders in both wars had asked for permission. We were charged by the North Koreans with germ warfare, but we denied the charge and they refused to admit a UN team attempting to verify it.

The United States, South Vietnam, and Australia have used tear gases in Viet Nam, as have the North Vietnamese and the Viet Cong. We were the first to do so. Our use was justified on "humanitarian grounds"—that it would reduce the number of people killed, particularly noncombatants, and that it would be analogous to riot control. The authorized justification given by the United States to the United Nations stated that 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." And Secretary Rusk said: "We do not expect that gas will be used in ordinary military operations. Police-type weapons were used in riot control in South Viet Nam—as in many other countries over the past 20 years—and in situations analogous to riot control where the Viet Cong, for example, were using civilians as screens for their own operations."

Where Viet Cong were protected by human shields, or by tunnels or caves, the alternatives were machine guns, napalm, high explosives, or fragmentation grenades. Tear gas certainly seemed a more humanitarian weapon. But, after the humanitarian justification had been made, reports from Viet Nam revealed that large numbers of tear gas grenades had been dropped on Viet Cong strongholds from helicopters which were followed immediately 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 (whether civilians or combatants), to incapacitate them with gas, and then, instead of capturing them, to wound or kill them with bombs. This seems wholly inconsistent with the humanitarian justification given earlier by the United States.

In September the Pentagon repeated this justification, saying again that riot-control agents were useful "in reducing civilian casualties" and "are used when they will help save lives." The following week, the *New York Times* described a report from the American Command in Saigon which said that tear gas had rarely been used to save civilian lives. Indeed the very volume of tear gas purchased for use in South East Asia—some 13.7 million pounds since 1964—indicates a widespread use in ordinary military operations. Thus the political rationale given by the United States for using tear gases no longer fits our military practice.

Somewhat the same thing has happened with the defoliants we are using in Viet Nam. We justified their use "to control weeds and other unwanted vegetation," saying that they "involve the same chemicals and have the same effects" as weed killers used domestically in the United States. At first, defoliants were used to destroy jungle trees and plants, particularly along roads, because enemy troops were using this vegetation as a cover from which to attack American and allied soldiers. This was not unlike the common use of herbicides to kill weeds along highways in this country and others. Gradually, however, the South Vietnamese and then the Americans began using herbicides to kill rice crops in Viet Cong held areas. Although the chemicals remained the same as those used for certain domestic weed killers, the use was no longer "to control weeds and other unwanted vegetation," the justification given by the United States to the United Nations. As with tear gases, our political rationale had been eroded by our military practice.

The United States has never taken the view that it could use tear gas and defoliants in Viet Nam on the grounds that it is not a party to the Geneva Protocol of 1925. Instead we have said that these agents are not prohibited by the Protocol, adding that we support the objectives of the Protocol. In 1966 we sponsored and voted for a resolution of the UN General Assembly which called for "strict observance by all states of the principles and objectives of the Protocol" and condemned "all actions contrary to those objectives." A United States delegate stated that "while the United States is not a party to the Protocol, we support the worthy objectives which it seeks to achieve." Following this resolution, the State Department took the view that, by voting for the resolution, the United States reaffirmed its long-standing support for the Protocol. In this view, the "basic rule" set forth in 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."

This position, of course, assumes that the Protocol includes no prohibition of tear gases or defoliants. With this qualification, the State Department view is that we are now bound to observe the rule of the Protocol even though it was not approved by the Senate. This is consistent with decisions of the Nuremberg trials convicting Germany of violating treaty standards which Germany had not expressly agreed should be applicable to it—simply because these standards had become widely accepted by a great many countries over a long period of time.

Despite the differences of view over the scope of the Protocol, it remains today a living document with a growing list of signatories. Some 84 countries have agreed to its terms. All members of NATO except the United States, and all

Warsaw Pact members including the Soviet Union, are parties. Indeed, all European states except Albania have joined the Protocol. Of the major industrial countries, only Japan and the United States have failed to join. Of the five nuclear powers, only the United States remains outside.

Recent International Debate.—In the last several years, there has been a great deal of interest in clearing up the disputes over interpretation of the Protocol, in making universal the adherence to it, and in devising new limitations on chemical and biological agents. In a foreword to the recent UN experts report, U Thant made three proposals: (1) That renewed appeals be made to all countries to join the Protocol; (2) That a clear affirmation be made that the Protocol prohibits the use in war of all chemical and biological agents, “including tear gas”; and (3) That agreement be reached to halt the development, production, and stockpiling of all chemical and biological weapons, and that they be eliminated from the arsenals of nations.

As to U Thant’s first proposal—that all should join the Protocol—an increasing number of nations have become parties in recent years, almost 20 since the 1966 UN resolution calling on all countries to do so. Last summer, the White House announced a review of United States policy in this area, including the possibility of resubmitting the Protocol to the Senate. That review is still going on, and the National Security Council should be meeting soon to consider the arguments of the various agencies. I hope that a decision to resubmit the Protocol will result.²

U Thant’s second proposal was to make clear that the Protocol prohibited the use in war of *all* chemical and biological agents. In July, the British delegate to the Geneva Disarmament Conference expressed fear that no unanimity could be achieved on this point. He no doubt had our exception of tear gases and defoliants in mind. On the 26th of August, the twelve non-aligned members of the Geneva Conference submitted a draft declaration which would contain the affirmation U Thant desires. This declaration would condemn the use in war of “any chemical agents of warfare” which “might be employed because of their direct toxic effects on man, animals or plants.” The language of the declaration is designed to include both tear gases and defoliants. The speech by the Swedish delegate who introduced the declaration made clear this was indeed its purpose.

The declaration is opposed by the United States and Britain. Our agreement to such an interpretation of the Protocol would, of course, foreclose our future use of tear gases and defoliants in Viet Nam. But an announcement by the President that he had directed our forces to refrain from such use as long as the North Vietnamese and Viet Cong did so would be a significant step toward further de-escalation of the Vietnamese war. Such weapons do not seem very useful for our troops if our purpose now is largely to protect populations and territory from attack, not to search out the enemy and destroy him. If, as Secretary Rogers announced on October 12, the orders of our military commanders have been changed from “maximum military pressure” to “protective reaction,” tear gases and defoliants may no longer be particularly advantageous to us from a military point of view.

An announcement that we would refrain from the use of tear gas and defoliants could lead to common agreement among nations that the Geneva

Protocol prohibited the use of these agents in war. Moreover, such an agreement would have a major impact on whether other countries use tear gas, and then perhaps more dangerous gases, in their own wars. Preventing the proliferation of gas warfare capabilities to other countries should be a matter of great concern, a matter outweighing any immediate military advantage in Viet Nam.

U Thant's third proposal dealt with possible agreements to halt development, production, and stockpiling of gas and germ weapons, and perhaps even to eliminate them.

The British have recently proposed a ban on any use, development, production, or possession of biological warfare agents. Under the British plan, agents of biological warfare would be treated separately from chemical weapons because their effects are even more unpredictable and horrible than those of chemical agents. The British draft treaty would require parties to destroy, or convert to peaceful purposes, any such agents in their possession. The British delegate recognized that verification of these obligations would not be possible because the "agents which might be used for hostile purposes are generally indistinguishable from those which are needed for peaceful medical purposes, and militarily significant quantities of a biological warfare agent could be produced clandestinely in a building the size of a small house or large garage."

Recognizing this fact, the British proposed that the Secretary General be authorized by the Security Council to investigate any charges of violation. At least a complaint procedure would thus be available, if a party could somehow acquire information leading him to suspect that another party was violating the agreement. Whether the complaint of *illegal* production would produce an investigation would depend on the vote of the Security Council and the admission of the inspecting team by the suspected country. A complaint of actual *use* of gas or germ warfare would more likely be investigated since it would not be subject to veto under the British plan and since the use would be more likely to have taken place on the complaining country's territory. In any event, the publicity entailed in the complaint procedure would offer some deterrent to some kinds of violations. Moreover, chemical and nuclear weapons would remain in existence, would help deter any would-be violator from using biological agents, and would make the existence of clandestine biological stockpiles unimportant. If, in fact, biological agents are unreliable weapons and cannot satisfactorily supply military needs not met by other weapons in our arsenal, then we should support this British proposal. I myself hope that this will be one result of the review now underway by the Nixon administration.³

At Geneva this summer, the United States delegate reserved his position on the British draft, saying that it raised issues now subject to review in Washington. The Soviet delegate opposed the British draft on the ground that eliminating only *biological* agents might escalate the *chemical* arms race. Just last month, Soviet Foreign Minister Gromyko submitted to the United Nations a new Soviet draft treaty dealing with both chemical and biological weapons. It would prohibit development, production, and stockpiling; its goal would be the elimination of all existing stockpiles. Yet it contains no adequate provision for verification, not even the complaints procedure of the British proposal.

Recent Congressional Action.—The Congress this year has taken steps to investigate chemical and biological warfare agents and to impose new limitations on United States testing, transportation, and foreign deployment of these agents. Congressman McCarthy and Senators MacIntyre, Nelson, and Goodell, among others, have led the way to a \$10.5 million dollar cut on research, development, and testing of biological agents, new chemical agents, and delivery systems for disseminating lethal chemical and all biological agents. A ban on the procurement from this fiscal years' funds of delivery systems designed for these agents also appears in the new law. It can only be overcome by a Presidential certification that such procurement is essential to our safety and security.

The new legislation also requires:

(1) Semiannual reports by the Department of Defense to the Congress on research, development, testing, and procurement of lethal and nonlethal chemical and biological agents. This may become the most significant provision of the new legislation if the Congress utilizes the information provided to begin exercising real legislative control in this area. Senator McIntyre has already announced that hearings will be held in the near future to review our CBW program to determine what additional steps may be needed.

(2) Advance notice to foreign nations before the deployment on their soil of any lethal chemical or any biological warfare agents or any delivery systems specifically designed to disseminate such agents, and review by the Secretary of State to insure that any American activities abroad involving such agents are consistent with international law. These restrictions arose from the disclosures that our chemical agents had been stored in Okinawa and West Germany.

(3) Review by the Surgeon General of the U.S. Public Health Service of the domestic transportation or open air testing of any lethal chemical or any biological warfare agents. If the Surgeon General's recommendation would have the effect of preventing the transportation or testing, then (and only then) the Department of Defense may appeal to the President who may approve the transportation or testing if considerations of national security override the dangers to health and safety. The concern over open-air testing was of course prompted by the death of 6,400 sheep after a nerve gas test at the Chemical Service's Dugway, Utah proving ground. And the concern over transportation arose from the proposal to ship mustard and other gases stored in a Colorado depot to the Atlantic ocean for disposal at sea.

These restrictions were hammered out in a House-Senate conference committee after each body had adopted its own language. The Senate's vote on passage of the Senate version was 91 to 0. If these same Senators are prepared to vote for a treaty prohibition on the first use of poison gas and germs in war, they would provide more than the necessary two-thirds majority for approval of the Geneva Protocol of 1925 I hope it will again be submitted to the Senate.

¹ For a more detailed account, and for citations to many of the texts quoted in this statement, see Bunn, *Banning Poison Gas and Germ Warfare: Should the United States Agree?*, 1969 WIS. L. REV. 375.

² President Nixon's announcement of November 25, 1969 that the Protocol would be resubmitted is set forth *infra* p. 250.

³ See President Nixon's statement of November 25, 1969, *infra* p. 250.