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INHIBITING RELIANCE ON BIOLOGICAL WEAPONRY: THE ROLE AND RELEVANCE OF INTERNATIONAL LAW

Richard A. Falk*

Strengthening international law restraints on recourse to biological warfare is certainly useful, but an exclusive focus on the importance of international law can be misleading. Unfortunately, experience in war-time suggests that nations determine their weapons options primarily from considerations of military advantage. The government, as the nexus for military policy-making, is a power system with relatively little independent disposition to constrain battlefield behavior out of respect for moral and legal norms, however firmly established by treaty and custom. This attitude, often associated with a *realpolitik* orientation, is especially pronounced in foreign affairs during periods of armed conflict. In a nuclear age of intense conflict among strategic rivals, war planning is a permanent feature of governmental operations, making the search for potential military advantage a perpetual one, and the fear of military vulnerability a constant preoccupation. Perception and misperception of the other side's activities tends to be crucial; it has become a matter of self-interest not to accuse prematurely or to react in a paranoid fashion to ambiguous information concerning possible violations of arms control agreements. This type of *discipline* and *self-restraint* is particularly important in regard to the subject of biological weaponry. In such an atmosphere, statesmen tend to invoke ultimate concerns about "sovereignty" and "survival" whenever they feel the need to justify official behavior. Normative thinkers have reinforced this behavior by drawing a distinction in international affairs between "moral man" and "immoral society," by speaking of the misfit between "a Lockean nation" and "a Hobbesian world," and by conceiving of international conflict as a struggle between our "good" and their "evil."

In any event, whether or not "realism" is still "practical," given the character of modern warfare and weaponry, a geopolitical ethos pervades official circles that is skeptical about the propriety of restraining foreign policy, especially on the battlefield, out of respect for international law. The admiration accorded Henry Kissinger as a diplomat *par*

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excellence was a tribute, in part, to his embodiment of statist "realism," including his undisguisedly scornful attitude toward normative restraints.

Certain additional factors reinforce this skepticism about legal restraints. Legal rules are almost impossible to draft without allowing the parties some degree of latitude in interpreting their scope. Often, unresolved disputes that arise during treaty negotiations produce "deliberate" ambiguities in the language of a final agreement. Because compliance is, in the first instance at least, solely dependent upon self-interpretation by governments, there is plenty of room for independent maneuvering within the four corners of virtually every international agreement. Particularly in the area of wartime restrictions, states are notoriously reluctant to accept third-party procedures for resolving disputes concerning alleged treaty violations.¹

Further, allegations of violations of international restraints often are difficult to substantiate, thus blurring the distinction between genuine treaty violations and hostile propaganda. The "yellow rain" controversy is a recent illustration of this dilemma.² Parties eager to justify an ad-

1. For example, in 1952 the United States invited the International Committee of the Red Cross (ICRC) to investigate charges that the United States had used chemical weapons in Korea. Korea and China, however, would not cooperate, so no formal inquiry could be made. 10 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 461, 462 (1968). Subsequently, the Soviet Union blocked by veto a U.N. Security Council Draft Resolution requesting the ICRC to investigate the charges and report to the Security Council. *Id.* at 465. In 1953, the General Assembly adopted a resolution proposing that a multistate commission investigate and report to the General Assembly. *Id.* The investigation was contingent on acceptance by all the governments involved; again, the North Korean and Chinese governments refused to cooperate. *Id.* at 456-66.

More recent examples of governmental reluctance to concede the resolution of interstate disputes to international bodies include the withdrawal of the United States from the compulsory jurisdiction of the International Court of Justice in the midst of its displeasure with the Court's decision in the *Nicaragua* case, *Military and Paramilitary Activities in and against Nicaragua*, (Nicar. v. U.S.) 1984 I.C.J. 392 (Judgment of Nov. 26).

2. Yellow rain refers to villagers' descriptions of a yellow fog and yellow particles falling from the sky shortly before they began to experience physical symptoms of illness. Letters and *notes verbales* from the United States, Democratic Kampuchea, Vietnam, and the U.S.S.R. sent to the United Nations in 1980 and 1981 charged that these reports indicated that chemical/biological agents were being used in Southeast Asia. Letters and *notes verbales* from Democratic Kampuchea, U.N. Docs. A/36/81, A/36/04, A/36/121, A/36/157, A/36/173, A/36/207, A/36/229, A/36/232-S/14473, A/36/254, A/36/312, A/36/664, A/36/687, A/36/721-S/14770, A/36/769; U.S.S.R., U.N. Doc. A/C.1/36/16; United States, U.N. Docs. A/36/509 (*note verbales*), A/C.1/36/10 (*note verbales*); Vietnam, U.N. Doc. A/36/549, A/C.1/36/5.

By resolution, the General Assembly requested that the Secretary-General appoint a group of medical and technical experts to investigate these allegations. G.A. Res. 144C, 35 U.N. GAOR Supp. (No. 48) at 61, U.N. Doc. A/35/687 (1980). Despite an extensive investigation of the charges, the final report of the U.N. Group of Experts was inconclusive. Chemical and Bacteriological (Biological) Weapons: Report of the

versarial approach to East-West relations vigorously endorsed the allegations, whereas reassurances and skepticism as to the charges tended to flow from viewpoints favoring strategic moderation. Although political moderates seemed far more inclined to rest their case upon evidence³ and an overall assessment of the situation, the merits were rarely seriously or objectively addressed by either superpower.

A related difficulty in maintaining respect for normative restraints is that of *tu quoque*, the basic notion that whatever the other side does, or might conceivably do, can, with propriety, be offset by comparable capabilities and contingency plans.⁴ Suspicions that the Soviet Union has embarked upon a biological weapons program⁵ encourage those who favor research and development activities by the United States for both deterrent and retaliatory effects, as well as for possible defensive measures, such as protective clothing or immunization. This setting heightens governmental secrecy. Accordingly, civil servants invoke "national security" to justify ignoring normative restraints,⁶ even those explicitly written into international law.

These orienting comments are not meant to denigrate the existing treaty regime restraining resort to biological weaponry, which enjoys widespread support and is a major arms control achievement. Rather, the purpose of this article is to locate inquiry and appraisal in an intermediate zone between legalism (regarding the law as determinative of official behavior) and cynicism (assuming unscrupulous and unrestrained displays of force as inevitable in international relations).⁷ An additional concern touches upon a critical component of arms control: the societal procedures and relations in the formulation and enforce-

Secretary-General, U.N. Doc. A/37/259 at 49 (1982). See also M. STORELLA, POISONING ARMS CONTROL: THE SOVIET UNION AND CHEMICAL/BIOLOGICAL WEAPONS 36-37 (1984) (noting that the U.N. Group of Experts was unable to verify the evidence of the use of chemical agents).

3. See Seeley, Wowicke, Meselson, Guillemin & Akatanakul, *Yellow Rain*, 253 SCI. AM. 128 (1985) (claiming chemical analysis of "yellow rain" revealed it indistinguishable from bee feces).

4. See *infra* note 22 and accompanying text (tying this notion to an interpretation of these restraints as merely prohibiting first use); see also STOCKHOLM INT'L PEACE RESEARCH INST., THE LAW OF WAR AND DUBIOUS WEAPONS 4 (1976) (noting that the legal principle of *tu quoque* was rejected as a defense when asserted by war criminals tried following World War II).

5. See Kucewicz, *Soviets Search for Eerie New Weapons*, Wall St. J., Apr. 23, 1984, at 30, col. 3 (first in a series entitled *Beyond Yellow Rain: The Threat of Soviet Genetic Engineering*, based on a seven-month investigation by the Wall Street Journal).

6. See *Unauthorized Storage of Toxic Agents: Hearings Before the Senate Committee to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Senate Hearings*].

7. McDougal & Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 YALE L.J. 771 (1985).

ment of any kind of wartime restraint. The prospects for effective international law are less a matter of devising and tinkering with existing texts of rules and agreements than of stimulating compliance at the domestic level. Cultural norms of aversion to behavior and tactics that spread disease in armed conflict need to be invoked and mobilized to reinforce the legal inhibitions. Citizens, regardless of their state's ideological orientation, must realize that implementing normative restraints depends heavily upon their direct action, both to stimulate bureaucratic compliance and to invigorate representative institutions.⁸ This poses a special challenge in those countries, such as the Soviet Union, where no effective channels for citizen participation of a democratic character exist.

I. THE EXISTING INTERNATIONAL LEGAL REGIME

Currently, two international agreements provide the existing framework for transnational regulation of biological warfare: the 1925 Geneva Protocol ("Protocol"),⁹ and the 1972 Biological Weapons Convention.¹⁰ The Protocol continues earlier international law efforts to ban the use of poison gas as a weapon.¹¹ Biological warfare, however, was only incidental to the principle treaty objectives, and is not even mentioned in the Preamble to the Protocol, which declares:

[w]hereas 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 . . . [t]o the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations. ¹²

8. See Falk, *Nuclear Weapons and the End of Democracy*, 2 PRAXIS INT'L 52 (1982); Falk, *Nuclear Weapons and the Renewal of Democracy*, 4 PRAXIS INT'L 115 (1984) (providing an analysis in a parallel setting).

9. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65 [hereinafter cited as Protocol]; see U.S. DEP'T OF STATE, TREATIES IN FORCE 242 (1985) (listing 129 state signatories).

10. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062 [hereinafter cited as Convention]; see U.S. DEP'T OF STATE, TREATIES IN FORCE 218 (1985) (listing 110 signatories to the Convention).

11. See THE LAWS OF ARMED CONFLICTS 69 (D. Schindler & J. Toman eds. 1973) (explaining how attempts to formally ban the use of poisons during warfare date back to the First Hague International Peace Conference convened in 1899); A.W. THOMAS & A.J. THOMAS, JR., DEVELOPMENT OF INTERNATIONAL LEGAL LIMITATIONS ON THE USE OF CHEMICAL AND BIOLOGICAL WEAPONS 44-71 (1970) (containing a comprehensive discussion of pre-Protocol international law) [hereinafter cited as THOMAS & THOMAS].

12. Protocol, *supra* note 9, at Preamble.

The operative clause of the Protocol, in effect, restates a preexisting prohibition on poison gas that clearly pertained to chemical weaponry. The perception of bacteriological warfare, however, was quite different. No definite prior legal tradition of prohibition existed with respect to biological substances. The treaty rule itself established the prohibition. Recognizing the limitations of previous treaty language, the Protocol declares that "the High Contracting Parties . . . extend this prohibition [on poison gas] to the use of bacteriological methods of warfare."¹³

There are several problems with the Protocol, despite wide adherence and the general view that it embodies a customary rule of international law, at least with respect to chemical weapons.¹⁴ The first is the lack of consensus concerning the identity of the toxic agents included within the prohibition. The use of herbicides and non-lethal tear gas by the United States during the Indochina War exemplifies this.¹⁵ When the United States voted in favor of the 1966 General Assembly Resolution calling for strict observance of the Protocol, it made a statement that it did not view the use of riot-control agents and herbicides as prohibited.¹⁶ Yet, as one commentator observed, this practice was "dangerous, not because tear gases or herbicides in themselves present any abnormal threat to international security," but because no unambiguous distinction can be drawn between these agents and the other "poisonous . . . materials specified in the Protocol: their legitimation therefore risks impugning the entire body of law that stems from the Protocol."¹⁷

To clarify the scope of the Protocol, in 1969 the General Assembly approved Resolution 2603A, which asserts an extensive view of the Protocol to include these non-lethal chemicals.¹⁸ Specifically, the Reso-

13. *Id.* at Declaration, para. 1.

14. See G.A. Res. 2603A, 30 U.N. GAOR Supp. (No. 34) at 16, U.N. Doc. A/7630 (1969) (recognizing 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 . . ."); see also J. SPAIGHT, *AIR POWER AND WAR RIGHTS* 138 (1947) (noting Geneva Protocol position on biological warfare).

15. See 10 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 470-73 (1968) (containing July 31, 1964 statement of Secretary of Defense Robert McNamara that the South Vietnamese military and police were equipped with riot-control agents and August 1, 1964 statement of Secretary of State Dean Rusk discussing use of poison gas by the United States in Vietnam).

16. G.A. Res. 2162B, 16 U.N. GAOR Supp. (No. 17) at 11, U.N. Doc. A/6136 (1966).

17. Robinson, *The Changing Status of Chemical and Biological Warfare: Recent Technical, Military and Political Developments*, in 2 STOCKHOLM INT'L PEACE RESEARCH INST. Y.B. 317, 321 (1982).

18. G.A. Res. 2603A, 30 U.N. GAOR Supp. (No. 34) at 16, U.N. Doc. A/7630 (1969).

lution interprets the Protocol as prohibiting the use in international armed conflict of *any* chemical agents of warfare, whether gaseous, liquid, or solid, employed for their direct toxic effect on persons, animals, or plants and of *all* biological agents of warfare. The Protocol is also ambiguous about the scope of the proscription against biological agents. While toxins derived from living things, such as cobra venom, may be considered biological agents, General Assembly Resolution 2603A defines "biological agents" as live organisms capable of multiplying,¹⁹ thus excluding such toxins. The *use* of these agents would still be prohibited under the Protocol, because these fall within the definition of chemical agents, but it has been argued that the 1972 Convention regulating the development and stockpiling of biological weapons²⁰ does not apply to these substances.

Although passed by wide margin, the Resolution is only a recommendation and is not as such officially binding. It is further weakened by the number of abstentions and absentees, which included most of the close allies of the United States.²¹ The relevant point here is that a sovereign state can make its own self-serving interpretation of its obligations under international law, particularly during a time of war. Under the current regime, little can be done to change a state's unilateral interpretation; neither the political will nor an effective enforcement vehicle exists to curb abuse. For example, parties subsequent to the United States involvement in Vietnam used herbicides in Portuguese Africa and again in the Horn of Africa without arousing sufficient criticism to enforce international controls under either the Protocol or General Assembly Resolution 2603A.

A second problem with the Protocol is that the United States and some other parties have interpreted it as merely prohibiting the *first use* of the prohibited weaponry. Some parties have either made a reservation to this effect or their practice has emphasized the development of stockpiles available for retaliatory use.²² In fact, the overall non-use of poison gas by combatants during World War II has been generally

19. See G.A. Res. 2603A, 30 U.N. GAOR Supp. (No. 34) at 16, U.N. Doc. A/7630 (1969) (defining biological agents of warfare as "living organisms, whatever their nature, or infective material derived from them — which are intended to cause disease of death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked.").

20. Convention, *supra* note 10.

21. See 24 U.N. GAOR (1836th mtg.) at 4, U.N. Doc. A/PV/1836 (1969) (recording vote on General Assembly Resolution 2603A as 80 in favor, 36 abstentions, 7 absent, and 3, including the United States, against).

22. See 2 STOCKHOLM INT'L PEACE RESEARCH INST. Y.B. 318 (1982) (listing parties that expressly reserve the right to retaliate in kind).

perceived as reflecting this deterrent structure, that is, fear of retaliation as well as the recognition by military commanders that no decisive advantages could be achieved.²³ Thus, it appears that where victim states lack the capacity to retaliate in kind, warring nations are more likely to resort to poison gas or other prohibited weaponry. Illustrative examples include Italy's use of poison gas against Ethiopia (1935-1936),²⁴ Japan's use of poison gas against China (1937-1945),²⁵ and Iraq's use of poison gas against Iran (1982-1983).²⁶

A further weakness of the Protocol is that it prohibits only the use of the proscribed substances. The Protocol does not clearly forbid threats to use, and it makes no effort to prohibit research, development, and possession. It would be naive to believe that once stockpiles for retaliation exist, strategists would not consider their use for other purposes, especially under wartime conditions. As a consequence, the prohibitions of the treaty remain a factor in policy-making, but they must increasingly compete with considerations of military necessity. Some of these weaknesses were eliminated with the signature and ratification of the 1972 Biological Weapons Convention ("Convention")²⁷ which entered into force in 1975. The Preamble to the Convention places the prohibition in the wider context of "achieving effective progress toward *general* and *complete* disarmament, including the prohibition and elimination of *all* types of weapons of mass destruction."²⁸ The Preamble also explicitly reaffirms the Geneva Protocol prohibition and augments its prohibitions on use, a feature reiterated in Article VIII. The Preamble also asserts that a legal regime prohibiting development, production, and stockpiling of biological weapons is "a first possible step" toward the establishment of a comparable regime for chemical weapons. The linking of biological warfare and chemical warfare regimes is important because it acts to discourage acquisition of a deterrent capability, which would likely stimulate an arms race, as well as to achieve an

23. See, J. SPAIGHT, *AIR POWER AND WAR RIGHTS* 188 (1947) (reporting that Winston Churchill advocated large-scale gas attack on Germany during World War II and was dissuaded by tactical reasoning and retaliatory prospects, rather than by legal inhibitions).

24. See THOMAS & THOMAS, *supra* note 11, at 162-63 (discussing the use of poison gas during time of war).

25. *Id.* at 164-66. See also Kelly, *Gas Warfare in International Law*, 9 *MIL. L. REV.* 1, 13 (1960); O' Brien, *Biological Chemical Warfare and the International Law of War*, 51 *GEO. L.J.* 1, 33-34 (1962).

26. *Iraq Escalates to Nerve Gas*, *NEWSWEEK*, Apr. 9, 1984, at 71; see also *N.Y. Times*, Feb. 23, 1986, at 11, col. 1 (charging Iran with use of mustard gas against Iraq).

27. Convention, *supra* note 10.

28. *Id.* at preamble (emphasis added).

unconditional and comprehensive regime of prohibition on these types of weapons. Finally, the Preamble asserts as the goal of the Convention the complete exclusion of the possibility of bacteriological (biological) agents and toxins being used as weapons and insists that "such use would be repugnant to the conscience of mankind."²⁹ Here, particularly, the Convention invokes societal attitudes as a ground for the efforts of statesmen to achieve an effective legal regime. The Convention considers that the effectiveness of that regime involves prohibition of development and possession, as well as the threat of use and actual use. This extension of the prohibitions of the Protocol to stages prior to use is a practical recognition that inhibiting use in armed conflict requires a stable regime of non-possession. If states lack biological weapons capability, there is no need to induce respect for the norm prohibiting use; if they do have such capability, the prospect of inducing respect is fragile, at best, especially if considerations of military necessity appear to warrant use.

Article I of the Convention formulates the basic treaty obligation. Parties agree "never in any circumstances to develop, produce, stockpile or otherwise acquire or retain . . . (1) Microbial or other biological agents, or toxins whatever their origin or method of production, *of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes.*"³⁰ The prohibition in this article is far-reaching, yet it is of limited value due to the uncertainty created by the vagueness of its qualifying language.

Under Article II of the Convention, the parties pledge to "undertake to destroy, or to divert to peaceful purposes" all biological agents, including delivery equipment.³¹ Articles I and II should encompass the retention and use of biological agents by intelligence agencies or any entity directly or indirectly related to the government.³² Assuming that such covert organs of the modern state acknowledge canons of accountability at all, such activities again may be sheltered within the qualifying language.

Article IV imposes upon parties the important obligation to assure that "necessary measures" are taken to prevent any "development, production, stockpiling, acquisition or retention of the agents, toxins,

29. *Id.*

30. *Id.* at art. I (emphasis added).

31. *Id.* at art. II.

32. Convention, *supra* note 10, at art. I(2) (stating "each State Party . . . undertakes never in any circumstances to . . . acquire or retain . . . such agents or toxins for hostile purposes or in armed conflict").

weapons, equipment and means of delivery" within its territory.³³ This obligation requires domestic legislation and regulation within constitutional limits of activities of individuals, universities, and corporate groups. As yet, only a few parties to the Convention have seen fit to enact appropriate implementing legislation.³⁴

Articles V and VI of the Convention contain verification and enforcement mechanisms that are notably absent from the Protocol. Under these provisions, the parties undertake to "consult" and "cooperate" in solving problems arising under the Convention³⁵ and may file a complaint with the U.N. Security Council when another party is considered to be "acting in breach of obligations" under the Convention.³⁶ Article VI(2) further obliges the parties to "cooperate" in carrying out a U.N. Security Council investigation.³⁷

Article X involves the agreement of the parties to share fully the peaceful uses arising from "further development and application of scientific discoveries in the field of bacteriology (biology)."³⁸ Article XIII(1) states that the Convention "shall be of unlimited duration,"³⁹ but Article XIII(2) reserves a right of withdrawal from the treaty obligations if a party "decides that extraordinary events related to the subject matter of the Convention have jeopardized the supreme interests of the country."⁴⁰

II. THE CURRENT STATUS OF THE LEGAL REGIME

The signal achievement of this Convention should not be overlooked, nor should its contents be too easily deprecated. Both superpowers have legally committed themselves to forego possession as well as use. As a result, no retaliatory use, or even deterrent capability, is contemplated or permissible under the Convention and renunciation is unconditional. Furthermore, parties agreed to destroy stockpiles of biological weapons existing as of 1975 within nine months of the Convention's entry into force.⁴¹ Significantly, the parties to the Convention signed simultane-

33. Convention, *supra* note 10, at art. V.

34. In the United States, Congressman Peter Rodino (D-N.J.) introduced H.R. 7977 on August 20, 1980 to implement the Convention in the United States. The bill is still pending.

35. See Convention, *supra* note 10, at art. V.

36. *Id.* at art. VI(1).

37. *Id.* at art. VI(2).

38. *Id.* at art. X.

39. *Id.* at art. XIII(1).

40. *Id.* at art. XIII(2).

41. See Convention, *supra* note 10, at art. II.

ously in Washington, London, and Moscow.⁴² It enjoys the participation of the Soviet Union, the United States, the United Kingdom, and most other major states (with the exception of China and France).⁴³ In this respect, the illegal status of biological weapons is more widely and significantly established than for any category of weaponry including chemical and nuclear. On its face then, the Convention seems to provide a comprehensive repudiation of development, production, and stockpiling of biological weaponry that does not depend upon deterrence for enforcement. What the Convention does permit is research associated with "defensive" or peaceful purposes.

Despite its numerous achievements, many recognize that the Convention, like the Protocol, suffers from many flaws and ambiguities. Particularly, critics assert that given the developments in biological capabilities and in the attitudes of states toward such weaponry, the Convention lacks sufficient restraints. First, "peaceful" applications can no longer be reliably distinguished from "military" applications. Similarly, "defensive" research, to protect populations by immunization and other methods, is also relevant for work toward a biological first-strike capability. Consequently, the Article I limitation to biological agents or toxins "that have no justification for prophylactic, protective or other peaceful purposes"⁴⁴ is a gigantic loophole capable of being reconciled with almost any desired path of research. Similarly, the Article II obligation to destroy stockpiles exempts any biological agent or toxin that is diverted to peaceful purposes.⁴⁵ This again allows states an alarming degree of discretion, which, when taken with ineffective verification procedures, means compliance almost entirely depends upon good faith and self-interest.

The veil of secrecy covering activities in this area arouses suspicions and makes it difficult to distinguish innocent from sinister activity on the part of foreign states and within our own. Malicious propaganda cannot easily be distinguished from disturbing revelation. Suspicions about violative behavior are, as a practical matter, impossible to verify by the procedures set forth in the Convention.⁴⁶ Parties are not cooper-

42. See STOCKHOLM INT'L PEACE RESEARCH INST., *THE LAW OF WAR AND DUBIOUS WEAPONS* 61 (1976).

43. See U.S. DEP'T OF STATE, *TREATIES IN FORCE* 218 (1985) (listing signatories to the Convention).

44. Convention, *supra* note 10, at art. I.

45. *Id.* at art. II.

46. See Convention, *supra*, note 10, at art. VI (providing that any state party who has evidence violations have occurred may register complaint with the U.N. Security Council which has discretion, subject to the restraints of Article II, paragraph 7 of the U.N. Charter, to investigate).

ative, tending to dismiss even reasonable suspicions as propaganda.

Given levels of international distrust, especially between the two superpowers, the potential dynamic of a biological weapons arms race seems present, despite adherence by both superpowers to a legal regime that forbids "development." There is nothing yet available to suggest any official disposition on the part of the U.S. Government to back away from President Richard Nixon's 1969 unconditional repudiation of biological warfare,⁴⁷ which included an unprecedented unilateral undertaking to destroy then-existing stockpiles of biological weaponry.⁴⁸ Noticeably, however, the U.S. Government has recently stepped up its support for experimentation and "development" of biological agents based upon medical justifications, but such research easily could have military implications.⁴⁹ The United States partly justifies its increased research by a claim that the Soviet Union is investing heavily in research and development to achieve a biological weapons arsenal or, more alarmingly, to circumvent the nuclear stalemate by developing a biological first-strike capability.⁵⁰

The use of biological weapons is gaining greater consideration by military planners because nuclear weapons are generally considered too destructive to permit strategic victory.⁵¹ Although the idea of using biological agents for specific purposes has been present since ancient times,⁵² military strategists have not given such weaponry high regard

47. President's Statement to the Press Renouncing Biological Warfare, 5 WEEKLY COMP. PRES. DOC. 1659 (Dec. 1, 1969) [hereinafter cited as Nixon Memorandum].

48. U.S. Policy on Toxins, 7 WEEKLY COMP. PRES. DOC. 1794 (Feb. 16, 1970); *Senate Hearings*, *supra* note 6, at 10.

49. See Wright & Sinheimer, *Recombinant DNA and Biological Warfare*, BULL. OF ATOM. SCIENTISTS, Nov. 1983, at 21 (noting an increase in defense obligations for all biological research increased in *real* terms by fifteen percent in fiscal years 1981 and 1982 respectively).

50. Kucewicz, *Soviets Search for Eerie New Weapons*, Wall St. J., Apr. 23, 1984, at 30, col. 4. In 1979, U.S. suspicions were dramatically aroused by an explosion at a Soviet biological weapons facility in Sverdlovsk in which approximately 1,000 soldiers and civilians were killed from the release of anthrax spores into the atmosphere. *Id.* The Soviets have not persuasively explained the incident. *Id.* The contention, which arises from these alleged activities, is that a society could immunize its own population and then let loose a biological agent that would spread a disabling or lethal disease throughout an enemy society. *Id.* at 30, col. 6. Kucewicz contends that evidence supports allegations that the Soviet Union is embarked on a search for biological weapons agents for which no credible defense is possible; See *id.* (stating "[I]t now appears such weapons are being developed in earnest by the Soviet Union, and that threat may someday rival even nuclear war").

51. R. ALDRIDGE, *FIRST STRIKE: THE PENTAGON'S STRATEGY FOR NUCLEAR WAR* (1983).

52. See THOMAS & THOMAS, *supra* note 11, at 155-56 (noting that crude methods of biological warfare were used in ancient times when "bodies of cholera and plague victims were dropped over the walls of beleaguered cities and left on the ground the en-

because they thought it too difficult to control, too unpredictable and too diffuse in effect.⁵³ Recent technological developments, however, may ultimately result in an insidious unraveling of the widespread cultural support for banishing biological weapons and in their use outside the limited, if abhorrent, setting of "covert operations."

III. COVERT OPERATIONS AND LEGAL RESTRAINTS

Fairly serious charges exist that claim the CIA's destabilization efforts against Castro's Cuba included projects to infect poultry and to induce pig fever by way of an African swine virus, previously unknown in this hemisphere.⁵⁴ The alleged use of biological agents is constitutionally significant as it was subsequent to Nixon's repudiation of such weaponry in 1969.⁵⁵ It also suggests that nations cannot take for granted the strict adherence to the law, despite dramatic public gestures of adherence by a government and its leaders.

The Senate Committee Hearings in 1975 investigated whether such covert operations constituted military activities or "bacteriological methods of warfare" encompassed by the Nixon Memorandum.⁵⁶ The hearings inquired into the CIA's retention of toxins⁵⁷ long after President Nixon had issued an order for their destruction.⁵⁸ Senator Walter Mondale questioned a CIA official, Nathan Gordon, about the failure of the agency to carry out the order:

Senator Mondale: So what the CIA was involved in was not military?

Mr. Gordon: The CIA is not a military organization. It is not, nor has never [sic] been charged with the functions of Department of Defense. Yes; it is not a military organization.⁵⁹

emy was to occupy").

53. In the 1930's Japan engaged in biological weapons research, and during World War II may have employed such weapons. See M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 358, n.148 (1959) (discussing the trial and conviction of twelve Japanese officers before a Soviet military tribunal in 1949 for the use of anthrax, plague, cholera, and typhus biological agents against the Mongolian People's Republic in 1939 and against China in 1940-42).

54. See N. CHOMSKY & E.S. HERMAN, *THE WASHINGTON CONNECTION AND THIRD WORLD FASCISM* 69, 379 n.94 (1979).

55. Nixon Memorandum, *supra* note 47.

56. *Id.*

57. *Id.* at 16 (revealing that the CIA had stored 8 milligrams of cobra venom and had also retained 11 grams of shellfish toxin said to be capable of killing 14,000 people).

58. U.S. Policy on Toxins, 7 WEEKLY COMP. PRES. DOC. 1794 (Feb. 16, 1970); *Senate Hearings*, *supra* note 6, at 10.

59. See *Senate Hearings*, *supra* note 6, at 71 (providing Senator Mondale questions to Nathan Gordon, Former Chief, Chemistry Branch, Technical Services Division, CIA).

This demonstrates the existence of ample room for evading national and international obligations, either by regarding only military organizations as obliged to abide by such commitments, by transferring military activity to non-military or para-military entities within the government,⁶⁰ or by characterizing substances as falling outside the prohibition.⁶¹

The hearings also evidenced revealing exchanges from William Colby, then Director of the CIA, who detailed a fairly comprehensive role for the CIA in relation to biological weapons. He referred to four "functional categories" of CIA activity:

- a. maintenance of a stockpile of temporarily incapacitating and lethal agents in readiness for operational use;
- b. assessment and maintenance of biological and chemical disseminating systems for operational use;
- c. adaptation and testing of a non-discernible microbio-inoculator (a dart device for clandestine and imperceptible inoculation with toxic agents) for use with various materials and to assure that the microbio-inoculator could not be easily detected by later examination of the target; and
- d. providing technical support and consultation on request for offensive and defensive [biological/chemical warfare].⁶²

Significantly, throughout the hearings, top CIA officials failed to acknowledge any legal (or normative) inhibition on the use of biological agents, even for offensive purposes. Colby referred to the reliance of the Office of Strategic Services (OSS), the predecessor to the CIA, on biological materials to incapacitate a Nazi leader during World War II as establishing "[t]he need for such capabilities."⁶³ Of the toxic substances in the CIA's possession in violation of Nixon's destruction order, Colby stated forthrightly: "There is no question about it. It was also for offensive reasons. No question about it."⁶⁴

The same attitude applied to other biological agents that the CIA held at Fort Detrick. Regarding materials designed to induce tuberculosis, the exchange at the Hearings was as follows:

Senator Huddleston: What application would be made of the particular agent?

Mr. Colby: It is obviously to induce tuberculosis in a subject that you want to

60. See *Senate Hearings*, *supra* note 6, at 37-38, 59-64 (containing admissions that 6 of the CIA's 11 grams of shellfish toxin came from the Dep't of Defense's supply which should have been destroyed and that the CIA considered transferring its shellfish toxin to a private firm for storage).

61. See *Senate Hearings*, *supra* note 5, at 64-73 (characterizing shellfish toxin as a chemical agent possibly exempt from Nixon's ban on biological toxins).

62. *Id.* at 11.

63. *Id.* at 10.

64. *Id.* at 17. Colby apparently refers to a dartgun used for dispensing toxins as well as to the toxins themselves.

induce it in.

Senator Huddleston: For what purpose?

Mr. Colby: We know of no application ever being done with it, but the idea of giving someone this particular disease is obviously the thought process behind this.⁶⁵

As the Chairman of the Select Committee, Frank Church, expressed his concern:

The particular case under examination today involves the illegal possession of deadly biological poisons which were retained within the CIA for 5 years after their destruction was ordered by the President and for 5 years [sic] after the United States had entered into a solemn international commitment not to maintain stocks of these poisons except for very limited research purposes.⁶⁶

There are several salient features of these CIA hearings that are worthy of note. First of all, the relative openness of American society, especially for a short period in the post-Vietnam setting of congressional opposition to the Executive branch, enabled such an inquiry into this otherwise secret, sensitive subject matter and exposed broader structural problems. There is every reason to suppose that the patterns, practices, and attitudes of the CIA are to some extent present in the intelligence services of all major states — basically, non-accountability and a cynical disregard of normative inhibitions. Second, Congress was more concerned with compliance with domestic law, obeying the Nixon Memorandum,⁶⁷ than with international law. Third, the language of the CIA officials shows almost no sensitivity whatsoever to the existence or importance of international legal constraints. What seemed important to CIA officials was obedience to "superior orders" within the U.S. Government and maximum policy flexibility for the CIA in relation to *any* future mission. These overall attitudes infused the congressional orientation toward the inquiry. The Senate Select Committee made no serious effort during extensive questioning to *assess* the manifested indifference of CIA officials to international legal obligations to which the United States had given its assent.⁶⁸ The Senate Committee's attitude, however, distinctly contrasts with allegations of non-compliance directed at rival states, particularly the Soviet Union.⁶⁹

65. *Id.* at 27.

66. *Id.* at 2 (opening statement of Senator Church, Chairman of the Select Committee); *see id.* at 21 (noting similar sentiments expressed by Senator Mondale).

67. Nixon Memorandum, *supra* note 47.

68. *See* G.A. Res. 2162B, 16 U.N. GAOR Supp. (No. 17) at 11, U.N. Doc. A/6316 (1966) (calling for strict observance of Protocol by all States). *But see* Neinast, *United States Use of Biological Warfare*, 24 MIL. L. REV. 1 (1964) (arguing that the United States was not bound under international legal obligations prior to hearings).

69. Address by Alexander M. Haig, U.S. Secretary of State to Berlin Press Associa-

In other words, evidence suggests a disturbing failure by subdivisions of government to abide by a national policy respectful of international commitments. These concerns raise fundamental issues of state-civil societal relations, and indicate the difficulty involved in making the law effective in the internal functioning of the modern state in the national security context.

What do we expect from government? How should "checks and balances" function in relation to compliance and accountability in the national security area? In the background, also, is the "we/they" problem. If we believe that they are not complying, why should we? Or more assertively, their non-compliance makes it prudent, and maybe even necessary and desirable, to take protective and deterrent steps to restore balance and discourage use. The only way to reinforce the inhibition on use may be, under certain circumstances, to violate the relevant agreement.

IV. STRENGTHENING THE SETTING OF THE LEGAL REGIME

The discussion of the prior sections suggests that the biological weapons regime is under severe pressure from a number of developments. The problems are not surprising, but their correction is exceedingly difficult to achieve within the treaty framework through recourse to the amendment process.⁷⁰ The one possible exception would be to reformulate, by treaty amendment, the Article I qualification in a more restrictive manner. For instance, the wording "that have no justification" could be replaced by "unless they have an overwhelming and unambiguous justification."⁷¹ In a multilateral setting, however, amendments

tion 5 (September 13, 1981) (accusing the Soviet Union and its allies with using three biological agents, mycotoxins, in Southeast Asia, available as U.S. Dep't of State, Press Release No. 300 (Sept. 12, 1981); see also Stoessel, *U.S. Issues Report on Chemical Warfare*, 82 DEP'T OF STATE BULL. 57 (May 1982) (linking the U.S.S.R. and its surrogates with the use of chemical and toxin weapons in Afghanistan, Kampuchea, and Laos).

70. See Convention, *supra* note 10, at art. XI (noting that "[a]ny State Party may propose amendments to this convention. Amendments shall enter into force for each State Party accepting the amendments upon their acceptance by a majority of the States Parties to the convention and thereafter for each remaining State Party on the date of acceptance by it.").

71. See Convention, *supra* note 10, at art. I (stating "[E]ach State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile, or otherwise acquire or retain: (1) Microbiological or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have *no justification* for the prophylactic, protective, or other peaceful purposes" (emphasis added)).

that all of the principal parties do not formally accept fragment the treaty regime and bind the various parties to different degrees in relation to each of the other parties.

More substantively, states are unlikely to forego the exemption for "peaceful applications" currently allowed by the Convention to increase reassurances that military development activities are not taking place. Similarly, principal states are not currently disposed to accept even impartial, external monitoring procedures over national research activities. To provide reassurance, monitoring would have to be both intrusive and extensive, and, even then, might not quiet suspicions and allegations. Finally, especially in the present international atmosphere, states are not only reluctant to augment investigative, verification, and compliance machinery,⁷² but, the existing procedures of recourse to the Security Council are unlikely to prove useful since the Security Council cannot operate if a Permanent Member exercises its veto power. Any extension of the prohibition on research and development is likewise not negotiable, given the attitudes of governments toward international security arrangements. Efforts to insist on such strengthening could weaken treaty morale even further.

The weaknesses of the legal regime are not fortuitous. They reflect the state-centered character of international relations. They also reflect the subject matter, which makes it rather easy for a determined violator to evade even a rigorous apparatus for verification. In this regard, the Convention may be unverifiable in any serious sense, regardless of the will of the parties on the issue. Therefore, the rationalist view of closing the loopholes and limitations of the existing arrangement so as to move toward greater effectiveness is naive unless reinforced by a new set of political tendencies in a more supportive global setting. It is possible that a more positive phase of U.S.-U.S.S.R. relations could be expressed by a more cooperative approach to arms arrangements.⁷³

A protective posture toward the Convention may be useful at this stage. Reassurances about compliance by both superpowers would reduce the pressure to engage in research with ambiguous ramifications. One of the frailties of the Convention is the inevitable connection between "defensive research" and "offensive capability"; it is difficult to conduct the former without achieving the latter. At the moment, both liberals and conservatives in the United States are challenging confi-

72. See, e.g., Oberdorfer & Pincus, *Arms Compliance Ideas Drafted*, Wash. Post, Jan. 9, 1986, at A7, col. 1 (noting verification of compliance has long been a contentious arms control issue).

73. See Wash. Post, Dec. 24, 1985, at A1, col. 6 (reporting apparent Soviet interest in on-site inspection for nuclear arms control verification purposes).

dence in treaty compliance. Liberals complain that the Department of Defense is concealing research with offensive applications by claiming peaceful intentions.⁷⁴

Conservatives give credence to contentions by Soviet emigre scientists that the Kremlin is embarked upon an enormous program of secret research and development activity to assemble the basis for a world-conquering biological warfare scenario.⁷⁵ Pressure may continue to mount on the United States to withdraw from its legal commitments if suspicions about Soviet "development" activities are confirmed or accepted at face value.⁷⁶ Of course, such allegations, whether true or believed to be true, may serve to mask developmental pressures in this country. Whether the allegations constitute "cause" or "pretext" is very difficult to determine.⁷⁷ Arkady N. Shevchenko, a high-ranking Soviet diplomat who defected to the West in 1978, provided damaging testimony about Soviet behavior. He describes the Soviet attitude toward international regulation as follows:

While the military strongly opposed any agreement on chemical or biological weapons, the political leadership, Gromyko in particular, felt it necessary for propaganda purposes to respond to a proposal by Great Britain to conclude a separate convention to prohibit biological warfare as a first step. The military's reaction was to say go ahead and sign the convention; without international controls, who would know anyway? They refused to consider eliminating their stockpiles and insisted upon further development of these weapons. The Politburo approved this approach. The toothless convention regarding biological weapons was signed in 1972, but there are no international controls over the Soviet program, which continues apace.⁷⁸

It is difficult to evaluate these various allegations, but an international intergovernmental effort to provide reassurance about compliance would restore confidence, as would some procedure for a common framework of agreed research. An intergovernmental select body of experts should be established to investigate the general directions of biological research and to set guidelines to sustain the prohibition on mili-

74. Wright & Sinheimer, *Recombinant DNA and Biological Warfare*, BULL. OF ATOM. SCIENTISTS, Nov. 1983, at 20, 21.

75. Kuciewicz, *Soviets Search for Eerie New Weapons*, Wall St. J., Apr. 23, 1984, at 30, col. 3.

76. *Id.*

77. *How Many Smoking Guns?*, Wall St. J., Nov. 3, 1981 at 34, col. 1; *Anyone Serious?*, Wall St. J., Nov. 23, 1981 at 34, col. 1; Wall St. J., Jan. 4, 1982 at 31, col. 1 (letter to the editor from Richard Burt, then Director of the Bureau of Politico-Military Affairs of the U.S. Dep't of State); see also Wall St. J., Jan. 24, 1982, at 24, col. 3, at 26, col. 6 (noting suspicions of Soviet use of chemical weapons in Southeast Asia and Afghanistan).

78. A. SHEVCHENKO, *BREAKING WITH MOSCOW* 174 (1985).

tary application to withstand the growing awareness of the combat potential of biological agents of warfare.

Publicity is also important, provided it is of a responsible kind. Repeating wild allegations about the behavior of a rival state tends only to weaken the commitment to uphold the legal regime on all sides. The recent efforts of public interest groups to insist that research with biological warfare implications be preceded by an environmental impact statement demonstrate one useful approach.⁷⁹ Such efforts help to quiet the fear that a small specialized unit located deep in the Pentagon labyrinth will build up a vested interest in assimilating biological warfare into military planning, and by secret activity, proceed far along a developmental path before the public, or even the rest of the government is aware. At this stage a nongovernmental private watchdog committee of eminent scientists and jurists should be established in the United States to oversee the interaction between research activities and allegations, and, perhaps, issue a report to dramatize concerns. Simultaneously, perhaps, some kind of informal international committee of experts should be established to explore the means to restore confidence in the 1972 treaty regime.⁸⁰ A review conference of parties to the Convention scheduled to take place at Geneva in October 1986 might provide the occasion on which to proceed in this direction.⁸¹

The special advantage of the biological warfare legal regime should be appreciated. Cultural revulsion should be tied to a framework that prohibits possession and development, as well as use. Furthermore, leading states possess a strong geopolitical incentive to avoid opening any further the lid on a biological warfare Pandora's box given the severe instabilities that could follow, including the danger of accidental or negligent release of biological toxins, widespread proliferation, sabotage, and terrorism.

79. See *Foundation on Economic Trends v. Heckler*, 756 F.2d 143 (D.C. Cir. 1985) (affirming an injunction temporarily enjoining a university experiment that involved deliberate release of genetically engineered recombinant DNA into the open environment); *Foundation on Economic Trends v. Weinberger*, 610 F. Supp. 829 (D.D.C. 1985) (granting a permanent injunction against construction of a laboratory by the Dep't of Defense to test chemical warfare and biological defense systems because of failure to issue satisfactory environmental assessment); see also National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1976 and Supp. V. 1981) (requiring environmental impact statement for testing of chemical and biological defense systems).

80. See Falk, *Strengthening the Biological Weapons Convention of 1972* (to be published in a 1986 Stockholm International Peace Research Institute Volume tentatively entitled *Biological and Toxin Weapons Today*) (providing suggestions along this line, together with supportive analysis).

81. See 5 U.N. DISARMAMENT Y.B. 264 (1980) (noting the first review conference on the Convention was held in March 1980).