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INTERNATIONAL LAW AND THE USE OF CHEMICAL WEAPONS IN THE GULF WAR

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INTRODUCTION

For more than fifty years after the signing of the Geneva Protocol in 1925¹ there were relatively few allegations involving the use of asphyxiating and poisonous gases and bacteriological weapons in warfare.² However, since the late 1970s there have been an increasing number of allegations involving the use of chemical weapons

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1. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 65, No. 2318 (1929) (signed at Geneva) [hereinafter Geneva Protocol]. See also D. SCHINDLER & J. TOMAN, *THE LAWS OF ARMED CONFLICT* 109 (2d ed. 1981).

2. It is alleged that, during the inter-war period, Italy used mustard gas in Ethiopia in 1936 in the Abyssinian Campaign and that Japan also used gases in its invasion of northern China in 1937. See M.S. DOUGAL AND F.P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 634 (1961). After World War II the U.S. used chemical defoliants and irritant gases in Vietnam between 1961 and 1970. See STOCKHOLM INTERNATIONAL PEACE RESOLUTION INSTITUTE (SIPRI) *YEARBOOK OF WORLD ARMAMENTS AND DISARMAMENT 1969/70*, at 193 [hereinafter SIPRI Y.B. 1969/70]. The International Committee of the Red Cross also verified allegations that Egypt used poison gas in 1967 against Yemeni loyalists in the Yemen Civil War. See G. VON GLAHN, *LAW AMONG NATIONS* 648 (4th ed. 1981).

both in international and national wars.³ Regardless of whether these allegations can be substantiated, it is clear that the threat of the proliferation of chemical weapons and their continued use is real and imminent and that only a concerted effort on the part of the international community may stop an increasing willingness by states to resort to these weapons.

No use of chemical weapons since the signing of the 1925 Protocol has been as extensive or severe as in the Gulf War between Iran and Iraq. The purpose of this Article is to consider the violations of the 1925 Protocol that occurred in the Gulf War and to analyze the responses of the international community to those violations in view of the exigencies of international law. This Article begins by briefly considering the legal nature and scope of the prohibition in the 1925 Geneva Protocol and then discusses the U.N.'s decision to investigate the allegations of violations of the Protocol and to examine the findings of this investigation. The Article concludes with a critical analysis of the various responses, collective and individual, to the conclusive evidence presented to the U.N. and questions the sincerity of the international community's stated resolve to prohibit not only the use of chemical weapons, but also their development, stockpiling and production.

I. THE GENEVA PROTOCOL OF 1925

A. *Background to the Geneva Protocol*

The Geneva Protocol was certainly not the first attempt to outlaw the use of chemical weapons in warfare. Although gases had not been used to a significant extent in warfare prior to World War

3. SIPRI publishes an annual yearbook on WORLD ARMAMENTS AND DISARMAMENT [hereinafter SIPRI Y.B.] which includes allegations of the use of chemical weapons. SIPRI reported allegations of the use of these weapons by the following countries or groups in addition to Iran and Iraq: Vietnam in Laos and Kampuchea in 1974-1988 and China in 1979; Laos in 1974-1982; Thailand across its border with Kampuchea in 1982, 1985 and 1988; South Africa in Angola in 1978, 1982 and 1988; Angola against UNITA positions in 1985, 1986 and 1988; C.I.A. in covert operations in Cuba in 1978-1982; Soviet Union and Afghan Mujahadeen in Afghanistan in 1979-1986; Ethiopia in Eritrea in 1980-1986 and in Somalia in 1981; El Salvador in 1981-1985 and Nicaragua in 1985-1986; U.K. and Argentina in Falklands in 1982; Guatemala against rebel forces in 1984; U.S. in Grenada in 1983; Indonesia in East Timor in 1985; and Libya and Chad in Chad in 1986 and 1987. SIPRI noted that these listings were only allegations and had not been verified by an independent investigative body. See SIPRI Y.B. 1982, Table 10.6, at 340; SIPRI Y.B. 1983, at 392; SIPRI Y.B. 1984, at 331; SIPRI Y.B. 1985, Table 6.4, at 180; SIPRI Y.B. 1986, Table 8.2, at 161; SIPRI Y.B. 1987, Table 5.1, at 106-07; SIPRI Y.B. 1988, Table 5.3, at 106; SIPRI Y.B. 1989, at 100-04.

I,⁴ several instruments called for the prohibition of the use of gases and poisons. At the Brussels Conference in 1874, the participating states adopted an International Declaration Concerning the Laws and Customs of War.⁵ Under Article 13(a) of that Declaration, the participating states forbade the “employment of poison or poisoned weapons.”⁶ At both the Hague Conferences of 1899 and 1907 the participating states adopted the Convention Respecting the Laws and Customs of War on Land.⁷ Under Article 23(a) of both Conventions, the participating states forbade the employment of “poison or poisoned weapons.”⁸ The participating states at the Hague Conference of 1899 also adopted a separate Declaration condemning the use of projectiles intended for the sole purpose of the “diffusion of asphyxiating or deleterious gases.”⁹ The existence of these instruments did not prevent the widespread use of chemical weapons by both sides in World War I. The use of various gases in that war caused some 1,300,000 casualties, more than 100,000 of them fatal.¹⁰

The desire to prevent a recurrence of the extent and severity of the injuries caused by chemical weapons in World War I was the major motivation for the drafting of the Geneva Protocol in 1925. According to the U.N. Yearbook on Disarmament: “[t]hose tragic figures contributed to a new global awareness of the need to prevent chemical warfare and to the emergence of the basic instrument for its elimination, the Geneva Protocol of 17 June 1925.”¹¹ One writer has noted that in World War I, chemical weapons were not released from airplanes and their use was restricted to the battlefield. Consequently, only soldiers had suffered the effects of exposure to these weapons.¹² However, after World War I there was no guarantee for the nations of the world that in future wars civilians

4. For a brief history of the use of gas in warfare prior to World War I, see Kelly, *Gas Warfare in International Law*, 9 MILIT. L. REV. 1, 3-5 (1960).

5. D. SCHINDLER & J. TOMAN, *supra* note 1, at 27.

6. *Id.* at 29.

7. Convention (II) With Respect to the Laws and Customs of War on Land, signed at the Hague, 29 July 1899, and Convention (IV) Respecting the Laws and Customs of War on Land, signed at the Hague 18 October 1907, reprinted in THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 100-32 (J.B. Scott ed. 1918); D. SCHINDLER AND J. TOMAN, *supra* note 1, at 57-92.

8. D. SCHINDLER & J. TOMAN, *supra* note 1, at 76.

9. Declaration (IV, 2) Convention Asphyxiating Gases, signed at the Hague, 29 July 1899, reprinted in THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, *supra* note 7, at 225-26; D. SCHINDLER & J. TOMAN, *supra* note 1, at 99-100.

10. UNITED NATIONS, 11 DISARMAMENT YEARBOOK 241 (1986).

11. *Id.*

12. Kelly, *supra* note 4, at 12.

would not be the target of chemical weapons. It has been suggested that the possibility of massive civilian casualties from chemical weapons provided an added incentive for the drafting of the Geneva Protocol.¹³

B. *Text of the Geneva Protocol*

The Geneva Protocol is only a short instrument and can be reprinted in full. The Protocol states that:

THE UNDERSIGNED PLENIPOTENTIARIES, in the name of their respective Governments:

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, had been justly condemned by the general opinion of the civilized world; and

Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the World are Parties; and

To the end that this prohibition shall be universally accepted as part of International Law, binding alike on the conscience and the practice of nations;

DECLARE

That the High Contracting Parties, so far as they are not already Parties of Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.

The High Contracting Parties will exert every effort to induce other states to accede to the present Protocol. Such accession will be notified to the Government of the French Republic, and by the latter on the date of the notification by the Government of the French Republic.

The present Protocol of which the French and English texts are both authentic, shall be ratified as soon as possible. It shall bear today's date.

The ratifications of the present Protocol shall be addressed to the Government of the French Republic, which will at once notify the deposit of such ratification to each of the signatory and acceding Powers.

At the time of the final drafting in Geneva in 1925, there were forty-five representatives who signed the Protocol and most of the states represented subsequently ratified it.¹⁴ At the end of 1988

13. *Id.*

14. Geneva Protocol, *supra* note 1, at 65, 67-74. The U.S. was one of the most recent

there were a total of 114 states parties to the Protocol.¹⁵ Both Iran and Iraq are parties to the Geneva Protocol; Iran acceded to the Protocol on July 4, 1929,¹⁶ and Iraq followed with its accession on September 8, 1931.¹⁷

C. *Effect of the Geneva Protocol*

Like any multilateral treaty, the provisions of the Geneva Protocol are legally binding on the states that have become parties to it. However, there is an increasing tendency to recognize the Protocol as amounting to more than just a multilateral treaty. It is generally assumed and commonly argued that the Protocol has become a part of customary international law and therefore binds all states whether or not they have become a party to it.¹⁸

On December 16, 1969, the U.N. General Assembly adopted Resolution 2603 on the "Question of Chemical and Bacteriological (Biological) Weapons." The Assembly stated that it: "[r]ecognized . . . 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."¹⁹

Every year since 1969 the General Assembly has passed resolutions relating to disarmament generally, and chemical weapons in particular. In at least one of those resolutions every year the Assembly reiterates its belief in the necessity of all states to adhere to the provisions of the Geneva Protocol and urges all states who are not already parties to the Protocol to accede to or ratify it. The

participants to ratify the Protocol taking that step in 1975. El Salvador and Nicaragua are the only remaining participants who have not ratified the Protocol. See SIPRI Y.B. 1989, *supra* note 3, at 478-96 (Annex A: Major Multilateral Arms Control Agreements).

15. At the end of 1988 a total of 71 states had acceded to the Protocol in addition to the 43 states who ratified it subsequent to their original signature of it. See SIPRI Y.B. 1989, *supra* note 3, at 480-94, for a list of all states who are parties to the Protocol, and the dates of their ratification or accession to it.

16. Geneva Protocol, *supra* note 1, at 71. Iran's accession to the 1925 Geneva Protocol is under Iran's former name of Persia.

17. SIPRI, CHEMICAL DISARMAMENT: NEW WEAPONS FOR THE OLD 147 (1970). Iran acceded to the Protocol without reservation. Iraq, however, made a two-fold reservation to the effect that (1) it would only be bound by the Protocol against other states who had signed or ratified or acceded to the Protocol, and (2) it would no longer consider itself bound by the Protocol if an enemy state used weapons prohibited by the Protocol. See SIPRI Y.B. 1988, *supra* note 3, at 569.

18. Bunn, *Banning Poison Gas and Germ Warfare: Should the Untied States Agree?*, 1969 WISC. L. REV. 375, 381; Baxter & Buergenthal, *Legal Aspects of the Geneva Protocol of 1925*, 64 AM. J. INT'L L. 853 (1970).

19. G.A. Res 2603A, 24 U.N. GAOR at 16, U.N. Doc. A. Res./2603A (1969) (emphasis in original) [hereinafter Resolution 2603A].

Assembly has also consistently called on the Conference of Disarmament in Geneva to further enhance the Protocol by completing its work on a comprehensive treaty banning the manufacture, stockpiling, testing and use of chemical weapons. It is clear that the General Assembly considers the Geneva Protocol to embody norms of customary international law.

Many writers have noted that the practice of states also supports the notion that the Geneva Protocol is binding on all states whether or not they are parties to the instrument.²⁰ Despite the widespread use of chemical weapons in World War I, these weapons were not used by the opposing armies against each other's forces in World War II. Furthermore, after World War II there were very few allegations of serious violations of the Protocol in warfare until the late 1970s.²¹ The Geneva Protocol has been in force for almost 65 years; 114 states are parties to it and it has been repeatedly reaffirmed as the essential instrument prohibiting chemical warfare. No non-party state has ever made the claim that it is not bound by the Protocol and therefore justified in international law to use chemical weapons in warfare, and it is difficult to imagine the international community accepting such a claim, even if it were made.

D. *Scope of the Prohibition in the Protocol*

The Protocol prohibits the use of "asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices," and also of "bacteriological methods of warfare." There is still uncertainty as to whether the phrase "or other gases" includes irritant gases, particularly tear gas, which is not "asphyxiating" or "poisonous," and which is commonly used in domestic situations to quell riots and restore order.

There is agreement that the Geneva Protocol does not prohibit

20. See Bunn, *supra* note 18, at 386-87 n. 57, where the author reviews the writings of O'Brien, Lauterpacht, Meyrowitz, Tucker, Schwarzenberger, and Greenspan, all of whom argued that the Geneva Protocol embodied customary international law. All of these writers were commenting in the 1950 and 1960s. Since then many more states have become parties to the Protocol according the instrument even greater force as a universally binding obligation.

21. See *supra* note 2. Between 1961 and 1970, U.S. forces used irritant gases and chemical defoliants in the Vietnam War. These gases were used against vegetation and not directed at human beings. Both U.S. and Australia (which had also sent forces to Vietnam) claimed that such substances were not prohibited by the Protocol. However, in December 1969, the General Assembly, in adopting Resolution 2603A, declared *inter alia* its belief that customary international law as embodied in the Geneva Protocol of 1925 prohibited "[a]ny chemical agents of warfare . . . which might be employed because of their direct toxic effects, on man, animals or *plants*." Resolution 2603A, *supra* note 19 (emphasis added).

the use of tear gas in internal or domestic situations. Furthermore, there is no dispute that the use of tear gas is a generally acceptable means of quelling violence and restoring order in internal situations. However, some states argue that, as far as international situations are concerned, the prohibition in the Protocol is absolute. Regardless of the use of tear gas and other substances in national domestic situations, states are bound by the provisions of the Protocol not to use gases in their international conflicts.²²

Contrarily, other states argue that the phrase "or other gases" should not be interpreted to mean all gases including tear gas. It would be ludicrous to suggest that it is permissible for a state to use tear gas against its own citizens but that it is a violation of international law if it uses tear gas against the soldiers of an opposing state.²³ The argument will not be dealt with in any substance here. It is sufficient for the purposes of this Article simply to mention the existence of the disagreement as to the scope of the prohibition in the Protocol.

However, there are more fundamental limitations to the scope of the prohibition in the Protocol than determining which gases it includes. The Protocol prohibits the use of chemical and bacteriological weapons in warfare. It prohibits neither (1) the manufacture and stockpiling of such weapons, nor (2) the use of such weapons in situations other than war.

1. The Manufacture and Stockpiling of Chemical Weapons. Many of the states party to the 1925 Geneva Protocol deposited reservations to their ratifications of, or accessions to, the Protocol claiming that they would no longer consider themselves bound by the Protocol if, in the course of the war, the opposing side used prohibited weapons against them.²⁴ After the extensive use of chemical weapons in World War I, many states were reluctant to

22. See Bunn, *supra* note 18, at 394-405, where the author considers whether the 1925 Geneva Protocol includes a prohibition of tear gas in warfare. He traces historical interpretations of the Protocol and shows that in 1969 only the Soviet Union and the Warsaw Pact countries argued strongly that the Protocol does prohibit the use of tear gas.

23. *Id.* Bunn shows us that the U.S. was always opposed to a broad interpretation of the Protocol and refers to other states which have supported the U.S. position. He says that most states have remained silent on the issue and therefore the issue is still unresolved. However, other writers have argued that most parties to the Protocol have demonstrated an understanding that the prohibition includes tear gas and other irritant chemicals. See Baxter & Buergenthal, *supra* note 18, at 866; SIPRI Y.B. 1969/1970, *supra* note 2, at 188-93.

24. See Geneva Protocol, *supra* note 1, at 67-71, for the text of ratifications and secessions to the Geneva Protocol accompanying the text of the Protocol. For reservations by states acceding after January 1930, see SIPRI Y.B. 1989, *supra* note 3, at 495-96.

commit themselves to a total ban on the use of the chemical weapons in the event that another state may use such weapons against them. Consequently, the Protocol does not mention the development, stockpiling or production of chemical weapons. A state engaged in any of those activities would not violate the Protocol.

A state that initiates the use of chemical weapons in warfare however, will violate the terms of the Protocol and will be in violation of customary international law. A state that retaliates with chemical weapons against the initiating states will not be in breach of its treaty commitment if it has reserved the right to retaliate with chemical weapons. It is debatable whether customary international law precludes a state responding with chemical weapons to a violation of the Protocol against that state if it has reserved the right to do so. Many states have not altered or revoked their reservations to the Protocol preserving the right to respond with chemical weapons if attacked with them. If many states did revoke their reservations to strengthen the prohibition in the Protocol, then it may be possible to argue conclusively that customary international law prohibits all use of chemical weapons in warfare.

2. The Use of Chemical Weapons in Situations Other Than War. The Protocol only prohibits "the use in war" of chemical and bacteriological weapons. Therefore, a state can argue that the use of prohibited substances in situations short of war is not a breach of the Protocol. This is not to suggest that the use of chemical weapons in a situation where there is no formal "state of war" is not a violation of international law. Such a use may amount to an international crime under the Convention on the Prevention and Punishment of the Crime of Genocide,²⁵ or a grave breach of the Universal Declaration of Human Rights,²⁶ even if it does not violate the Geneva Protocol. The holocaust of the Jewish people during World War II is such an example. Germany mainly used asphyxiating gases to kill 6,000,000 Jews in pursuit of Hitler's "Final Solution," but the use of these gases was not "in the course of war." Although Germany could argue that its use of gases was not a breach of the Geneva Protocol, many German officers were tried and convicted because their actions amounted to international crimes.

25. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, No. 1021 (1948).

26. Universal Declaration of Human Rights, 3 U.N. GAOR, U.N. Doc. A/811 (1948).

E. Efforts to Broaden the Ban on Chemical and Bacteriological Weapons

The international community is well aware that the Geneva Protocol only prohibits the use in war of chemical and bacteriological weapons and has called for comprehensive treaties banning all development, stockpiling and production of these weapons.

In 1972, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) Weapons and Their Destruction²⁷ was signed and has already been ratified or acceded to by 111 states.²⁸ Under the terms of the Convention, parties undertake not to develop, stockpile or produce bacteriological or toxic weapons and to destroy, or divert to peaceful uses, all such weapons in their possession. They also undertake neither to transfer such weapons to other states nor to help them develop, stockpile or produce such weapons.

Since 1971, the Conference on Disarmament convening in Geneva has continued to negotiate the drafting of a convention for a comprehensive ban on the development, stockpiling and production of chemical weapons similar to the Convention on Bacteriological Weapons. After nineteen years of negotiation there is still a lack of consensus to finalize a chemical weapons convention. Many proposals have been considered by the multilateral negotiating body in Geneva and these proposals have often included texts of complete draft conventions submitted by various states.²⁹ Every year the U.N. General Assembly adopts resolutions expressing the urgent need to intensify negotiations for a comprehensive and effective convention. According to the U.N. Yearbook on Disarmament, although all states represented in the negotiating process acknowledge the urgency for a comprehensive ban on chemical weapons, the main reasons for the inability to reach agreement on a final text for the Convention "concern the scope of a prohibition, in particular the appropriateness of its covering the use of such weapons, the pace of implementation, and the methods of verification of

27. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) Weapons and Their Destruction, *reprinted in* UNITED NATIONS, JURIDICAL YEARBOOK 1971, at 118 (1973) (signed at London, Moscow and Washington on 10 April 1972; entered into force on 20 March 1975).

28. As of January 1, 1989. See SIPRI Y.B. 1989, *supra* note 3, at 480-94, for a list of all parties to the Convention and the year of their ratification or accession. The SIPRI list also includes, in addition to the 111 states party to the Convention, the names of a further 24 states that have signed the Convention but have not yet ratified it.

29. See, e.g., the text of the U.S. draft proposal in UNITED NATIONS, 9 DISARMAMENT YEARBOOK 559 (1984) (appendix VII).

compliance.”³⁰

Until there is a comprehensive convention with an absolute ban on chemical weapons, the 1925 Geneva Protocol prohibiting their use in warfare remains the most significant document on this issue in international law. As previously mentioned, the Protocol was largely observed in warfare since its drafting in 1925 until the late 1970s.³¹ Many states have expressed concern at the increasing number of allegations involving the use of chemical weapons and at the weakening of the 1925 Protocol every time one of those allegations is verified. Consequently, there was considerable pressure on the U.N. to act when allegations of Iraqi use of chemical weapons against Iran first became public.

II. THE U.N.'S DECISION TO INVESTIGATE THE ALLEGED USE OF CHEMICAL WEAPONS

A. *Background to the U.N. Investigation*

Iran first communicated to the U.N. its allegation that chemical weapons had been used by Iraq on November 3, 1983.³² Subsequently, Iran reiterated its allegation in a series of letters to the U.N. as well as in discussions between its permanent representative to the U.N. and the Secretary-General.³³ Press reports in 1984 began to suggest that there was evidence to confirm Iranian allegations of Iraq's use of chemical weapons. According to the Secretary-General of the U.N.:

Press reports indicated that medical authorities in a number of countries in which Iranian nationals were being treated or relevant data were being analyzed had not excluded the possibility that chemical weapons had been used. Those reports were accompanied by a growing call by Governments as well as by public and private organizations for an objective and impartial investigation.³⁴

In response to this mounting pressure to act, the Secretary-General assembled a team of specialists to travel to Iran and investigate

30. UNITED NATIONS, *supra* note 10, at 242.

31. *See supra* note 2.

32. 38 U.N. SCOR at 80, U.N. Doc. S/16128 (1983).

33. *See Report of the Specialists Appointed by the Secretary-General to Investigate Allegations by the Islamic Republic of Iran Concerning the Use of Chemical Weapons: Note by the Secretary-General*, 39 U.N. SCOR at 108, U.N. Doc. S/16433 (1984) [hereinafter 1984 Report].

34. *Id.*

the allegations.³⁵ As a result of continued allegations of the use of chemical weapons after the first investigation in 1984, the Secretary-General called on the same team of specialists³⁶ to undertake annual investigations in 1985, 1986 and 1987.³⁷ In 1988 the allegations were so serious that the Secretary-General called for four separate investigations in that year alone.³⁸

B. Nature of the U.N. Investigation

The Secretary-General requested the specialists "to determine, to the extent possible, whether chemical weapons had been used, and, if so, the type and extent of their use."³⁹ In order to fulfill their responsibilities the specialists pursued several lines of inquiry. These included interviews with Iranian and Iraqi government officials about alleged uses of chemical weapons and with medical personnel about patients they had treated and were currently treating. The specialists also visited war zones to examine evidence and to take samples of weapons (or the remains of them) by which chemical substances had allegedly been released. Most significantly, the specialists conducted detailed medical examinations of hundreds of patients and many cadavers.

The specialists reported extensively on the symptoms they observed in the patients and cadavers they examined. In 1984, 1985

35. The team of specialists comprised the following four experts: Dr. Gustav Anderson, Senior Research Chemist, National Defense Research Institute, Sweden; Dr. Manuel Dominguez, Colonel, Army Medical Corps (specializing in atomic, biological and chemical weapons), and Professor of Preventative Medicine, Universidad Complutense de Madrid, Spain; Dr. Peter Dunn, Superintending Scientist, Materials Research Laboratories, Department of Defense, Australia; and Colonel Ulrich Imoberste, Chief, Nuclear, Biological and Chemical Weapons Defense Division, Ministry of Defense, Switzerland.

36. In fact, the 1985 investigation was undertaken by Dr. Manuel Dominguez alone. Three other investigations were undertaken by all four of the specialists with the exception of the 1986 investigation. On that occasion Colonel Ulrich Imoberste did not travel to Iran but joined up with the team on their return to Europe.

37. 40 U.N. SCOR at 48, U.N. Doc. S/17127 (1985) [hereinafter 1985 Report]; 41 U.N. SCOR at 114, U.N. Doc. S/17911 (1986) [hereinafter 1986 Report]; 42 U.N. SCOR, U.N. Doc. S/18852 (1987) [hereinafter 1987 Report].

38. The first investigation in 1988 was undertaken in April by Dr. Dominguez alone. See 43 U.N. SCOR, U.N. Doc. S/19823 (1988) [hereinafter 1988 Report I]. The second investigation was undertaken in July by Dr. Dominguez and Dr. Erik Dahlgren, Deputy Head of Department of Nuclear, Biological and Chemical Defense, Swedish Defense Research Institute, Sweden. See 43 U.N. SCOR, U.N. Doc. S/20060 (1988) [hereinafter 1988 Report II]. The third investigation in 1988 was also undertaken in July by Dr. Dominguez and by Dr. Dahlgren. See 43 U.N. SCOR, U.N. Doc. S/20063 (1988) [hereinafter 1988 Report III]. The final investigation was undertaken in August 1988 by Dr. Dahlgren, Col. Imoberste and Dr. A.N.P. van Heijst, Former Director, Dutch National Poison Control Centre, National Institute of Public Health and Environmental Hygiene, Netherlands. See 43 U.N. SCOR, U.N. Doc. S/20134 (1988) [hereinafter 1988 Report IV].

39. See 1984 Report, *supra* note 33, at 109, ¶ 1 (Terms of Reference).

and 1986 the investigations involved only trips to Iranian hospitals and rehabilitation centers or the examination of Iranian patients in European hospitals.⁴⁰ However, the investigation in 1987 and the first investigation in 1988 involved the examination of patients in Iraqi hospitals, as well as in Iran, following Iraq's allegations that Iran was now using chemical weapons against Iraqi forces.⁴¹ The second and fourth investigations in 1988 were only undertaken in Iran, and the third investigation in 1988 was only undertaken in Iraq.

III. FINDINGS OF THE INVESTIGATION

A. *Iraq's Use of Chemical Weapons*

Throughout the course of the U.N. investigation in Iran, the team of specialists examined or observed over 1,000 patients or cadavers alleged to have been exposed to chemical weapons.⁴² The nature of the symptoms suffered by patients were similar in every investigation and established distinct clinical patterns. When these patterns were combined with the analytical results from testing of weapons fragments, the specialists were able to reach absolute and unanimous conclusions about Iraq's use of chemical weapons. Throughout the investigation in Iran the team of specialists unanimously concluded that two types of chemical agents had been used by Iraq: Yperite (commonly known as mustard gas) and Tabun, an agent affecting the nervous system.

1. *The Use of Mustard Gas.* In 1984 the specialists found from their examinations and observations that the patients who had been

40. Both the 1984 and 1986 investigations took place in Iran. The 1985 investigation, however, only involved the examination of Iranian nationals in hospitals in Belgium, the Federal Republic of Germany and the United Kingdom. See 1985 Report, *supra* note 37, at 48.

41. When the team of specialists examined patients in Iraqi hospitals in 1987, Iraqi officials conceded that Iran had not used chemical weapons prior to the alleged attacks of 1987 and claimed that these patients were the first Iraqi victims of Iranian chemical weapons attacks. 1987 Report, *supra* note 37, at 16.

42. 1984 Report, *supra* note 33, at 111, ¶ 22, 41 patients and 13 cadavers examined; 1985 Report, *supra* note 37, at 49, ¶ 2, 17 patients examined; 1986 Report, *supra* note 37, at 177, ¶ 8, 82 patients examined; 1988 Report I, *supra* note 38, at 9-10, ¶ 7, 66 patients examined and 56 patients observed; 1988 Report II, *supra* note 38, at 10-11, ¶ 13, 42 patients and 24 cadavers examined and 34 patients observed; 1988 Report IV, *supra* note 38, at 9, ¶ 9, 6 patients examined and 18 others observed. In addition to those patients and cadavers examined or observed, the specialists concluded that many additional patients had suffered similar injuries and that the subjects examined or observed were only a selection of those available for observation.

exposed to mustard gas commonly experienced some or all of the following symptoms: intense conjunctivitis, palpebral oedema (severe swelling of eyelids from serous fluid), acute rhinorrhea (uncontrolled discharge of nasal mucus), intense erythema (inflammation of the skin) resulting in blackened lesions, particularly in the armpits, genitalia and groin, and in ulcerations and blisters filled with yellow fluid (covering as much as 80% of the body in extreme cases), tracheitis (inflammation of the trachea), laryngitis accompanied by hoarseness and haemorrhagic expectoration (the coughing or vomiting of blood from the chest or lungs) with emission of mucosa, and leucopenia (a disease of the blood which reduces the number of leucocytes, the components in the blood which protect the body against disease causing organisms, leaving patients highly susceptible to infection).⁴³ In each of the subsequent investigations, the specialists found similar symptoms amongst the patients and cadavers they examined and consistently concluded that these people had been exposed to mustard gas.

In both 1984 and 1985, the specialists were not able to say conclusively that Iraq had caused the injuries the specialists had observed. There was certainly an implication in the conclusions of the team that this was the case, but Iraq was not named explicitly. However, in the report of the 1986 investigation, the specialists explicitly named Iraq as responsible for the use of the mustard gas. The specialists were of the opinion that Iraqi use of the mustard gas had increased since the 1984 investigation and that Iraq had used the gas "on many occasions."⁴⁴

In addition to the Iranian patients examined in 1986, the specialists also examined Iraqi soldiers who were being treated in an Iranian hospital after capture by Iranian forces. All of the soldiers claimed to have been exposed to chemical bombs delivered by Iraqi aircraft attacking Iranian positions on the war front. The specialist noted that these patients were examined in the absence of Iranian personnel and were not under duress at the time. Each of the patients were able to identify the planes as Iraqi aircraft because of distinctive markings.⁴⁵

The specialist also interviewed an Iraqi pilot shot down over Iranian territory and held as a P.O.W. by Iran. The pilot claimed to have participated in two "special missions" which involved Iraq's

43. 1984 Report, *supra* note 33, at 111, ¶¶ 27-28.

44. 1986 Report, *supra* note 37, at 119.

45. *Id.* at 119, ¶ 52.

use of chemical weapons against Iranian forces. He was able to describe in detail the size, mass and coloring of chemical bombs used by Iraq. His testimony was consistent with the evidence of unexploded bombs in Iranian positions, and again the specialists noted that he was not under duress at the time of the interview.⁴⁶

In the 1984 and 1985 investigations, the specialists examined or observed only Iranian soldiers. However, from 1986 on the specialists found an increasing number of civilians among the victims of exposure to mustard gas. In the first 1988 investigation, Dr. Dominguez saw 122 victims of attacks in two centers—in the village of Halabja and in the Marivan-Nowdoshe-Sanadaj area. Dr. Dominguez found that most of the victims were civilians including women and children. He also concluded that many people in addition to the ones he had seen had suffered similar injuries and that the number of dead and injured as a result of chemical agents had been very high.⁴⁷ In April 1988, Dr. Dominguez determined that Iraq's use of chemical weapons had multiplied in intensity causing an increase in the severity of injuries and in the number of victims, particularly women, children and civilians.⁴⁸

In the fourth investigation in 1988, the team of specialists concluded that while civilian casualties were not as severe as they had been in Halabja earlier in the year, Iranian civilians in the town of Oshnaviyeh had also been exposed to an attack with mustard gas by Iraq.⁴⁹

2. *The Use of Nerve Gas.* In 1984 the specialists found that the patients who had been exposed to nerve gas commonly suffered some or all of the following symptoms: respiratory problems, acute agitation, nausea and vomiting, urinal and faecal incontinence, bradycardia (significant slowing of the rate of heartbeat), lachrymation (weeping), rhinorrhea (uncontrolled discharge of nasal mucus), transpiration (the discharge of air, vapor or sweat through the skin resulting in dehydration if sufficient fluids are not taken), tremors of the limbs, tongue and mouth, acute miosis (excessive contraction of the pupil) and lack of accommodation of the eye, and a severe lowering of the normal levels of acetylcholine-esterase⁵⁰ (which can lead to respiratory paralysis and death).

46. *Id.* at 119, ¶¶ 51, 54.

47. 1988 Report I, *supra* note 38, at 10, 12, ¶ 25.

48. *Id.* at 13, ¶ 32(c).

49. 1988 Report IV, *supra* note 38, at 11, ¶ 22(a).

50. 1984 Report, *supra* note 33, at 111, ¶ 31. Acetylcholine-esterase acts as a catalyst

In 1985 and 1986, the specialists were unable to say conclusively that nerve gas had been used despite the existence of evidence which supported this finding. In 1985, Dr. Dominguez was unable to examine some patients who had already been released from the hospital. However, in reviewing their medical histories he was prepared to say that, according to the symptoms they had suffered, they had probably been exposed to the nerve agent Tabun.⁵¹ In 1986, the specialists reported that they themselves had seen no evidence of patients' exposure to nerve gas. However, they added that they had spoken to medical staff who had treated many patients earlier in 1986. The common symptoms suffered by these patients led the specialists to conclude that Iraq had probably used nerve gas on occasions that year.⁵²

In 1987 and 1988, the specialists discovered an alarming increase in Iraq's use of nerve gas. In 1987, five patients were examined. All were civilians who had been working at a water installation in the Iranian town of Korramshahr. They were attacked with rockets from a helicopter and there were 100 civilians casualties including at least 15 deaths. The symptoms suffered by these patients were consistent with others in previous years and led the specialists to conclude that the victims had been exposed to nerve gas, probably Tabun.⁵³

In the first investigation in 1988, four patients were examined and Dr. Dominguez concluded that many patients in addition to those examined had suffered similar effects.⁵⁴ All were civilians in the Kurdish village of Halabja which is situated in north-eastern Iraq close to the Iranian border. In March 1988, at the time of several Iraqi attacks against Halabja, the village was in territory which was under the control of Iranian forces. A "very high" number of civilians had been killed or severely injured in the attacks, and their symptoms were consistent with the finding that Iraq had used nerve gas against a civilian target.⁵⁵ Dr. Dominguez expressed the opinion that his observations revealed a disturbing increase in Iraq's use of nerve gas, particularly against civilians including

for the transmission of nerve reactions in the body's nervous system. If the body's levels of this substance are seriously reduced, certain functions of the nervous system are endangered.
Id.

51. See 1985 Report, *supra* note 37, at 49 (appendix).

52. 1986 Report, *supra* note 37, at 18.

53. 1987 Report, *supra* note 37, at 9, 10.

54. 1988 Report I, *supra* note 38, at 10, ¶ 11.

55. *Id.* at 12, ¶ 25.

women and children.⁵⁶

In the second investigation in 1988, the team of specialists concluded that Iraq had continued its use of nerve agents, probably Tabun. The specialists examined eight patients and four cadavers and the symptoms observed were consistent with the findings of earlier investigations. Six of the patients were from the village of Shakheshmiran (close to Halabja), and the team of specialists again concluded that civilians as well as soldiers were victims of Iraq's use of nerve agents.⁵⁷

B. Iran's Use of Chemical Weapons

The specialists only included visits to Iraqi hospitals in 1987, and in the first and third investigations in 1988. Iraqi officials alleged that Iran had used chemical weapons against Iraq's forces for the first time in 1987.⁵⁸ In the course of the three investigations in Iraq, the specialists examined or observed 160 patients or cadavers.⁵⁹ The symptoms observed by the specialists were similar to those observed in Iran, and they concluded that the patients had been exposed either to mustard gas, nerve gas, or a highly aggressive irritant gas—probably Phosgene.⁶⁰ Unlike most of the investigations in Iran, the specialists were unable to say who had caused the injuries.

All the patients examined or observed in Iraq were soldiers. All those examined in 1987 had been stationed within 500-1,000 meters of the war front.⁶¹ All those examined or observed in the first investigation in 1988 had been stationed close to the Halabja area at the time of the Iraqi attacks which injured the Kurdish civilians from Halabja observed in Iranian hospitals.⁶² The nine patients observed in the third investigation in 1988 were the only alleged Iraqi victims of mortar grenade attacks by Iranian forces, but the team of specialists were unable to verify this claim.⁶³ In each of the investigations in Iraq, the specialists had no conclusive evidence of

56. *Id.*

57. 1988 Report II, *supra* note 38, at 11-13.

58. 1987 Report, *supra* note 37, at 16.

59. *Id.* at 13: 32 patients examined, 3 cadavers observed and reports from 5 autopsies considered. 1988 Report I, *supra* note 38, at 13, 14: 39 patients examined and 72 patients observed. 1988 Report III, *supra* note 38, at 11, ¶¶ 33-34: 42 patients examined.

60. 1987 Report, *supra* note 37, at 14-15, and 1988 Report I, *supra* note 38, at 16, ¶ 54(a). In 1988 Report III, *supra* note 38, at 11, ¶ 32(a), the specialists only found evidence of the use of mustard gas.

61. 1987 Report, *supra* note 37, at 16. *See also* appendix to the 1987 Report at 21-31.

62. 1988 Report I, *supra* note 38, at 14.

63. 1988 Report III, *supra* note 38, at 7.

the type of weapons used and were unable to say how the injuries to the Iraqi soldiers were caused.⁶⁴

The implicit conclusion from each of the reports is that it was highly possible that the injuries sustained by Iraqi soldiers on the front and in the Halabja area were caused by Iraqi weapons and not Iranian ones. This conclusion would certainly be consistent with the testimony of Iraqi soldiers examined in Iranian hospitals in the 1986 investigation.⁶⁵

C. *Applying the Geneva Protocol to the Findings*

The U.N. team of specialists were unable to find sufficient evidence to conclusively state that Iran had used chemical weapons even once in the course of the Gulf War. However, the findings of the U.N. team of specialists revealed that if Iran did use chemical weapons against Iraq, such use occurred: (1) no earlier than 1987; (2) only after several years of Iraqi use of chemical weapons; and (3) only against military targets.

If Iran did use chemical weapons at any stage of the Gulf War, that use would amount to a violation of the Protocol despite the finding that it was definitely Iraq that used chemical weapons first. Iran's accession to the Protocol in 1929 was without reservation. At no time since its accession has Iran reserved the right to respond with chemical weapons after another state has initiated the use of such weapons against it. However, as has already been said, the evidence of Iranian use of chemical weapons lacks substance and it may well be that Iran never used such weapons.

Conversely, in every investigation after 1985, the U.N. team was able to confirm conclusively the Iranian allegation of recurring use of chemical weapons by Iraq against military personnel and, in later years, increasingly against civilians. The U.N. team found that over the eight year period of the Gulf War thousands of people had died or had been severely injured by Iraqi chemical weapon attacks. The team confirmed allegations that in March 1988, Iraq had attacked the Kurdish village of Halabja with mustard and nerve gases indiscriminately killing and injuring thousands of civilians—men and women, infants and young children, elderly and infirmed.

64. 1987 Report, *supra* note 37, at 18; 1988 Report I, *supra* note 38, at 17; 1988 Report III, *supra* note 38, at 11, 12.

65. See *supra* notes 45-46 and accompanying text.

There is absolutely no question that Iraq's repeated use of mustard and nerve gases throughout the Gulf War were gross violations of its commitments under the 1925 Geneva Protocol. At no stage did Iraq attempt to argue that its use of such weapons against Iranian forces was outside the prohibition in the Geneva Protocol. In relation to the use of chemical weapons against Kurdish villages, particularly Halabja, Iraqi officials did make the claim that its war against the Kurds was an internal affair and of not concern to anyone but Iraq.⁶⁶ However, Iraq could hardly claim that these uses of chemical weapons were not "in the course of war" given that Halabja at the time was behind enemy lines and that Iranian soldiers were also killed and injured by the attacks with chemical weapons.

Iraq ceased to claim that the allegations were a fabrication once it became obvious that the evidence was conclusive and overwhelming. The frequency and severity of Iraq's use of chemical weapons represented the most horrific and blatant violation of the Geneva Protocol since it was drafted in 1925. One would have expected international outrage and condemnation as a minimal response, and a unanimous international reproof with sanctions as highly desirable.

IV. RESPONSES TO THE U.N. INVESTIGATION

A. *By the U.N. Security Council*

After the Secretary-General had received the report of the 1984 investigation from the team of specialists, he presented it to the President of the Security Council for consideration by the Council under the item "The Situation between Iran and Iraq."⁶⁷ Deliberations of the Security Council in relation to the report were concluded on March 30, 1984, by a declaration of the President on behalf of the members of the Council.⁶⁸ According to the declaration, the members of the Security Council (1) "strongly condemn the use of chemical weapons," (2) "reaffirm the need to abide strictly by the provisions of the Geneva Protocol of 1925 concerning a ban on the use of poisonous gases and bacteriological weapons," and (3) "call on the States to adhere to the obligations flowing

66. Smolowe, *Where is the Outrage?*, TIME, Sept. 26, 1988, at 20.

67. See 1984 Report, *supra* note 33, at 1-2 which contains a covering note by the Secretary-General about the report of the specialists.

68. 40 U.N. SCOR at 10, U.N. Doc. S/17130 (1985).

from the accessions to the Geneva Protocol of 1925.”⁶⁹

After receiving the report of the 1985 investigation, the deliberations of the Security Council in response to the report were concluded on April 25, 1985, when the President of the Security Council again made a statement on behalf of the members of the Council. The President of the Council stated that the members (1) “were appalled that chemical weapons were used against Iranian soldiers,” (2) “strongly condemn renewed use of chemical weapons in the conflict and any possible future use of such weapons,” and (3) “urge the strict observance of the Geneva Protocol of 1925 according to which the use in war of chemical weapons is prohibited and has been justly condemned by the world community.”⁷⁰

Statements by the President of the Security Council on behalf of the members are not resolutions of the Council. Statements only reflect the opinions of the individual members of the Council and are not adopted by the Council as a single body. In both the statements referred to above,⁷¹ the President constantly stated that the “members of the Council” and not the Council itself had responded in a particular way. On the other hand, all resolutions of the Council are responded to by the body as a whole. The text of a resolution always states that the “Security Council” responds in a particular way. A statement of the President of the Council on behalf of the members clearly lacks the same weight as a full resolution.

Furthermore, a statement of the President of the Council on behalf of the members is often made without public debates on the issue. Both the 1984 and 1985 statements on “The Situation Between Iran and Iraq” were made in the context of a formal meeting of the Council but without public discussions and certainly without a vote by the members of the Council.⁷² The usual procedure is for the President to open the meeting and read the text of the statement as the conclusion to the Council’s consideration of the issue. As a result of this procedure, an offending state is not openly criticized by individual members of the Council in the course of debates on the issue.

Statements by the President of the Security Council on behalf of the members of the Council can be adopted for various reasons in

69. *Id.*

70. 40 U.N. SCOR at 6, U.N. Doc. S/17130 (1985).

71. *See supra* notes 68-70 and accompanying text.

72. 40 U.N. SCOR (2524th mtg.), U.N. Doc. S/PV. 2524 (1984).

different ways,⁷³ but they are often used in situations where one or more of the members of the Security Council objects to the adoption of a resolution or when it is evident that a draft resolution will not be adopted.⁷⁴

The 1984 and 1985 statements of the President of the Council on behalf of the members about the use of chemical weapons in the Gulf War do not include the reasons why statements were issued in preference to the adoption of full resolutions. However, on the basis of Security Council practice in regard to the use of chemical weapons in the Gulf War, it may be suggested that the Security Council was more concerned with encouraging a peaceful settlement to the conflict than in criticizing Iraq for violations of international law.

It is understandable that in both 1984 and 1985 the members of the Security Council refrained from mentioning Iraq by name in their condemnation of the use of chemical weapons. The specialists had been unable to say conclusively that Iraq had used chemical weapons⁷⁵ and the Security Council could hardly act on its own initiative to mention Iraq explicitly. The members of the Council were simply responding to the findings of the investigations. It should be noted, however, that in the wording of the 1985 statement by the President of the Security Council, the implication of Iraqi use of chemical weapons was stronger than in 1984. The President of the Council said in the 1984 statement that the members condemned the use of chemical weapons generally, but in the 1985 statement he said that the members of the Council condemned the use of chemical weapons "against Iranian soldiers."

On February 24, 1986, prior to the 1986 investigation by the team of specialists, the Security Council unanimously passed Resolution 582 dealing with the Iran-Iraq conflict.⁷⁶ In Resolution 582, the Security Council,

Noting that both the Islamic Republic of Iran and Iraq are parties to the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare signed at Geneva on 17 June 1925, . . .

2. *Also deplures* the escalation of conflict . . . and, in particular,

73. For examples of Security Council statements made through the President in the practice of the Security Council, see Chai, *Consultation and Consensus in the Security Council*, in K. VENKATA RAMAN, *DISPUTE SETTLEMENT THROUGH THE UNITED NATIONS*, 517, 536-44 (1977).

74. *Id.*

75. See *supra* text accompanying note 43.

76. S.C. Res. 582, 41 U.N. SCOR at 11-12, U.N. Doc. S/RES/582 (1986).

the use of chemical weapons contrary to the obligations under the Geneva Protocol.⁷⁷

In the report of the 1986 investigation presented sixteen days after Resolution 582 was adopted, the specialists for the first time explicitly named Iraq as responsible for the use of chemical weapons against Iran "on many occasions."⁷⁸ Deliberations of the Security Council in response to this report were concluded on March 21, 1986, when the President of the Security Council made another statement on behalf of the members of the Council.⁷⁹ Again, the Security Council did not adopt a resolution in response to the report. On this occasion the President of the Council, on behalf of the members of the Council, named Iraq and stated that because the members of the Council were:

Profoundly concerned by the unanimous conclusion of the specialists that chemical weapons on many occasions have been used by Iraqi forces against Iranian forces, most recently in the course of the present Iranian offensive into Iraqi territory, the members of the Council strongly condemn this continued use of chemical weapons in clear violation of the Geneva Protocol of 1925 which prohibits the use of chemical weapons.⁸⁰

According to this statement, the members of the Security Council demanded again that the provision of the Geneva Protocol be strictly observed.⁸¹

If the members of the Security Council really were "profoundly concerned" and ready to "strongly condemn" Iraq's continued use of chemical weapons in clear violation of its signature to the Geneva Protocol, why was the Council unwilling to adopt a resolution with the strongest possible wording of condemnation? The members of the Security Council made no demand for an Iraqi guarantee that it would not continue to use chemical weapons and there was no suggestion of a desire to impose diplomatic or economic sanctions against Iraq. The findings of the specialists were unequivocal and confirmed that Iraq's actions amounted to the worst violation of the 1925 Geneva Protocol since it was adopted.

After the 1986 investigation, the Security Council had the necessary evidence to publicly censure Iraq with a full resolution de-

77. *Id.* (emphasis in original).

78. *See supra* note 44 and accompanying text.

79. 41 U.N. SCOR at 12, U.N. Doc. S/17932 (1986).

80. *Id.*

81. *Id.*

manding that it desist from using chemical weapons. Instead, the Security Council failed to fulfil its responsibilities under the Charter and thereby encouraged Iraq to continue its violations of the Geneva Protocol. Iraq had flagrantly violated the Protocol but was not held accountable by the Security Council for its violations.

It is well known that Iraq ignored the statements of the President of the Security Council and increased its use of chemical weapons after the 1986 investigation. In the course of the 1987 investigation, the specialists concluded that there was little more they could do to help the U.N. in its efforts to prevent the use of chemical weapons. In his covering note to the specialists' report of the 1987 investigation, the Secretary-General emphasized the need for political action to maintain commitment to the 1925 Geneva Protocol. He said that:

The Secretary-General wishes to draw the attention of the Security Council to the comment of the specialists, that having now undertaken several missions . . . "technically there is little more that we can do that is likely to assist the U.N. in its efforts to prevent the use of chemical weapons in the present conflict. . . ." *It is indeed evident that only concerted efforts at the political level can now hold out any hope of maintaining commitment to this vital Protocol, most importantly in the present conflict. The Secretary-General has repeatedly made clear that he considers the violation of the Geneva Protocol to be one of the gravest infringements of international norms and that he strongly and unequivocally condemns the use of chemical weapons whenever and wherever this may occur. He urges the parties concerned and all Governments to direct their full attention to the implications of this report.*⁸²

Despite the impassioned plea from both the Secretary-General and, by implication, the specialists themselves, the Security Council was again unwilling to adopt an unequivocal resolution with condemnation and the calling of sanctions against Iraq. Instead, the President again made a statement on behalf of the members of the Security Council in response to the report of the investigation.⁸³ On this occasion there was no formal record of deliberations of the issue and the President simply said that the statement was made "after consultations." In the declaration, the President of the Council stated on behalf of the members that:

82. 1987 Report, *supra* note 37, at 2 (emphasis added).

83. 42 U.N. SCOR at 5, U.N. Doc. S/18863 (1987).

The members of the Security Council . . . have considered the report of the mission of specialists. . . . Deeply dismayed by the unanimous conclusions of the specialists that there has been repeated use of chemical weapons against Iranian forces by Iraqi forces, that civilians in Iran have also been injured by chemical weapons, and that Iraqi military personnel have sustained injuries from chemical warfare agents, they again strongly condemn the repeated use of chemical weapons in open violation of the Geneva Protocol of 1925 in which the use of chemical weapons in war is clearly prohibited . . . [and] they again emphatically demand that the provisions of the Geneva Protocol be strictly respected and observed.⁸⁴

The statement of the President of the Council on behalf of the members again contained strong words but lacked substantive action.

On July 20, 1987, two months after the statement of the President of the Council on behalf of the members, the Security Council unanimously adopted Resolution 598.⁸⁵ Although the resolution dealt with the situation between Iran and Iraq generally, the Security Council also specifically referred to the use of chemical weapons. However, the Council refused to name Iraq and condemn it for its use of these weapons. The Council stated that it “[*deploras*] the bombing of purely civilian population centers . . . and, in particular, the use of chemical weapons contrary to obligations under the 1925 Geneva Protocol.”⁸⁶

After the first investigation in 1988, Dr. Dominguez presented his report about the civilian casualties in the Kurdish village of Halabja detailing some of the horror of Iraq’s most blatant and extensive use of chemical weapons since the beginning of the Gulf War. On May 9, 1988, the Security Council adopted a resolution for the first time specifically in response to a report from one of the annual investigations.⁸⁷ However, while the 1986 and 1987 statements of the President of the Security Council on behalf of the members had openly condemned Iraq, and while Dr. Dominguez’s unqualified conclusion was that Iraq’s use of chemical weapons had been on a more intensive scale than ever before, the wording of

84. *Id.*

85. S.C. Res. 598, 42 U.N. SCOR at 5-6, U.N. Doc. S/Res/598 (1987).

86. *Id.* (emphasis in original).

87. S.C. Res. 612, 43 U.N. SCOR, U.N. Doc. S/Res/612 (1988). Resolution 612 was adopted unanimously. See 43 U.N. SCOR (2812th mtg.) at 2, U.N. Doc. S/PV.2812 (1988).

Resolution 612 failed to mention Iraq by name. The Security Council was “[d]ismayed by the Mission’s conclusion that chemical weapons continue to be used in the conflict and that their use has been on an even more intensive scale than before.”⁸⁸

In the operative parts of the resolution, the Security Council resolved that it:

2. *Condemns vigorously* the continued use of chemical weapons in the conflict between Iran and Iraq contrary to the obligations under the Geneva Protocol;

3. *Expects* both sides to refrain from the future use of chemical weapons in accordance with their obligations under the Geneva Protocol.⁸⁹

It is not suggested here that Iran was above reproach in its conduct throughout the course of the Gulf War. It is simply suggested that in the matter of the flagrant violations of the Geneva Protocol, as determined by the U.N.’s own team of specialists, there is serious incongruence between the Security Council’s stated abhorrence and its failure to name Iraq in the first resolution it had adopted specifically in response to the reports of the investigations by the team of specialists.

After considering the reports of the second, third and fourth investigations in 1988, the Security Council adopted Resolution 620 on August 26, 1988.⁹⁰ On this occasion, the Security Council again failed to condemn Iraq by name despite the repeated conclusion by the team of specialists that Iraq had undoubtedly continued its use of chemical weapons throughout 1988. The Security Council did say that it was “[d]eeply dismayed by the missions’ conclusions that there have been continued use of chemical weapons in the conflict between Iran and Iraq and that such use against Iranians had become more intense and frequent.”⁹¹

Here the Council acknowledged the finding of the investigations that the Iranians were the victims of increasing attacks. The obvious implication in the Council’s wording is that Iraq had caused those more intense and more frequent attacks. However, in the operative part of the resolution, the Security Council avoided explicit condemnation of Iraq. Instead, the Council said that it:

1. *Condemns* resolutely the use of chemical weapons in the con-

88. *Id.* (emphasis in original).

89. *Id.* (emphasis in original).

90. S.C. Res 620, 43 U.N. SCOR, U.N. Doc. S/Res/620 (1988).

91. *Id.* (emphasis in original).

flict between Iran and Iraq, in violation of the obligations under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous and Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and in defiance of its Resolution 612 (1988).⁹²

It can be argued that both Resolutions 612 and 620 amount to condemnation of Iraq's use of chemical weapons because the condemnation is expressed in general terms and covers whichever party is guilty of violating the 1925 Geneva Protocol. However, it is suggested that, in failing to condemn Iraq explicitly, neither resolution is a satisfactory response to the findings of the investigation. Furthermore, in Resolution 620, there was more reason for the Council to condemn Iraq by name because Iraq had ignored Resolution 612 and continued its use of chemical weapons with impunity.

B. By the U.N. General Assembly

The General Assembly never considered the reports of the investigation by the team of specialists as a separate issue and certainly never adopted a resolution condemning Iraq's violation of the Geneva Protocol. In 1986, for example, the Assembly passed three resolutions related to the use of chemical weapons. Only one of those three resolutions referred to a breach of the Geneva Protocol. In Resolution 58C of December 3, 1986,⁹³ the Assembly made a general reference to the use of chemical weapons when it stated that it was:

Reiterating its concern over reports that chemical weapons had been used and over indications of their emergence in an increasing number of national arsenals as well as over the growing risk that they may be used again.

1. *Calls for* compliance with existing international obligations regarding prohibitions on chemical and biological weapons and condemns all actions that contravene these obligations.⁹⁴

The reasons for the General Assembly's failure to deal with the issue had nothing to do with the fact that the use of chemical weapons in the Gulf War was under consideration by the Security Council which therefore did not warrant consideration by the Assembly. The Assembly had its own reasons for abstinence on the issue. Throughout the course of the conflict between Iran and Iraq, the

92. *Id.* (emphasis in original).

93. G.A. Res. A/41/58C, 41 U.N. GAOR at 75, U.N. Doc. A/41/53 (1986).

94. *Id.*

General Assembly had two items of relevance on its agenda: These two items were (1) "Consequences of the Prolongation of the Armed Conflict between Iran and Iraq" and (2) "Chemical and Bacteriological (Biological) Weapons."⁹⁵ In its annual discussions on either of these two items, the Assembly could easily have passed a resolution condemning Iraq for its use of chemical weapons.

It is true that throughout the course of the Gulf War, particularly in the final few years, the U.N. organization was actively involved in attempting to find a peaceful solution to the conflict. It seems that, in the process to achieve that objective, the U.N. was unwilling to do anything to isolate Iraq and give it cause to refuse cooperation in achieving a solution.⁹⁶ The primary goal of the U.N. is the maintenance of international peace and security,⁹⁷ and sometimes the achievement of that objective seems to override matters of justice and legality. The U.N. did help to arrange a cease-fire agreement and subsequently an end to the war between Iran and Iraq. However, one of the costs of the U.N.'s pursuit of a peaceful settlement was the failure to deal in any substantive way with Iraq's violations of the Geneva Protocol.

C. *By the Independent International Community*

In September 1988, after more details of the Iraqi chemical attacks on Halabja had become known, President Reagan called for an international conference to reiterate support for the Geneva Protocol and to strengthen universal resolve to implement a new and comprehensive treaty banning chemical weapons. The international community of states responded favorably to the suggestion and a conference was convened in Paris in January 1989.⁹⁸ Representatives of 142 nations met in Paris to discuss the issue of the use of chemical weapons and to produce a final statement. Although the final declaration condemned the recent violation of the Geneva Pro-

95. See, e.g., the General Assembly's Annotated Preliminary List of Items for the Provisional Agenda of 1986, 42 U.N. GAOR, U.N. Doc. A/42/100 (1987) (item 48 at 137 and item 62 at 165, respectively).

96. One U.N. official was quoted as saying: "In the interests of peace I doubt that we will hear much more about the issue [of Iraq's use of chemical weapons]." See *Return of the Silent Killer*, TIME, Aug. 22, 1988, at 46.

97. U.N. CHARTER, art. 1, begins: "The purposes of the United Nations are: (1) To maintain international peace and security. . . ."

98. France hosted the conference because it is the depository state for signatures and ratifications of the Geneva Protocol. The Conference was titled "The Conference of States Parties to the 1925 Geneva Protocol and Other Interested States on the Prohibition of Chemical Weapons."

TOCOL in general terms, it failed to name Iraq as the party primarily responsible for the violations of the Protocol. The declaration states that:

The participating States . . . are determined to prevent any recourse to chemical weapons by completely eliminating them. They solemnly affirm their commitments not to use chemical weapons and condemn such use. They recall their serious concern at recent violations as established and condemned by the competent organs of the United Nations.⁹⁹

In the final declaration, the participating states also reiterated their support for the Geneva Protocol and urged non-party states to accede to the Protocol. They also called on the Conference on Disarmament in Geneva to increase its efforts to conclude a comprehensive treaty banning chemical weapons as “a matter of urgency.”¹⁰⁰

If the participating states really were “seriously concerned at recent violations” of the Geneva Protocol and if they really were “determined to prevent any recourse to chemical weapons by completely eliminating them,” why was there a reluctance to openly condemn Iraq for its blatant and persistent violations of the Protocol? The declaration suggests that the violating parties have been sufficiently condemned by the “competent organs of the United Nations” and yet we have seen that neither the Security Council nor the General Assembly passed a resolution condemning Iraq!

At the Paris conference, the primary objective was the adoption of a unanimous declaration reiterating support for the Geneva Protocol and expressing a commitment to a comprehensive treaty banning chemical weapons altogether. The conference was a success in that such a declaration was adopted. However, surely one of the most effective ways to reiterate support for the Geneva Protocol and to demonstrate real commitment to a comprehensive treaty is to swiftly and universally condemn a state that violates the Protocol. Such a response is particularly desirable when the conclusive evidence shows that the violations of the treaty obligations occurred over a number of years in increasing intensity and frequency. The sincerity of the international community in urging the completion

99. Letter from the Permanent Representative of France to the U.N. Secretary-General (Jan. 19, 1989) (Final Declaration of the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States on the Prohibition of Chemical Weapons, presented as an annex to the letter), *reprinted in* 44 U.N. GAOR, U.N. Doc. A/44/88 (1988).

100. *Id.*

of a comprehensive ban on the development, stockpiling and production of chemical weapons must be questioned when there has been a universal failure to condemn a state that has repeatedly violated the existing ban on the use of these weapons.

If the conference had chosen to name Iraq and condemn it for breaching the Protocol, the final declaration would certainly not have been a unanimous one. Perhaps the final declaration would have been more meaningful, even if not unanimous, if Iraq had been subjected to international censure. The Paris conference was called because the Geneva Protocol had been so flagrantly violated. However, Iraq was able to participate at the conference, reverbitalize a commitment to the Protocol through the unanimous final declaration, and then leave the conference without any public condemnation. In this respect it is suggested that the conference failed to *demonstrate* effective support for the provisions of the Geneva Protocol. Any state contemplating the future use of chemical weapons could only be encouraged to do so as a result of observing Iraq consistently in violation of its treaty obligations without incurring any substantive international criticism.

D. By Individual States

The unwillingness to condemn Iraq at the international level merely reflected the various political and economic interests causing a lack of resolve by individual states to openly criticize Iraq.¹⁰¹ Most of the states in the region had supported Iraq throughout the war with Iran for the fear of the spread of Khomeini's fundamentalist and militant Islam. In addition, Iraq had developed the largest army in the Middle East and none of the states in the region wanted to antagonize Iraq. The Arab States exert significant influence over the non-aligned countries and few states in that block were prepared to criticize Iraq.

The West European States have long serviced Iraq with technology and arms and none of them were prepared to jeopardize lucrative contracts by condemning Iraq. The Soviet Union had been actively attempting to increase its political influence in the Middle East and was reluctant to criticize Iraq at such a time. Even the U.S. Administration opposed condemnation and the introduction of sanctions against Iraq.

In September 1988, legislation was introduced in both the Senate

101. *Where is the Outrage?*, *supra* note 66, at 20.

and the House of Representatives in the U.S. which would have imposed economic sanctions against Iraq for its violations of the Geneva Protocol.¹⁰² However, the legislation was presented as part of a "package" of foreign policy legislation involving several issues in addition to Iraq's use of chemical weapons, and it was never passed. Opposition to some other aspects of the package prevented the acceptance of the bill, and it was rejected in its entirety.¹⁰³ Even if the legislation had been passed, it was well known that the Administration was opposed to its adoption and may well have vetoed it.¹⁰⁴ Secretary of State Schultz had argued that economic sanctions against Iraq could have damaged U.S. diplomatic efforts to persuade Iraq to commit itself not to use chemical weapons again.¹⁰⁵

It was suggested that the U.S. Senate and Congress would again consider the issue of chemical weapons in the 1989 session of the two houses. It is possible that legislation imposing economic sanctions on Iraq and also any firms that supplied technology, materials and assistance to states intending to develop chemical weapons will be introduced. At the time of this writing, no further action had been taken.

CONCLUSION

Despite overwhelming and conclusive evidence that Iraq used both nerve gas and mustard gas on an increasing scale for at least five years killing and injuring thousands of soldiers and civilians in flagrant breach of its obligations under the Geneva Protocol of 1925, the international community has not universally condemned Iraq. Because of their silence, governments from all countries have encouraged future violations of the Geneva Protocol. One writer quotes from a commentary of the Indian Defense Forces on the issues of the impunity of Iraq's violations of the Geneva Protocol:

Politically, the Iraqi use of chemical weapons poses great challenges to the non-aligned movement. If the political costs are seen as minimal, and as affordable, the military incentives for chemical

102. S. 2848, 100th Cong., 2d Sess. § 1 (1988) (Sanctions Against Iraqi Chemical Weapons Use Act) (presented to the Senate on Sept. 30, 1988, and referred to the Committee on Foreign Relations).

103. Felton, *Iraq Sanctions Yield to Special Interests in Senate*, CONG. Q. WEEKLY REP., Oct. 29, 1988, at 3141.

104. *Id.* See also Pear, *Can Words Stem a Flow of Weapons*, N.Y. Times, Jan. 8, 1989, at E2, col. 1.

105. *Id.*

weapons would multiply globally. . . . Once chemical weapons are spread and are seen as legitimate, the advanced and interventionary powers . . . would most certainly use them in their conflicts with the third world.¹⁰⁶

It is a sad indictment on every state that political expediency has been permitted to prevail over the exigencies of the rule of law in international affairs. So much of the persuasive power of international law is dependent upon the willingness of states to criticize and condemn when necessary. For over fifty years the international community was able to espouse the virtues of the Geneva Protocol and its prohibition on the use of chemical weapons. Iraq's actions severely undermined the value of the Protocol. The complicity of the international community contributes *de facto* and *de jure* to the weakening process.

106. Robinson, *Chemical and Biological Warfare: Developments in 1984*, SIPRI Y.B. 1986, *supra* note 3, at 171 (quoting Mahan, *Chemical Weapons in the Gulf: A Dangerous Portent*, in 8 STRATEGIC ANALYSIS 70-81 (1984)).