

Biological Weapons and International Law

Harvard professor Matthew Meselson and others have been pressing for an international agreement that would, among other things, make the possession of chemical or biological weapons by individuals a crime under international law. This is certainly a laudable objective, but a significant constraint may already exist. Specifically, the ban on possession of biological weapons is now widely recognized and can be argued to have become part of customary international law, as has the Geneva Protocol prohibition against the use in war of chemical and biological weapons. As a result, an individual responsible for the maintenance of his or her government's biological weapon agents (particularly if they were intended for aggressive use) possibly could be prosecuted for war crimes, even if his or her nation is not a party to the Biological Weapons Convention (BWC), which prohibits the possession of biological weapons.

The Geneva Protocol was negotiated in 1925 and entered into force in 1928. Although it prohibits the use in war of chemical and biological weapons, many of the states that ratified the protocol in subsequent years did so with so-called "second use reservations." Pursuant to those reservations, a Geneva Protocol party that is attacked with chemical or biological weapons retains the right to respond in kind. Thus, the protocol came to be considered, in effect, a ban on the first use of chemical and biological weapons. The protocol now has 134 parties and has been in force for almost 75 years. Thus, its first-use prohibition is considered to be part of customary international law, which is binding on all states.

An international agreement merges with customary international law in general terms when the agreement has become widely accepted in the international community for a considerable period of time. As defined in the Statute of the International Court of Justice, this occurs once there is "evidence of a general practice accepted as law." This is regarded to have two elements: state practice, which refers to the general and consistent actions of states; and *opinio juris*, which refers to actions taken out of a perceived legal obligation, as demonstrated by national statements.

On 8 June 1943, President Roosevelt declared that the use of weapons covered by the Geneva Protocol had been "outlawed by the general opinion of civilized mankind" and that the United States would never be the first to use them. Although the United States would not ratify the Geneva Protocol until 1975, this statement was interpreted to mean that the United States believed as early as 1943 that the first-use prohibition against chemical and biological weapons established by the protocol had become part of international law. Moreover, by 1943, the Geneva Protocol had been in force for 15 years and had 42 parties—a sizable number considering that the world had far fewer countries then. Thus, the state practice and *opinio juris* standards had both been met with regard to the first use of chemical and biological weapons.

The same can be said for possession of biological weapons. Unlike chemical weapons (which were used extensively in World War I) biological weapons have never been used in war in modern times. The BWC has now existed for nearly 30 years and has been accepted by most of the world's nations (some 107 states). Moreover, since the United States unilaterally renounced its biological weapons program in 1969, no state has acknowledged a legitimate possession of biological weapons. Thus, on the basis of state practice, the possession of biological weapons could be considered to be prohibited by customary international law.

Once something can be so considered, violation of that rule in connection with an armed conflict could give rise to war crimes charges. The defendants in the Nuremberg trials were prosecuted in part on the argument that the prohibition against genocide had become accepted as customary international law. Similarly, it is possible that in a future conflict, if Iraq can be shown to possess biological weapons for aggressive use, Saddam Hussein and other senior members of his government could be in principle charged as war criminals on this ground.

If such a doctrine can find international acceptance, one more element of an international web of constraints enhancing international peace security will be in place.

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