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The Origins of Modern International Chemical Weapons Law

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The Origins of Modern International Chemical Weapons Law

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Statement of Purpose and Background

The primary document of the modern international chemical weapons regime is the Chemical Weapons Convention, a relatively recent law that has yet to be fully implemented. But what was the groundwork for this law? What was the crucial time where the elements that would later be part of the Chemical Weapons Convention fell into place? The history of chemical weapons law goes back a long time, with codified laws emerging at the beginning of the 20th century. The preeminent law on the subject was the Geneva Protocol of 1925. However, the United States did not ratify that treaty. Therefore, when the United States made a serious push to ratify the treaty much later, in the late 1960s, there was much discussion among American statesmen, publicists, and scientists on what the future of the international chemical weapons regime should be. It is instructive to compare the path of chemical weapons law to other attempts at arms limitation, since the concerns about chemical weapons were not the same as for other classes of weapons, and if future lawmaking took those concerns seriously, we would expect to see a different regime emerge. It appears that the crucial time in the development of the law was from the late 1960s to the United States' ratification of the Geneva Protocol during the Ford administration. Indeed, when one looks at the writings of the thinkers of the 1960s and 1970s, one sees that subsequent events touched upon or addressed the same problems that then worried them. Had the United States ratified the Geneva Protocol earlier, it is quite possible that the international chemical weapons regime would look very different than it does today.

What reason do we have for thinking that there was something especially important about the Nixon era? L. Craig Johnstone, in a *Foreign Affairs* article from 1971, asserts that the Nixon administration's policies on chemical and biological weapons and the military's plans for the end

of ecological warfare in Vietnam “contributed significantly to international efforts to reach agreement on prohibiting chemical and biological warfare” (712). This statement holds up well today, although we now can write with the benefit of hindsight and thus can say exactly to where the Nixon administration’s efforts led. At the time, one can surmise that the major issue was the United States’ potential ratification of the Geneva Protocol. After all, the United States was unusual in not being party to the treaty (Johnstone 712). In addition, Nixon was revivifying the Protocol after years of neglect, with Truman being the last president to attempt to see it passed (Johnstone 712). But the accession to the Geneva Protocol by the United States was ultimately irrelevant. The Geneva Protocol represented the old international chemical weapons regime. That the United States had never formally joined it was a matter of some importance, to be sure, but we now know that it was merely a stepping-stone on the way to the Chemical Weapons Convention. What therefore matters more than the text of the Geneva Protocol itself are the debates that arose because of Nixon’s push for U. S. ratification, since it is possible that these debates had a direct effect on the formation of the later treaties on chemical and biological weapons. If there is no direct effect, then one can at least take the debates as one part of the international movement for a more robust international chemical weapons regime that later found its culmination in the Chemical Weapons Convention.

History of the Law Before the 1960s

Before the Geneva Protocol

To understand the debates of the 1960s and 1970s, one must understand how the history of thought on chemical weapons limitation prior to that point. While most scholars date the

beginning of the international chemical weapons regime to the Geneva Protocol of 1925, we have good reason to think that there was a less comprehensive regime in place much earlier. For example, the prohibition on poison was stated by ancient authors such as Cicero (Moon 657). Early modern international law theorists such as Hugo Grotius and Emmerich de Vattel later reiterated that same prohibition (Moon 658). While the technology used in modern chemical weapons may therefore be only of contemporary concern, the moral and legal ramifications of weapons of that sort are not exclusively a modern preoccupation. De Vattel, in his denunciation of the use of poison, made two arguments that have persisted to the present day: first, that any initial use of poison (or chemical weapons) will invite reprisal by the other side, and second, that these weapons are of such brutal character that to use them at all is a moral offense (Moon 658f). We can see this idea of biological and chemical weapons as particularly cruel persist even after the development of nuclear weapons; in fact, one member of the United States Congress specifically named a nuclear strike as preferable to the use of biological agents (McCarthy 682).

As the codification of international law began, there were sensibly some attempts to codify the international regime on biological and chemical warfare. This coincided with the explosive growth in technology in the 19th and 20th centuries that made these weapons more dangerous than ever. J. K. Mietinen notes that this advance in technology led to treaties in 1889 and 1907, the Hague Conventions, that sought to ban chemical weapons (37). However, these treaties were ineffective, and “12,000 tons of tear gases and over 100,000 tons of more toxic agents were used” in the First World War (Mietinen 37). While this went counter to the longstanding prohibition against weapons of this type, one could surmise that the technological progress was so rapid that nobody really knew how monstrous these weapons would be. As

Miettinen notes, a strong consensus that the use of chemical weapons was immoral emerged following the widespread calamity of the war (37).

The Purpose of the Geneva Protocol of 1925

The document that laid the foundation of the international chemical weapons regime for roughly seventy years is the Geneva Protocol of 1925. What makes this law so significant, other than its longevity? In many ways, it is quite peculiar. It does not fall easily into the categories of “arms control” or “disarmament.” Rather, it prohibits the “use in war” of chemical and bacteriological weapons, but not the testing or stockpiling of them (Baxter and Buergenthal 2). Nineteen countries ratified the treaty with reservations to the effect that it is only valid under conditions of reciprocity, which as Baxter and Buergenthal note, weakens the case that such an interpretation was widely viewed as obvious from the text of the Protocol (19). Nevertheless, this does show that there was not a consensus in the international community concerning a restriction on both first and second uses of chemical and bacteriological weapons.

The United States and the Geneva Protocol

While the United States did not ratify the Geneva Protocol in 1925, it did sign the protocol at the conference in which it was adopted (Moore 421). This indicates that the United States agreed in principle with the provisions of the treaty. John Norton Moore states that the United States did not ratify the treaty because of “inadequate coordination with the Senate” (421). That description lends further credence to the idea that the United States was committed at the time to the principles outlined in the Protocol, and that its failure to ratify was more of a domestic political issue than a fundamental disagreement on policy. As we have seen, however,

it was only briefly reconsidered under Truman and not taken up seriously until the Nixon administration. There is no good reason to suspect that during this period the United States had changed its mind with regard to the principles of the Protocol; indeed, many close U. S. allies in this period were signatories, as was its chief enemy, the Soviet Union. Baxter and Buergenthal go so far as to state that “all the military and industrial nations of the world” as of 1970 had signed it (2). While the United States lagged behind the prevailing international community on paper, it is hard to substantiate the claim that it differed significantly in philosophy. It is because the United States shared a common philosophical ground with the rest of the international community that it was able to become a major player in the proliferation debates of the 1970s.

Problems of the Geneva Protocol

Problems with the Treaty Itself

However, if we can presume that the position of the United States represented a commonly agreed upon perspective of the prevailing international law of the time, then it is as important to look at what the United States did not believe as what it did. Richard D. McCarthy, a member of the United States Congress, gave a speech in 1969 where he elucidated the U. S. government’s position on the proper role of chemical weapons. He relates an official saying that the United States aims “to develop and maintain a defensive chemical-biological capability so that our military forces could operate for some period of time in a toxic environment if necessary; to develop and maintain a limited offensive capability in order to deter all use of chemical and biological weapons by the threat of retaliation in kind” (McCarthy 681). The striking bit from this quotation is the idea of an *offensive* chemical or biological weapons force,

exactly that which is prohibited under current international law. One may assume that the United States could take that position because it was not a signatory to the Geneva Protocol. However, that is not so; as we have seen, the stockpiling or testing of chemical weapons was not prohibited by the Protocol.

Furthermore, McCarthy notes that the presence of a biological weapons stockpile not only allows for a second strike, but also could give the capability for a first strike (681). Indeed, he thought that the policy of developing biological weapons was in part in order to have this first strike capability (681), although he later doubts whether the system of reprisals would work at all, since he doubts that the United States would be willing to make a second strike as long as other weapons were available (682). A first strike would, of course, be illegal under the Geneva Protocol, and as we have seen, the United States was not inclined to violate the Geneva Protocol even though it had not ratified it, since it agreed in principle with the provisions of the Protocol. But if the possibility of a first strike was conceivable under the Geneva Protocol regime, then it would be open alike to those who had signed the Protocol and those who had not, as long as the state using the weapons would feel confident that there would be no reprisal. It is important to note that while McCarthy was talking about biological weapons, the provisions of the Geneva Protocol were the same for chemical weapons and thus the same problem arises. If the Soviet Union has a chemical weapons stockpile, under this scenario, the United States or France or Britain cannot be sure that the weapons are truly for use in a second strike, or if they are being held for a potential first strike. This same difficulty arose with nuclear weapons in this period. However, the international community chose a different strategy in formulating the law concerning nuclear weapons. The differences between the two strategies are instructive in showing how chemical weapons differ from nuclear weapons, on the one hand, and on the other

hand how different legal regimes can address similar problems. First, however, we must consider why the United States did not ratify the Protocol.

Problems with Ratification by the United States

We know that the United States was hesitant to join the Geneva Protocol in 1925, and no serious movement on the issue occurred until the Nixon administration. There is good reason to think that Nixon's push to ratify the Protocol in 1969 helped galvanize international opinion in the direction that a stronger prohibition on chemical weapons was possible, primarily through his tough language on the closely related subject of biological weapons (Meselson 14). The specifics of Nixon's statement are worth going into, but for the moment, the important thing is that the push toward the modern international chemical weapons regime did not begin until the late 1960s, and that the United States' actions were important in this development.

In addition, the United States probably wanted to abide by the Vienna Convention on the Law of Treaties. It did not ratify this convention; however, President Nixon signed it, indicating that the United States agreed in principle with the treaty. The reason it did not pass the Senate was that there was a dispute over the precise interpretation of the word "treaty" (Dalton et al. 276). Nevertheless, the United States took the position that it considered some provisions of the Vienna Convention to have the force of customary law for the United States (Dalton et al. 277). Why would the United States want to enter into a reservation when ratifying the Geneva Protocol? Since the United States had used tear gas and herbicides in Vietnam, there was a debate at the time about whether the United States would have been in violation of the Geneva Protocol (had it been a party to it). The United States claimed that this was consistent with the law, while the United Nations General Assembly adopted a resolution stating otherwise (Baxter

and Buergenthal 13). This may have delayed the ratification of the treaty, since at the time it was not clear whether the Soviet Union would accept a reservation to the effect that the Protocol does not prohibit herbicides and tear gas. If the Soviet Union did not accept, under the law of treaties the Soviet Union would not be bound by the terms of the protocol with respect to the United States (Baxter and Buergenthal 27). In addition, the Nixon administration made it clear that under its interpretation, the Protocol did not prohibit these chemicals, which was not an acceptable position to the Senate Foreign Relations Committee. Therefore, the Protocol was not ratified until the Ford administration, when the treaty was ratified without a reservation concerning herbicides and tear gas. Indeed, the Ford administration rejected first use of herbicides and riot-control agents under most circumstances, which was sufficient for the Foreign Relations Committee; it did not, however, change the United States' position that the text of the treaty does not prohibit them (U. S. State Department).

The Concurrent Development of the Biological Weapons Regime

Biological Weapons and the Nixon Administration

While working toward the passage of the Geneva Protocol, Nixon made some progress on biological weapons as well. In addition to renouncing the use of biological weapons, he renounced their possession (Johnstone 711). This presages not only the Biological Weapons Convention, but also the Chemical Weapons Convention of much later. Obviously, however, Nixon could not make as strong a statement with regard to chemical weapons. As long as the debate about herbicides and tear gas raged, he was unlikely to make any progress—one needs a clear definition of chemical weapons first. In addition, at the same time when he forswore the

possession of biological weapons, he “reaffirmed the renunciation by the United States of the first use of lethal chemical weapons” (Johnstone 711), thereby leaving open the option of a *second* use of lethal chemical weapons. If the United States was to keep the option of second use on the table, that means that it was the view of the United States that second use of chemical weapons was an appropriate reprisal to a first use. This is in line with a common interpretation of the Geneva Protocol that we have seen and accepted practice with treaties regarding war in general (Baxter and Buergenthal 19). However, the Nixon administration’s stronger position is telling. It may be an indication more generally that the international community was moving toward the idea that the use of certain weapons constitutes a human rights issue, and that merely to possess the weapons is too great a threat to international peace for the international community to countenance. These views would receive more concrete support in the Biological Weapons Convention.

The Development of the Biological Weapons Convention

The Stanford Arms Control group notes that while biological weapons have not proven themselves especially useful in war, chemical weapons “have relatively well-proved tactical applications” (116). Thus, while the problem of controlling chemical weapons may appear on the surface to be the same as the problem of controlling biological weapons, we should not be surprised that after the Geneva Protocol they developed separately. Because chemical weapons are more effective in war, states may be more hesitant to give them up. They may also require greater confidence that unfriendly powers will not use them before they will be willing to disarm.

It is perhaps for this reason that the arguments about the problems of the Geneva Protocol found themselves addressed first with regard to biological weapons, and only later with regard to

chemical weapons. The Biological Weapons Convention (BWC) makes it clear that the use of biological weapons in war, even as a reprisal, is forbidden, and furthermore uses the term “biological” in order to expand upon the scope of the Geneva Protocol’s term “bacteriological” (Paris 518). In some respects, this is reminiscent of the Nuclear Non-Proliferation Treaty (NPT), since it forbids the stockpiling of biological weapons much like the NPT forbids states from building or attempting to acquire nuclear weapons. However, the BWC does not grandfather in states that currently have the weapons, unlike the NPT. This may stem from the weakness of biological weapons relative to nuclear weapons, making states less worried about giving up their weapons. It also may stem from the long-standing moral prohibition of forms of biological and chemical warfare, a norm that predates the invention of nuclear weaponry. While the moral issue does not obviously separate chemical weapons from biological weapons, the efficacy issue does, which may explain the delay in adoption of a similar treaty for chemical weapons.

From the 1970s to the Current Chemical Weapons Regime

How Chemical Weapons Law Is Distinct

When the Chemical Weapons Convention (CWC) was finally adopted, it differed in one important respect from the BWC. It had something called the “Verification Annex” that dealt with inspections to ensure that states are complying with the treaty, which Kristin Paris calls “the most comprehensive verification scheme of any international treaty” (545). Part of the reason why this might be so is that the CWC was adopted many years after the BWC. Another reason, however, may be the greater utility in war of chemical weapons as opposed to biological weapons. Since a state may see more to gain from using chemical weapons, it may also see more

to gain in being certain that nobody is surreptitiously stockpiling them. It is notable that the main controversies over the accession of the United States to the Geneva Protocol concerned riot-control chemicals and herbicidal chemicals; the precise classification of biological weapons was not at issue. Finally, the Geneva Protocol regime had already found itself wanting in the realm of chemical weapons in the Iran-Iraq War and the proliferation of chemical weapons in the 1980s (U. S. State Department). No similar problem had confronted the BWC regime during that time. Therefore, we can say that while the issue of biological weapons was in some ways an easier problem, and recognized as such early on, that may have paradoxically led to a worse treaty.

How does this compare to nuclear weapons law? The progression of the chemical weapons regime differed significantly from the progression of the nuclear weapons regime in two ways. First, the important treaties on chemical weapons (the Geneva Protocol and the CWC) were both multilateral treaties. There are important multilateral treaties in the field of nuclear weapons (the Limited Test Ban Treaty, the NPT, the Outer Space Treaty, and the Comprehensive Test Ban Treaty, for example), but the primary work on arms control and disarmament was done through the cooperation of the world's two superpowers, the United States and the Soviet Union. We see the fruits of that cooperation in SALT, for arms control, and in START, for disarmament. This indicates that chemical weapons were less of a cold war issue than nuclear weapons, and the preoccupation by all scholars with the Geneva Protocol makes this very clear—the issue of chemical weapons predates the creation of chemical weapons and the postwar international order, although it certainly was not without effect in that order. Second, the statesmen, publicists, and scientists of the late 1960s and early 1970s were already exploring the possibility of disarmament with regard to chemical weapons, and in fact achieved a treaty concerning disarmament in the closely-related subject of biological weapons. However, there was no progress in nuclear

disarmament until START and the end of the cold war; while the cold war remained, there could be little hope of disarmament. Therefore, while we have seen that the distinctions between biological and chemical weapons were important, and that in turn they shared a certain moral condemnation that did not immediately appear in the case of nuclear weapons, chemical weapons law and nuclear weapons law differed because of differing historical circumstance. We can say that the legal thinkers of the 1960s and 1970s used the historical situation that was given to them and attempted to come up with the best solution that they could; in the case of chemical weapons, it was a more radical solution than for nuclear weapons, even if they did not succeed in implementing it until the 1990s for reasons previously discussed.

Problems for the Future

The Chemical Weapons Convention attempts to address the problems that concerned the writers of the 1960s and 1970s. However, is it effective in doing that? While the current law on chemical weapons is very clear on paper, one must look at the results in order to determine its effectiveness. It is simple to require that states dismantle their chemical weapons stockpiles, and it is another thing altogether actually to do this. A complete study of the results of the CWC is outside the scope of this paper, but the response of the United States at least is encouraging. The Army has plans in place to eliminate the United States' chemical weapons stockpile; although these plans were challenged under environmental law, a district court upheld the Army's position ("Court Rejects Challenge" 3.4). Thus we can see the problems of disarmament: it may take a long time (the case was from 2009, over a decade following the CWC going into effect), and it may conflict with other laws, further extending the legal process. The overall impression one gets, however, is positive, since it appears quite likely that all the weapons will be destroyed. It

also speaks positively for disarmament, in a roundabout way: if destroying the weapons causes environmental problems, then that strengthens the case that the weapons should never have been produced in the first place and are too dangerous to allow. Nevertheless, not all indicators point toward a happy resolution to the chemical weapons issue. The United States had already said that it would fail to meet the 2012 deadline for the destruction of its chemical weapons, and the other biggest possessor, Russia, announced this year that it likewise would not make the deadline (Horner 43). Thus, we can say that while the principal issues that beguiled the Nixon and Ford administrations have been resolved on the level of norms, there may still be additional progress required in the development of international law before the chemical weapons regime reaches its final state. What reform happens, if it happens at all, in part depends on the continued application of the CWC. If it succeeds, then it will stand out as one of the most impressive victories for disarmament, and for the intellectual groundwork that made it possible.

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