

10.1 Is the prohibition on the use of chemical weapons a principle of customary law? Treaty and custom. Reservations in international treaties. Reprisals: conditions governing the conduct thereof.

[Source: “Le droit de la guerre” in *Annuaire Suisse de Droit International*, 1989, pp. 244-247; original in French, unofficial translation]

N.B. As per the disclaimer ^[1], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[of the Swiss Federal Department for Foreign Affairs] considers whether the prohibition on the use of chemical methods of warfare stipulated in the Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare [...] has acquired the force of custom.

[Opinion of the Directorate for Public International Law:]

1. The 1925 Protocol prohibits the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices. In other words, it bans the use of chemical weapons. The Protocol also extends that prohibition to the use of bacteriological and biological weapons.

Under the Protocol, the States Parties shall, in so far as they are not already party to treaties which prohibit the use of such weapons, accept that prohibition. That particular wording suggests that the 1925 Protocol confirms rather than stipulates the rule prohibiting the use of chemical weapons. Therefore, certain writers have described that instrument as declamatory.

The 1919 Treaty of Versailles, which appears indirectly to establish the existence of an international custom which prohibits gases in that it states at the beginning of Article 171 that “The use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices [shall be] prohibited,” is among the treaties to which the 1925 Protocol implicitly refers.

Under Article 23(a) of the Regulations annexed to the 1899/1907 Convention Respecting the Laws and Customs of War, it is also prohibited to employ poison or poisoned weapons. Moreover, subparagraph (e) of that provision reiterates the general prohibition contained in the 1868 Declaration of St Petersburg and the 1880 Oxford

Manual. Article 5 of the Treaty relating to the Use of Submarines and Noxious Gases in Warfare, signed at Washington in 1922, also reiterates that the use of chemical weapons is condemned by the general opinion of the civilized world. Thus, it is possible to state, as do the learned writers, that the 1925 Protocol declares a custom.

2. Many States have issued reservations when ratifying the Protocol. Those States essentially fall into one of two categories. First, there are those States making reservations which wished to make clear that they had an obligation solely towards the States Parties to the Protocol. Such reservations would appear to be superfluous since the Protocol contains a restriction to that effect. [...] Under the reservations of a second type, various States have declared that they would not deem themselves bound by the Protocol with respect to a State if that State or its allies failed to comply with the prohibitions contained therein. In other words, the States making the reservations rely on their right to carry out reprisals in the event that one of the States Parties to the Protocol or one of their allies uses chemical weapons first. Incidentally, those reservations constitute a certain degree of progress in comparison with the *si omnes* clause contained in Article 2 of the above-mentioned 1899/1907 Hague Convention which releases the State Parties from any obligation towards another State Party on the sole pretext that that State has an ally which is not party to the Convention.

To be lawful reprisals must be of the same kind. Thus, a State against which chemical herbicide methods of warfare are used is not theoretically justified in responding by using anti-personnel agents, whether they be irritant, asphyxiating or lethal. Therefore, reprisals must be in kind to use the English terminology.

3. What are the effects of the reservations to the 1925 Protocol – those of the second type – which the vast majority of learned writers regard as an expression of customary law? Sandoz regards them as irrelevant. [However, it is possible to lean towards] a less

black and white view where a reservation, which consists in declaring that the Protocol will cease to be applicable with respect to a hostile State whose armed forces or allies fail to comply with the prohibitions contained therein, goes further than the right of reprisal which itself enables the fundamental prohibition on the use of chemical weapons to be preserved.

In that context several situations may be envisaged. When all the belligerent States are party to the Protocol no chemical or bacteriological weapons may be lawfully used other than in the event of reprisals in kind. The same applies where States which are not party thereto take part in the conflict. However, in that case it is in accordance with custom that the States Parties are under an obligation with regard to them. Moreover, if any hostile State, whether or not party to the Protocol, uses prohibited methods of warfare, a State making a reservation will continue to be bound by the rule of custom only with regard to that and any other belligerent State. On the other hand, a State Party which has issued no reservation will only be able to exercise its right of reprisal with regard to a State Party which has infringed one of the rules of the Protocol. However, in practice the distinction is a fragile one. Whether or not party to the Protocol and, as far as the former are concerned, whether or not they have deposited a reservation, States are justified in using toxic agents only within the well defined framework of reprisals. Customary law and treaty law impose the same conditions on the conduct of reprisals, i.e. subsidiarity, proportionality and indeed humanity.

4. To sum up, the 1925 Protocol and custom prohibit the first use of chemical weapons and accept the lawfulness of second use only in the case of reprisals in kind.

Note of the Directorate for Public International Law of the Federal Department of Foreign Affairs dated 15 December 1988.

Unpublished document.

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