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Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization

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CLEAR AND PRESENT DANGER: ENFORCING THE INTERNATIONAL BAN ON BIOLOGICAL AND CHEMICAL WEAPONS THROUGH SANCTIONS, USE OF FORCE, AND CRIMINALIZATION

*Michael P. Scharf**

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INTRODUCTION

Mr. President, Sir. We've received human intel confirmation. That bastard bin Laden is producing chemical weapons at a facility in the Sudan. Now, the terrorist mastermind who declared jihad on the United States and blew up our embassies in Tanzania and Kenya has the poor man's version of the atom bomb!

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[Explicative] . . . General, what are our options?

A conversation like the fictional colloquy set forth above took place between President Clinton and his military advisers on the eve of the U.S. cruise missile attack on the Sudanese chemical weapons plant on August 20, 1998.¹ The purpose of this article is to provide a comprehensive answer to the President's inquiry. First, it analyzes the costs and benefits of the various means of responding to violations of the international ban on chemical and biological weapons, and then suggests alternatives that have not yet been explored.

In spite of the dreadful effects of biological and chemical weapons, nations regularly disregard treaties that forbid the use of such weapons and continue to develop, produce, stockpile, and use threatening quantities of these deadly agents. Chemical and biological weapons have been used in a wide range of conflicts, including Afghanistan, Chechnya, Eritrea, Laos, Myanmar (Burma), Sri Lanka, Yemen, and the former Yugoslavia.² By far the best documented cases are Iraq's use in its 1980–88 war against Iran, and subsequently against Kurdish groups in northern Iraq.³ In the aftermath of the 1990–91 Persian Gulf conflict, inspections by U.N. teams revealed an enormous inventory of chemical weapons.⁴ Documents seized from the Iraqi Defense Ministry indicated that Iraq possessed a substantial biological warfare capability at the time of the Gulf War.⁵ Some twenty other countries possess or are currently suspected of possessing these weapons.⁶

For a variety of reasons, the proliferation of chemical and biological weapons has recently begun to pose a much greater and more immediate

1. See *infra* notes 78–92 and accompanying text. While the President's advisors provided an analysis of the operational costs and benefits of the possible options, "reliable sources" have acknowledged that the President did not seek an analysis of the international law implications from the Department of State's Office of the Legal Advisor until after the attack was launched. Bruce Zagaris, *Owner of Bombed Sudanese Pharmaceutical Plant Presses the U.S. for Compensation and Release of Frozen Funds*, 15 INT'L LAW REPORTER 97, 98 (1999).

2. BURNS WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 462 (3rd ed. 1997); Miriam E. Sapiro, *Investigative Allegations of Chemical or Biological Warfare: The Canadian Contribution*, 80 AM. J. INT'L L. 678 n.3 (1986) (citing reports of U.N. investigators) [hereinafter Sapiro, *Investigative Allegations*].

3. See Sapiro, *Investigative Allegations*, *supra* note 2, at n.2.

4. Andrew D. McClintock, *The Law of War: Coalition Attacks on Iraqi Chemical and Biological Weapon Storage and Production Facilities*, 7 EMORY INT'L L. REV. 633 (1993).

5. According to U.S. officials, documents seized from the Iraqi Defense Ministry indicated the production of anthrax, botulinum toxin, and clostridium perfringens (the causative agent of gangrene). *Id.* at 634 n. 2.

6. Jonathan B. Tucker, Director of the Center for Nonproliferation Studies, *The Current Status of the BCW Regimes*, Paper Delivered at the Hoover Institution Conference on Biological and Chemical Weapons at Stanford University, November 16–18, 1998, at 1 (on file with the author).

threat to international security than in prior years. The globalization of industry has greatly increased access to the technology, expertise, and raw materials required to produce chemical and biological weapons. Unlike nuclear weapons programs, which require sensitive materials that are difficult and expensive to produce and specialized facilities for bomb fabrication, chemical and biological weapons can be developed by most countries and determined terrorist organizations, because they can be produced with readily available dual-use equipment and substances.⁷ Thus, chemical and biological weapons can be developed by most countries and even terrorist organizations that are determined to do so. Moreover, if a State can mate chemical and biological weapons to missile delivery systems, it gives that State the ability to attack enemy population centers. For this reason, leaders in the developing world think of chemical and biological weaponry as "the poor man's atom bomb."⁸ In addition, chemical and biological weapons have proliferated to states, such as Iraq and North Korea, which have repeatedly flaunted international standards and have been known to sponsor terrorism, increasing the likelihood that these weapons will proliferate still further. Finally, the prohibition on the production and use of these weapons has been weakened by the failure of the international community to respond to Iraq's use of them against Iran and against the Iraqi Kurds.

Currently there are two means of enforcing the international prohibition of chemical and biological weapons. First, the international community can induce compliance through imposition of sanctions, such as trade embargoes, freezing of assets and diplomatic isolation. Second, when sanctions fail, States can individually or collectively respond to the threat of chemical or biological weapons by using military force. After exploring the potential strengths and weaknesses of these approaches, this article examines the desirability of supplementing them with a third approach based on the criminal prosecution of persons responsible for the production, stockpiling, transfer, or use of chemical and biological weapons.

I. THE LETTER OF THE LAW

Before scrutinizing the means of enforcing the ban on chemical and biological weapons, it is necessary to understand the scope of the prohibition. This section examines the coverage of the law, and demonstrates

7. Anne Q. Connaughton & Steven C. Goldman, *The Chemical Weapons Convention and Department of Commerce Responsibilities*, 760 PLI/COMM 533, 537-538 (1997).

8. Brad Roberts, *Controlling Chemical Weapons*, 2 TRANS. L. & CONTEMP. PROBS. 435 (1992).

that at least part of the problem is due to inadequacies in the existing chemical and biological weapons treaty regimes: the 1907 Hague Convention, the 1925 Geneva Protocol, the 1972 Biological Weapons Convention, and the 1993 Chemical Weapons Convention.

A. The 1907 Hague Convention

The laws of war were first comprehensively codified in the 1907 Hague Convention,⁹ which constitutes an authoritative source of customary international law.¹⁰ Article 23 of the 1907 Hague Convention prohibits the use of poisonous weapons,¹¹ as well as the deployment of weapons "calculated to cause unnecessary suffering."¹² Unfortunately, these prohibitions did not deter the use of chemical weapons by both sides in World War I.¹³ It is estimated that the use of chlorine and mustard gas during that war caused over a million casualties, including 90,000 deaths.¹⁴

9. Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, reprinted in DOCUMENTS ON THE LAWS OF WAR 44 (Adam Roberts & Richard Guelff eds., 2d ed. 1989) [The Hague Convention].

10. The Secretary-General of the United Nations stated in his report on the Statute of the International Criminal Tribunal for the Former Yugoslavia, that "the part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: . . . the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; . . ." See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), para. 35, U.N. Doc. S/25704, 3 May 1993, reprinted in 2 VIRGINIA MORRIS AND MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 3, 9 (1995). See also paras. 609-617 of the judgment of the International Criminal Tribunal in the Tadic case (IT-94-I-T), May 7, 1997, reprinted in relevant part in JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA 40 (1998).

11. See *supra* note 9, art. 23(a).

12. *Id.* art. 23(b). The 1977 Protocol I Additional to the 1949 Geneva Conventions similarly provides:

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, art. 35, 1125 U.N.T.S. 3, 21.

13. HILARE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 245 (1992).

14. *Weston et al.*, *supra* note 2, at 463.

B. The 1925 Geneva Protocol

In 1925, the Geneva Protocol (the Protocol) was established to ban the "use in war of asphyxiating, poisonous or other gasses, and of all analogous liquids, materials or devices."¹⁵ The Geneva Protocol was a direct response to the failure of the 1907 Hague Convention to prevent the use of chemical weapons during World War I. Over 145 States have ratified the 1925 Geneva Protocol.¹⁶ The treaty was thought to have prevented the use of chemical weapons by all of the European belligerents in World War II.¹⁷

However, in subsequent years it became increasingly evident that, because of the many gaping holes in coverage, the Protocol was just as ineffective in preventing the production and use of biological and chemical weapons as its predecessor. First, many States reserved the right to use chemical and biological weapons against non-parties and to retaliate in kind against parties who used chemical or biological weapons first. In addition, the Protocol does not ban the design, testing, production, or stockpiling of biological or chemical weapons or precursors, thereby providing an incentive for countries to continue producing and stockpiling these weapons, and ensuring the short order availability of such weapons for retaliatory purposes. Moreover, the prohibition does not apply to peacetime use of chemical or biological weapons. Nor does it apply to internal use by a government against its own citizens such as the Iraqi government's poison gas attacks on the Iraqi Kurds, which resulted in the deaths of several hundred thousand people. Further, the Protocol contains no verification regime to investigate suspected violations and ensure compliance with the prohibition. Finally, the Protocol has not been enforced. The international community has not imposed sanctions for documented violations of this Protocol, such as the use by Iraq of chemical weapons against Iran.¹⁸ Nor has the international community imposed sanctions on countries which export

15. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare *done* June 17, 1925, 26 U.S.T. 571, [hereinafter Geneva Protocol of 1925].

16. See Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 246 (1996).

17. See generally RICHARD M. PRICE, *THE CHEMICAL WEAPONS TABOO* (1997). Price argues that the 1925 Geneva Protocol created a "chemical weapons taboo" which was a necessary condition for the avoidance of chemical warfare in World War II. The author acknowledges, however, that the non-use of chemical weapons during the war was largely out of fear that the opposing side would respond by employing chemical weapons against population centers.

18. See *supra* note 7, at 536-37.

chemical weapons precursors.¹⁹ In light of these weaknesses, it became apparent that the Protocol was not an adequate solution to the problems posed by the frequent use of chemical weapons and the growing proliferation and stockpiling of biological weapons.²⁰

C. *The Biological Weapons Convention*

Some of the weaknesses of the 1925 Geneva Protocol were eliminated by the 1972 Biological Weapons Convention, which entered into force in 1975.²¹ The Biological Weapons Convention was the first treaty to totally outlaw an entire category of weapons.

Under Article I of the 1972 Convention, each State party agrees never to produce, stockpile, or otherwise acquire:

1. [M]icrobial 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; [and]
2. [W]eapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.²²

Article II requires each State Party to destroy existing stockpiles of biological weapons within nine months of the Convention's entry into force.²³

The 1972 Biological Weapons Convention, which has been widely ratified, reflects a comprehensive repudiation of the development, production, and stockpiling of biological weaponry. Despite its symbolic importance as a norm creating treaty, the absence of verification and enforcement provisions has rendered it "merely a paper agreement that could easily be circumvented."²⁴ This became apparent when, in 1979,

19. See Paul Rubenstein, *State Responsibility for Failure to Control the Export of Weapons of Mass Destruction*, 23 CAL. W. INT'L L.J. 319, 322-27 (1993). Rubenstein argues that countries like Germany which allowed the export of chemical precursors, chemical process equipment, and technical expertise to Iraq during the 1980s could be held liable under principles of state responsibility since it was reasonably foreseeable that Iraq would use them to produce chemical weapons for aggressive use.

20. See Peter H. Oppenheimer, *A Chemical Weapons Regime for the 1990s: Satisfying Seven Critical Criteria*, 11 WIS. INT'L L.J. 1 (1992).

21. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, *opened for signature* April 10, 1972, 26 U.S.T. 583 [hereinafter Biological Weapons Convention].

22. *Id.* art. I.

23. *Id.* art. II.

24. See Susan Wright, *Prospects for Biological Disarmament in the 1990s*, 2 TRANSNAT'L. L. & CONTEMP. PROBS. 453, 454 (1992); see also NICHOLAS A. SIMS, *THE DIPLOMACY OF BIOLOGICAL DISARMAMENT: VICISSITUDES OF A TREATY IN FORCE, 1975-85*

an accident at a covert Soviet biological weapons plant was responsible for the outbreak of an epidemic of anthrax in Sverdilovsk, USSR, which may have killed up to a thousand persons.²⁵

Like the Protocol, the Biological Weapons Convention is riddled with gaps and loopholes. First, biological weapons research is not prohibited. Second, the Article I limitation to biological agents or toxins "that have no justification for prophylactic, protective or other peaceful purposes" constitutes an enormous loophole since "protective" and "peaceful" applications cannot reliably be distinguished from hostile military applications. Similarly, the obligation to destroy stockpiles for any biological agent or toxins contained in Article II does not apply to biological agents that are "divert[ed] to peaceful purposes," thereby providing states an alarming degree of discretion.²⁶

In 1994, the Parties to the Biological Weapons Convention established an Ad Hoc Group of fifty interested member-States to draft a Compliance Protocol to strengthen the Convention.²⁷ "The fifth draft of the Compliance Protocol, produced in July 1998, was 251 pages long and consisted of 23 articles, seven annexes, and five appendices. This draft of the treaty also contained more than 3,000 bracketed items indicating points of disagreement."²⁸ The Ad Hoc Group plans to meet again in 1999 to complete the Protocol.²⁹

D. The Chemical Weapons Convention

"Given the inherent limitations of the Geneva Protocol, in 1968 the international community began negotiating a comprehensive chemical weapons convention that would ban not only the use, but also the production and stockpiling of chemical weapons, and that would additionally provide the means to verify compliance and to sanction

(1988. Sims concludes, "Those who took the British initiative of 1968 [which included strong provisions for verification and complaint investigation] and watered it down into the Convention of 1972 gave the world biological disarmament on the cheap: a disarmament régime of minimal machinery which would cost next to nothing to sustain. It is now painfully evident that these short-term savings have been outweighed by the long-term costs of a régime lacking the means to sustain its credibility in the face of suspicious events which cannot be resolved one way or the other." at 290.

25. Raymond A. Zilinskas, Book Review, 84 AM. J. INT'L L. 984, 984-85 (1990) (reviewing NICHOLAS A. SIMS, *THE DIPLOMACY OF BIOLOGICAL DISARMAMENT: VICISSITUDES OF A TREATY IN FORCE, 1975-85* (1988)).

26. Richard A. Falk, *Inhibiting Reliance on Biological Weaponry: The Role and Relevance of International Law*, 1 AM. U. J. INT'L L. & POL'Y 17 (1986).

27. See *supra* note 6, at 8.

28. *Id.* at 9.

29. See *id.* at 11-12.

violations.”³⁰ The objective of the Chemical Weapons Convention (the Convention) was to eliminate an entire class of weapons of mass destruction.

On April 29, 1997, the Convention entered into force.³¹ Over 100 states, including the United States, China, India, Iran and Russia, have ratified or acceded to the Convention.³² The Convention prohibits the development, production, or other acquisition, retention, stockpiling, transfer, and use of chemical weapons and chemical weapons production facilities.³³ It also prohibits State Parties from engaging in any military preparations to use chemical weapons and from assisting or inducing anyone to engage in an activity that is prohibited by the Convention. The Convention requires State Parties to eliminate all chemical weapons and chemical weapons production facilities under their jurisdiction or control within ten years of accession.

Most importantly, the Chemical Weapons Convention establishes a permanent Organization for the Prohibition of Chemical Weapons (the OPCW), whose role is to monitor implementation of the agreement through on-site inspections, including inspections of private, non-military chemical production facilities.³⁴ In addition, the Convention provides for challenge inspections of any facility or location, public or private, when a State Party suspects that the facility is not in compliance with the Convention. Because of its extensive verification procedures, the Convention is estimated to cost between \$33 million and \$500 million per year to operate.³⁵

While the verification provisions of the Chemical Weapons Convention have been heralded as “among the most intricate and intrusive

30. *Supra* note 7, at 537.

31. See John J. Kim & Gregory Gerdes, *International Institutions*, 32 INT’L LAW. 575, 590 (1998).

32. See *id.* The United States Senate gave its advice and consent to the Chemical Weapons Convention on April 24, 1997, subject to twenty-eight conditions. Notably among these is Condition 28, which requires the President to certify that proper search warrants will be obtained for any U.S. facility subject to inspection when consent of the owner was withheld. This condition responded to concerns that U.S. businesses could be subject to unreasonable searches and seizures by the Convention in contravention of their Fourth Amendment rights.

33. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on the Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 21, 103D CONG., 1ST SESS. (1993), reprinted in 32 I.L.M. 800 [hereinafter Chemical Weapons Convention]. For an analysis of the Convention’s negotiating history, see WALTER KRUTZSCH & RALF TRAPP, A COMMENTARY ON THE CHEMICAL WEAPONS CONVENTION (1994), and THOMAS BERNAUER, THE PROJECTED CHEMICAL WEAPONS CONVENTION: A GUIDE TO THE NEGOTIATIONS IN THE CONFERENCE ON DISARMAMENT (1990).

34. Under Article III of the Chemical Weapons Convention, parties must disclose to the OPCW the location of their production facilities and chemical weapons stockpiles. See *supra* note 33.

35. See Zilinskas, *supra* note 25, at 986.

ever designed for a disarmament regime,"³⁶ the Convention is not without its flaws. In particular, the Convention does not provide mandatory sanctions against violators. Nor does it apply to numerous "hold-out" states which continue to refuse to join³⁷ or non-State actors, such as terrorist or paramilitary groups. Moreover, it only "regulates chemical weapons and their precursors in terms of *tons*," even though technological developments have produced agents only a few grams of which are lethal.³⁸ And it permits any State Party to withdraw from the regime in "the supreme interests of the country" on only ninety days notice.

The Convention's most significant weakness is the result of ill-conceived action by the U.S. Congress. In enacting implementing legislation, Congress included three "poison-pill" provisions introduced by treaty opponents that could eviscerate the Chemical Weapons Convention's verification regime.³⁹ One provision authorizes the president to refuse a challenge inspection on "national security grounds," the second prevents the removal of samples from U.S. territory for analysis, and the third sharply limits the number of U.S. chemical plants subject to inspection. Other countries are likely to treat these as equivalent to reservations and assert them to frustrate verification.⁴⁰

II. MEANS OF ENFORCEMENT

A. Security Council Enforcement

None of the treaties on chemical and biological weapons provide for the imposition of mandatory sanctions against violators. The parties to these treaties can individually or collectively impose sanctions,

36. Oppenheimer, *supra* note 20, at 44.

37. Most of the middle eastern countries did not sign and have not ratified or acceded to the Chemical Weapons Convention, citing Israel's refusal to sign the Nuclear non-Proliferation Treaty. *See id.* at 45.

38. *Id.*

39. *See supra* note 6, at 7.

40. The result would be similar to the effect of the U.S. "Connally Reservation" to the compulsory jurisdiction of the International Court of Justice, which provided that the United States acceptance of the World Court's jurisdiction would not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 305-06 (2d ed. 1995). One of the reasons given for the U.S. withdrawal from the compulsory jurisdiction of the International Court of Justice in 1986 was that every time the United States attempted to bring a case against a country before the International Court of Justice, the country used the reservation against the United States via reciprocity to successfully defeat the International Court's jurisdiction. *See Statement by the Legal Adviser, Abraham D. Sofaer, to the Senate Foreign Relations Committee* (Dec. 4, 1985), *reprinted in id.* at 324.

but embargoes are ineffective unless they are universally enforced. Thus, the U.N. Security Council may increasingly be called upon to respond to violations of the chemical and biological weapons conventions.

The United Nations Charter charges the Security Council with the responsibility for determining the existence of any threat to, or breach of, the peace. Articles 41 and 42 of the Charter authorize the Security Council to restore international peace and security, by force if necessary. The Security Council may call upon U.N. members to impose sanctions and to use force to ensure compliance, e.g., to interdict vessels violating an embargo. The Security Council can also freeze the assets of responsible leaders⁴¹ and ban their travel.⁴² Furthermore, the Security Council can call upon or authorize states to use military force in response to a violation of the international prohibition on biological and chemical weapons. The Security Council can even authorize the capture of persons responsible for serious violations of international law.⁴³

In the aftermath of Iraq's invasion of Kuwait, the Security Council adopted a series of resolutions to compel Iraq to destroy its arsenal of chemical and biological weapons. After Iraq invaded Kuwait, the Security Council imposed sweeping sanctions and authorized the use of force against Iraq.⁴⁴ At the conclusion of the Persian Gulf conflict, the Security Council adopted Resolution 687 (1991), which specified the conditions which Iraq must satisfy before sanctions would be lifted.⁴⁵ To avoid the possibility of a future Iraqi threat using biological or chemical weapons,⁴⁶ Resolution 687 required Iraq to "unconditionally accept the

41. See S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg. at 3, U.N. Doc. S/RES/841 (1993) (freezing the assets of the de facto military regime in Haiti and their major civilian supporters).

42. See S.C. Res. 1137, U.N. SCOR, 52nd Sess., 3831st mtg., U.N. Doc. S/RES/1137 (1997) (imposing travel restrictions on Iraqi leaders).

43. See S.C. Res. 837, U.N. SCOR, 48th Sess., 3229th mtg. at 83, U.N. Doc. S/RES/837 (1993) (authorizing the "arrest, and detention for prosecution, trial and punishment," of Somali warlord Mohamed Farrah Aidid, who was responsible for the murder of 24 U.N. Peacekeeping troops in 1993).

44. See S.C. Res. 660, U.N. SCOR, 45th Sess., 2932nd mtg., U.N. Doc. S/RES/660 (1990) (demanding withdrawal of Iraqi troops from Kuwait); S.C. Res. 661, U.N. SCOR, 45th Sess., 2933rd mtg., U.N. Doc. S/RES/661 (1990) (imposing economic sanctions); S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg., U.N. Doc. S/RES/665 (1990) (authorizing use of force to enforce the embargo); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., U.N. Doc. S/RES/678 (1990) (authorizing invasion of Iraq by coalition forces).

45. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991).

46. In a letter to the leaders of the House and Senate regarding Iraq, President Clinton stated in relevant part:

Sanctions against Iraq were imposed as a result of Iraq's invasion of Kuwait. It has been necessary to sustain them because of Iraq's failure to comply with relevant UNSC resolutions, including those to ensure Saddam Hussein is not allowed to resume the unrestricted development and production of weapons of mass destruction.

destruction, removal, or rendering harmless, under international supervision, of. . . [a]ll chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support, and manufacturing facilities.”⁴⁷ The preamble of Resolution 687 invokes *inter alia* the 1925 Geneva Protocol and the 1972 Biological Weapons Convention as the justification for imposing this requirement.

Resolution 687 required Iraq to divulge the locations, amounts, and types of its chemical and biological weapons to the Secretary-General of the United Nations. The destruction of these materials was to be performed under the supervision of the United Nations Special Commission (UNSCOM), which was charged with the responsibility for inspection and investigation of all known or suspected weapon sites. After a series of violations of Resolution 687, culminating in Iraq’s refusal to allow the inspection teams access to sites designated by UNSCOM,⁴⁸ the United States and Great Britain threatened to use military force to compel Iraqi compliance.⁴⁹ The United States and Great Britain asserted that such force was permitted by Resolution 678, which authorized member states to use all necessary means to uphold and implement “all relevant resolutions” subsequent to Resolution 660.⁵⁰ Air strikes were temporarily averted when, on February 23, 1998, Iraq’s Deputy Prime Minister Tariq Aziz and United Nations Secretary-General Kofi Annan signed a Memorandum of Understanding in which Iraq agreed to accord “immediate, unconditional and unrestricted access” to UNSCOM.⁵¹

Clinton Letter to the Leaders of House and Senate, Iraq (Dec. 1, 1997) (visited October 1, 1998) <<http://www.usis.usemb.se/regional/nea/gulfsec/clnt1201.htm>>.

47. *Supra* note 45, at 8.

48. See *Standoff in Iraq: Chronology of Iraqi Violations* (visited Oct. 1, 1998) <<http://www.foxnews.com/news/packages/iraq/violations.sm1/>>.

49. See *Text of Clinton Statement on Iraq; Text of President Clinton’s Address to Joint Chiefs of Staff and Pentagon Staff* (Feb. 17, 1998) (visited Oct. 1, 1998) <<http://europe.cnn.com/ALLPOLITICS/1998/02/17/transcripts/clinton.iraq/>>.

50. See Frederic L. Kirgis, *The Legal Background on the Use of Force to Induce Iraq to Comply with Security Council Resolutions*, ASIL FLASH INSIGHT, November 1997. The governments of several other members of the Security Council, including China, France, and Russia, have disputed that Resolution 678 can be used as an ongoing authority to use force. See *id.*

51. *Memorandum of Understanding between the United Nations and the Republic of Iraq* (Feb. 23, 1998) (visited Oct. 1, 1998) <<http://www.cnn.com/WORLD/9802/23/un.iraq.agreement/index.html>>. The *Memorandum of Understanding* provides in relevant part:

The United Nations and the government of Iraq agree that the following special procedures shall apply to the initial and subsequent entries for the performance of the tasks mandated at the eight Presidential Sites in Iraq as defined in the annex to the present Memorandum:

Unfortunately, the February 23 Memorandum of Understanding turned out to be a short-lived solution. Notwithstanding President Clinton's warning "that if Saddam failed to cooperate fully [with UNSCOM], we would be prepared to act without delay, diplomacy or warning," on December 16, 1998, UNSCOM head Richard Butler reported to the Security Council that Iraq was once again refusing to turn over key documents and blocking inspections at suspected chemical and biological weapons sites.⁵² Within hours of receiving Butler's report, the United States and the United Kingdom launched a massive four-day air campaign against "a wide range of Iraqi weapons facilities and intelligence installations."⁵³

From 1991–1998, the UNSCOM inspection regime was the most intrusive and comprehensive ever imposed upon a nation. Notwithstanding Saddam Hussein's intermittent intransigence to permit U.N. inspections,⁵⁴ the Security Council's approach to Iraqi chemical and biological weapons convention violations provides a blue print for the future.

B. Unilateral Military Action

1. Anticipatory Self-Defense

Prior to the advent of the United Nations Charter, there was a customary right of reprisal, permitting nations to use military force to

-
- (a) A Special Group shall be established for this purpose by the Secretary-General in consultation with the Executive Chairman of UNSCOM and the Director General of IAEA. This Group shall comprise senior diplomats appointed by the Secretary-General and experts drawn from UNSCOM and IAEA. The Group shall be headed by a Commissioner appointed by the Secretary-General.
 - (b) In carrying out its work, the Special Group shall operate under the established procedures of UNSCOM and IAEA, and specific detailed procedures which will be developed given the special nature of the Presidential Sites, in accordance with the relevant resolutions of the Security Council.
 - (c) The report of the Special Group on its activities and findings shall be submitted by the Executive Chairman of UNSCOM to the Security Council through the Secretary-General.

52. Gerald Seib and Thomas Ricks, *Attack on Iraq: U.S. Launches Strike as Baghdad Refuses to Comply with U.N.*, WALL ST. J., December 17, 1998, at A1.

53. *Id.*

54. See Paul Taylor, *West Found Weakened in Annual Arms Survey*, THE BOSTON GLOBE, Oct. 23, 1998, at A2 ("The study [published by the International Institute for Strategic Studies] noted that although the United States and Britain made a credible threat of force in February to compel Iraq to resume cooperation with U.N. arms inspectors, they had not acted after Baghdad in August effectively ended the searches for weapons of mass destruction.").

enforce international obligations in certain limited circumstances. The specific parameters governing lawful reprisals were set forth in the *Naulilaa Incident Arbitration decision*: (1) the offending state must have committed an act contrary to international law; (2) the injured state must have made a demand on the offending state and that demand have gone unsatisfied; and (3) the force used in the reprisal must be proportionate to the offending act.⁵⁵

If it were still good law, the doctrine of armed reprisal could be used to justify an attack on a chemical or biological weapons facility operating in violation of the chemical and biological weapons conventions. The practice of the United Nations and the opinions of the World Court, however, indicate that the right of armed reprisal is generally contrary to the U.N. Charter. Numerous resolutions condemning armed reprisals as inconsistent with the Charter have been adopted over the years.⁵⁶ Most notably, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, provides that "states have a duty to refrain from acts of reprisal involving the use of force."⁵⁷ The International Court of Justice implicitly rejected the right of reprisal in the *Corfu Channel Case*⁵⁸ and in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*.⁵⁹ While the U.N. Charter generally prohibits armed reprisals, such measures are permissible if they qualify as an exercise of self-defense under Article 51 of the Charter.

Self-defense differs from reprisal, which is punitive in character, in that the purpose of self-defense is to mitigate or prevent harm. But the two concepts overlap in the case of anticipatory self-defense. Hugo

55. NAULILAA INCIDENT ARBITRATION, Portuguese-German Arbitral Tribunal, 8 *Rec. des d cisions des trib. Arb. mixtes* 409 (1928), translated and discussed in W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 903-04 (3d ed. 1971).

56. See Rex J. Zedalis, *On the Lawfulness of Forceful Remedies for Violations of Arms Control Agreements: "Star Wars" and other Glimpses at the Future*, 18 N.Y.U. J. INT'L L. & POL. 73, 123 (1985).

57. *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

58. *Corfu Channel Case*, UK. v. Alb., 1949 I.C.J. 4 (rejecting British contention that a mine sweeping operation to clear the waters of mines laid by Albania in contravention of international law constituted a justifiable intervention in self-help to remedy the breach of a general international obligation).

59. *Case Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (expressing concern in regard to the legality of the United States incursion into Iran). Judge Morozov's dissenting opinion expressly characterized the incursion as violative of the Charter because it did not meet the requirements of Article 51. *Id.* at 51, 56-57 (Morozov, J., dissenting).

Grotius, often regarded as the father of international law, first recognized a State's right to use force to forestall an anticipated attack in 1625.⁶⁰ The contours of the right of anticipatory self-defense were fleshed out in an exchange of diplomatic notes between the governments of the United States and Great Britain during the *Caroline* incident of 1837.⁶¹ The two countries agreed that international law permitted a military response to a threat, provided that the danger posed was, in the words of U.S. Secretary of State Daniel Webster, "instant, overwhelming, leaving no choice of means and no moment for deliberation."⁶² The Webster formulation of self-defense is often cited as authoritative customary law. Following the *Caroline* incident, the imminent threat of armed attack has generally been found to justify defensive military action, provided that the threatened nation has first exhausted all peaceful means of resolution and that the action ultimately taken was proportionate to the threat.

Scholars are divided over whether the specific language contained in Articles 2(4) and 51 of the U.N. Charter has overridden the customary right of anticipatory self-defense as articulated during the *Caroline* incident.⁶³ Article 2(4) prohibits the use of military force in the territory of another state without its consent.⁶⁴ Article 51 provides an exception to that prohibition for the case of self-defense in response to "an armed

60. HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 169–185 (1646) (Francis W. Kelsey, trans., Clarendon Press, 1925).

61. In 1837, rebels in Upper Canada with American logistical support, unsuccessfully revolted against British rule. The Canadian military identified the American steamboat, *Caroline*, as a vessel running arms to the rebels and sent a military force into the United States to set the ship ablaze, killing an American citizen in the process. Subsequently, American officials arrested a Canadian citizen in New York for the murder which prompted a protest by the British government. See *Destruction of the "Caroline"*, 2 John B. Moore, Dig. International Law Digest § 217, at 409–14.

62. *Id.* at 412.

63. Those taking the position that Article 51 prohibits anticipatory self-defense include: LOUIS HENKIN, *How Nations Behave*, LAW AND FOREIGN POLICY (2d ed. 1979) at 141; PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 166–67 (3d ed. 1968); IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES*, 275–76 (1963); HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 797–98 (1950); L. OPPENHEIM, *INTERNATIONAL LAW* 156 (H. Lauterpacht ed. 7th ed. 1948). Those taking the position that Article 51 allows anticipatory self-defense include: Abraham Sofaer, *Terrorism, the Law, and National Defense*, 126 MIL. L. REV. 89 (1989); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 150–52 (1991); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF DEFENSE*, 172–76 (1988); D.W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 188–89 (1958); M. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 599–600 (1963).

64. Article 2(4) of the U.N. Charter provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER, art. 2(4).

attack.”⁶⁵ Those who favor a restrictive interpretation of self-defense, argue that the original Charter signatories intended to supplant customary self-defense norms and rely on new U.N. enforcement mechanisms for maintaining peace in an effort to minimize the overall use of force.

The modern, though by no means universal, trend is to interpret the U.N. Charter as not requiring a state to absorb a devastating or even lethal first strike before acting to protect itself. International law “is not a suicide pact, especially in an age of uniquely destructive weaponry.”⁶⁶ It is noteworthy that the equally authentic French version of Article 51 uses the phrase *aggression armée*, meaning “armed aggression,” instead of the more restrictive term “armed attack” contained in the English version.⁶⁷ The right to respond to armed aggression would include the right to respond to threats, since aggression can exist separate from and prior to an actual attack.⁶⁸ Even if that was not the uniform interpretation of the drafters of the U.N. Charter in 1948,⁶⁹ interpretation of the Charter must keep pace with technological developments in weaponry that render restrictive interpretations obsolete.

This division among scholars reflects the discordant practice of the United Nations as evidenced in particular by its contrary responses to the Israeli preemptory air strike against Egypt in 1967 and the Israeli bombardment of the Iraqi Osirak nuclear reactor in 1981.⁷⁰ The United Nations appeared to recognize the right of anticipatory self-defense when Israel launched a preemptory airstrike against Egypt, precipitating

65. Article 51 of the U.N. Charter provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” *Id.*, art. 51.

66. Louis R. Beres, *The Permissibility of State-Sponsored Assassination During Peace and War*, 5 *TEMPLE INT’L & COMP. L. J.* 231, 239 (1992).

67. Beth M. Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 *N.Y.U.L. REV.* 187, 202 (1984).

68. *Id.* at 202.

69. The meaning of “armed attack” may have appeared self-evident to the drafters of the U.N. Charter who had just experienced a war which began with Hitler’s massive blitzkrieg assaults (accompanied by scores of tanks, planes, and soldiers) into Germany’s neighboring states.

70. The United Nations has also taken seemingly inconsistent stands on the issue in the context of the 1986 U.S. air raid on Libya and the 1993 cruise missile attack on Iraq. The overwhelming majority of the members of the United Nations rejected the United States’ claim that the Libyan raid was justified as anticipatory self-defense as discussed below. In contrast, most members of the United Nations supported the claim by the United States that the 1993 cruise missile attack on Iraq was justified as anticipatory self-defense in light of Iraq’s attempts to assassinate former President Bush. See generally Stuart G. Baker, Note, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 *GA. J. INT’L & COMP. L.* 99 (1994).

the 1967 "Six Day War."⁷¹ Many countries supported Israel's right to conduct defensive strikes prior to armed attack and draft resolutions condemning the Israeli action were soundly defeated in the Security Council and the General Assembly.⁷²

Fourteen years later, on June 7, 1981, Israeli pilots bombed the Iraqi Osirik nuclear reactor. In a statement released after the air strike, the Israeli government justified its action as an act of self-defense, claiming that "sources of unquestioned reliability told us that [the reactor] was intended . . . for the production of atomic bombs. The goal for these bombs was Israel."⁷³ This time, the United Nations Security Council and General Assembly responded by condemning Israel for the strike.⁷⁴ However, the resolution condemning Israel did not declare that the threat to Israel was not credible, that the Israeli strike was disproportionate to the threat, or that Israel had failed to seek alternative peaceful means to resolve the crisis.⁷⁵ Those commentators who agree with the United Nations condemnation generally take the position that the Iraqi threat to Israel was not sufficiently "immediate" within the formula or

71. The Israeli air strike was in response to Egyptian President Nasser having ordered Egypt's armed forces into a state of maximum alert, terminating the presence of the United Nations peacekeeping force in his country, and closing the Gulf of Aqaba and the Strait of Tiran to Israeli shipping. A few days later, the armed forces of Syria, Jordan, and Iraq were placed under unified Egyptian command. Israel pursued alternative means to resolve the conflict by prevailing upon other nations to intercede. But with the Arab leaders issuing increasingly bellicose threats, Israel initiated a preemptory air strike against the Egyptian airfields. See Polebaum, *supra* note 67, at 193.

72. A draft resolution submitted by the Soviet Union calling for a condemnation of Israel was not accepted by the Security Council. 22 U.N. SCOR (135th mtg.) at 5, U.N. Doc. S/7951 Rev. 1 (1967). The same resolution was brought to the floor of the General Assembly for a vote and was defeated. U.N. GAOR (5th Emergency Special Session, June 17, 1967–Sept. 18, 1967) (154th mtg.) at 15–17, U.N. Doc. A/L.519 (4 July 1967).

73. Polebaum, *supra* note 67, at 205. Israel's attack on the Iraqi reactor should be viewed within the context of the following factors: (1) Since Israel was created by the United Nations in 1948, Iraq has sought Israel's destruction by participating in all wars against Israel and by rejecting all possibilities for peace. Iraq has remained in an official state of war with Israel throughout its existence. *Id.* at 218. (2) A few months prior to the bombing, the Iraqi government issued public statements suggesting that its nuclear reactor was intended to be used "against the Zionist enemy." *Id.* at 219. (3) Iraq had little need for peaceful nuclear energy in light of its vast oil reserves. *Id.* at 221. (4) Intelligence indicated that the Iraqi reactor would become operational in one to three months, after which time bombardment would endanger civilians by releasing radioactive materials. *Id.* at 222. (5) While an attempt at negotiations with Iraq would have been futile, Israel made repeated unsuccessfully diplomatic efforts to persuade the French and Italian governments to cease shipments of sensitive nuclear material to Iraq. *Id.* at 223.

74. U.N. Doc. S/RES/487 (1981); G.A. Res. A/RES/36/27 (1981).

75. U.N. Res. 487, *supra* note 74; G.A. Res. 27, *supra* note 74; See also U.N. Doc. S/PV 2285 (1981).

the spirit of *the Caroline*.⁷⁶ Yet, the action of the United Nations, "unaccompanied by clear explanations or analysis, seem[s] to represent a mere political consensus and not a legal one."⁷⁷

Notwithstanding the international community's condemnation of the Israeli attack on the Iraqi nuclear plant, the United States took similar action on August 20, 1998,⁷⁸ against a plant in Khartoum, Sudan thought to be producing the lethal nerve agent VX and other chemical weapons components.⁷⁹ The U.S. Government justified its cruise missile attack on the Al-Shifa plant by stating that the plant had no commercial uses, was closely guarded, and that its owner had close financial links to Osama bin Laden, a Saudi exile suspected of masterminding the August 1998 bombings of two U.S. embassies in Kenya and Tanzania.⁸⁰ In arguing that the attack on the Al Shifa plant was consistent with the right of self defense under Article 51 of the U.N. Charter, Ambassador Bill Richardson informed the Security Council that the attack was necessary to "deter and prevent the repetition of unlawful terrorist attacks on the United States and other countries."⁸¹ But unlike past U.S. assertions of the right of self-defense, Richardson's communication contained no evidentiary support for the U.S. assertion.⁸²

76. See Anthony D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM. J. INT'L LAW 584 (1983).

77. Polebaum, *supra* note 67, at 217.

78. This was the second time that the Clinton Administration asserted the doctrine of anticipatory-self defense to justify an attack. Five years earlier, it had relied on the doctrine to justify its June 26, 1993 cruise missile attack on the Iraqi Intelligence Service Headquarters in Baghdad in the aftermath of the failed attempt to assassinate former President Bush during his visit to Kuwait. See Statement by Ambassador Madeleine K. Albright, United States Permanent Representative to the United Nations, in the Security Council, on the Iraqi Attempt to Assassinate President Bush (June 27, 1993), USUN PRESS RELEASE 110-(93), June 27, 1993. The majority of States expressed no objections to the 1993 airstrike and seem to have largely accepted the legal justification provided by the United States; the only States that publicly condemned the U.S. action were China, Bangladesh, Yemen, Iran and Sudan. Baker, *supra* note 70, at 99-104.

79. See generally Michael Barletta, *Report: Chemical Weapons in the Sudan*, 6 THE NONPROLIFERATION REVIEW (1998).

80. CNN Interactive, *U.S. Missiles Pound Targets in Afghanistan*, Sudan (visited Sept. 16, 1998).

See also, Coordinator for Counterterrorism, U.S. Department of State, *Fact Sheet: U.S. Strike on Facilities in Afghanistan and Sudan*, United States Information Agency, August 21, 1998 (visited April 20, 1999) <<http://www.usia.gov/topical/pol/terror/98082112.htm>>

81. Letter Dated 20 August 1998 From the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/760, 20 August 1998.

82. See Statement by Ambassador Madeleine K. Albright, United States Permanent Representative to the United Nations, in the Security Council, on the Iraqi Attempt to Assassinate President Bush, June 27, 1993, USUN Press Release 110-(93), June 27, 1993 (containing photographs and detailed intelligence proving Iraqi involvement in the attempted assassination of former President Bush in Kuwait). See also, Milt Bearden, *Explaining Our*

At first, international criticism of the attack on the Sudanese plant was muted, which signaled acceptance of the principle of anticipatory self-defense in the context of the destruction of a chemical weapons facilities in the hands of a known terrorist.⁸³ However, world opinion, even among America's closest allies, began to coalesce against the United States when it turned out that Osama bin Laden had no financial connection to the Sudanese plant and that the plant actually produced drugs for treating malaria, diabetes, hypertension, ulcers, rheumatism, gonorrhea, and tuberculosis.⁸⁴ The American case was further eroded when it was discovered that the Sudanese plant had a contract with the United Nations to provide these medicines—a contract which had been approved by the United State Representative to the United Nations.⁸⁵ While the U.S. Government steadfastly refused to provide its intelligence data to dispel doubt, former U.S. President Jimmy Carter, as well as several Arab countries, demanded an independent U.N. investigation to determine whether chemical warfare agents could be detected in the remains of the factory.⁸⁶ In contrast with its support for the efforts of UNSCOM to investigate potential chemical weapons sites in Iraq, the United States blocked the Carter initiative, stating: "we don't think an investigation is needed. We don't think anything needs to be put to rest."⁸⁷

It is noteworthy that the international response to the U.S. cruise missile attack on the Sudanese plant focused on the degree of proof required, rather than the underlying legal right to launch anticipatory attacks against chemical weapons facilities. Yet, having failed to suffi-

Actions in Sudan, N.Y. TIMES, August 26, 1998, (in justifying the 1986 bombing of Tripoli, the Reagan administration released a decoded message intercepted from the Libyan mission in East Germany, which proved Libyan involvement in the Labelle Disco bombing).

83. This is to be distinguished from the international community's vocal condemnation of the United States' April 1986 air raid against targets in Libya, which were conducted in response to the Libyan bombing of a German discotheque frequented by U.S. serviceman, which is discussed below.

84. Colum Lynch, *Allied Doubts Grow About US Strike on Sudanese Plant*, THE BOSTON GLOBE, September 24, at A2; David L. Marcus, *Frank Criticizes Bombing of Plant in Sudan*, THE BOSTON GLOBE, Sept. 24, 1998, at A9. The Al Shifa plant supplied sixty percent of Sudan's pharmaceutical needs. See Barletta, *supra* note 79, at note 34. According to Sudanese doctors and health officials, the Al Shifa plant's destruction could lead to severe drug shortages endangering the lives of thousands of Sudanese. *Id.*

85. In January 1998, the Al Shifa plant had been awarded a \$199,000 contract to ship 100,000 cartons of Shifazole veterinary medicine to Iraq, as part of the U.N. oil-for-food program. See Barletta, *supra* note 79, at note 37. See also Lynch, *supra* note 84, at A2; Marcus, *supra* note 84, at A9.

86. Sudan's head of state, Omar al-Bashir, pledged that the Sudan would cooperate with a United Nations on-site investigation of the remains of the Al Shifa plant to determine whether it had been used to produce chemical weapons or precursor chemicals. See Barletta, *supra* note 79, at note 41. See also Lynch, *supra* note 84, at A2; Marcus, *supra* note 84, at A9.

87. Barletta, *supra* note 79, at notes 173–178.

ciently prove its case, the action seriously undermined U.S. credibility, making it more difficult to garner international support for such action against biological or chemical weapons facilities in the future. As a congressional critic of the attack against the Sudanese plant pointed out, "Attacking an installation in another country may be justified, but you've got to be very, very sure about the threats before launching the attack. It is important to have self-defense capability, but if you overuse it, you lose it."⁸⁸

The Sudanese bombing incident focused attention on the necessity requirement of the doctrine of self-defense. Because a preemptory attack on a chemical or biological weapons production or storage facility can pose a serious threat to the surrounding civilian population, the issue of proportionality may also become a source of controversy. A direct hit on a conventional ammunition depot will create a massive explosion; any resulting collateral damage will be limited to the immediate vicinity. In contrast, an attack on a chemical or biological weapons facility could result in the release of a deadly cloud of gas.⁸⁹ The extent of the contamination of the surrounding area would depend on prevailing environmental conditions and the physical characteristics of the chemical or biological agent.⁹⁰ A World War II allied attack on an Italian ship laden with 100 tons of mustard gas, which resulted in the release of a poisonous cloud which drifted over the port town of Bari, killing more than 1,000 civilians, demonstrated the potential for collateral damage.⁹¹ During the Persian Gulf conflict, the U.S. Department of Defense estimated that up to six million Iraqis could have been killed from the dispersion of anthrax and botulism viruses caused by a single attack on a biological weapons facility.⁹² Thus, all but the most carefully executed attacks on chemical or biological facilities will likely fail the proportionality requirement of self-defense.

2. Assassination

Consider a situation in which a particular state determines that another state plans to launch a chemical or biological surprise attack upon its population centers. Intelligence assessments reveal that the assassination of selected key figures would prevent this attack altogether. Intelligence further reveals that conventional forms of preemption would generate far greater harm, especially if the attack resulted in

88. Marcus, *supra* note 84, at A9.

89. See McClintock, *supra* note 4, at 637-38.

90. *Id.* at 637-38.

91. *Id.* at 637 n.10.

92. *Id.*

releasing the targeted chemical or biological agents. Under this scenario, would a preemptive assassination violate international law?

Just as international law is not a suicide pact, neither is it a license to kill. Assassination has traditionally been viewed as unlawful in both war and peace. Where a condition of war exists between states, international assassination constitutes a war crime. Article 23(B) of the Hague Convention IV of 1907, provides that "it is especially forbidden . . . to kill or wound *treacherously*, individuals belonging to the hostile nation or army."⁹³ The United States Army's field manual on the law of land warfare has incorporated this prohibition in the following terms: "This article . . . prohibits *assassination*, proscription or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.'"⁹⁴

Yet the 1907 Hague Convention's prohibition on assassination is not as broad as it might appear at first blush. Focusing on the "treacherous" requirement of the Hague Convention, a recent military legal analysis of war time assassination concluded that none of the following acts contravened the prohibition: (1) the November 18, 1941 raid by Scottish commandos at Bedda Littoria, Libya whose goal was to kill German Field Marshal Erwin Rommel; (2) the April 18, 1943 downing of a Japanese aircraft known to be carrying Admiral Osoruku Yamamoto by a U.S. Air Force jet fighter; and (3) the October 30, 1951 air strike by the U.S. Navy that killed 500 senior Chinese and North Korean military officers and security forces at a military planning conference at Kapsan, North Korea.⁹⁵

Where agents of one State assassinate the official of another state during peacetime, the action may constitute an internationally prohibited act of terrorism. Article 2(a) of the Convention on Internationally Protected Persons, to which the United States and most other countries are parties, criminalizes "the intentional commission of . . . murder, kidnapping or other attack upon the person or liberty of an internationally protected person," which are defined to include heads of state and other high level officials.⁹⁶ It is important to note, however, that the Internationally Protected Persons Convention accords a head of state or

93. The Hague Convention, *supra* note 9, art. 23(b) (emphasis added).

94. *Dep't of the Army, The Law of Land Warfare* art. 31 (1956) (Army Field Manual No. 27-10, Washington, D.C.) (emphasis added).

95. W. Hays Parks, Memorandum of Law: *Executive Order 12333 and Assassination*, ARMY LAWYER, Dec. 1989 (Dept. of the Army Pamphlet 27-50-204), at 5.

96. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted* Dec. 14, 1973, 28 U.S.T. 1975, 1037 U.N.T.S. 167.

state official protected status only when the official is outside his/her own country.⁹⁷

Notwithstanding these international law prohibitions, according to the results of a 1975 Senate investigation, United States presidents have instigated plots to assassinate foreign leaders in Cuba, the Congo, the Dominican Republic, Chile and South Vietnam.⁹⁸ In response to these revelations, President Gerald R. Ford promulgated Executive Order 12,333, which provides, "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."⁹⁹

Although Executive Order 12,333 has been reissued by Presidents Carter, Reagan, Bush and Clinton,¹⁰⁰ its value is more symbolic than real. A president can circumvent the ban posed by the Executive Order and legally carry out an assassination in four ways: (1) he can declare the existence of hostilities and target persons in command positions as combatants; (2) he can broadly construe Article 51 to mean that certain criminal acts justify the use of assassination as a legitimate means of self-defense; (3) he can narrowly construe Executive Order 12,333, for instance, to prohibit only "treacherous" attacks on foreign leaders; and (4) he can simply repeal or amend the order, or even approve a one time exception to it.¹⁰¹

The contours of the Executive Order were tested by the 1986 bombing of Libyan leader Colonel Muammar Qaddafi's personal quarters in Tripoli in response to Libyan involvement in the bombing of the La Belle Disco in West Berlin. According to investigative reporter Seymour M. Hersh, who spent three months interviewing more than seventy current and former officials in the White House, the State Department, the C.I.A., the National Security Agency, and the Pentagon, Qaddafi's assassination was the primary goal of the Libyan bombing.¹⁰² Hersh reported that nine of the eighteen American fighter jets that flew

97. The Convention defines "Internationally protected person" as: "Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him." *Id.*, art. 1(1)(a).

98. Select Comm. to Study Governmental Operations, With Respect to Intelligence Activities, Alleged Assassination Plots Involving Foreign Leaders, S. REP. NO. 465, 94TH CONG., 1ST SESS. (1975).

99. EXEC. ORDER NO. 12,333, 3 C.F.R. 90 (1976).

100. Boyd M. Johnson, III, *Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader*, 25 CORNELL INT'L L. J. 401, 403 (1992).

101. *Id.*

102. Seymour M. Hersh, *Target Qaddafi*, N.Y. TIMES MAGAZINES, Feb. 22, 1987, at 17-19.

to Tripoli on April 14, 1986, had a specific mission to target Qaddafi and his family.¹⁰³ One well-informed Air Force intelligence officer as stated that "There's no question they were looking for Qaddafi. It was briefed that way. They were going to kill him."¹⁰⁴ The Reagan administration characterized the attack as a legitimate self-defense operation under Article 51 in light of evidence that Libya was planning future terrorist attacks against the United States,¹⁰⁵ an assertion that was rejected by an overwhelming majority of the members of the United Nations.¹⁰⁶ Shortly thereafter, Senior Army lawyers made public a memorandum that concluded that Executive Order 12,333 was not intended to prevent the United States from acting in self-defense against "legitimate threats to national security."¹⁰⁷

During the Persian Gulf War in 1990, Air Force Chief of Staff Michael J. Dugan publicly stated that the United States might seek to "decapitate" Iraqi leadership by targeting Saddam Hussein, his family and even his mistress.¹⁰⁸ This statement resulted in a great deal of outrage in the United States and abroad, and refocused attention on the permissibility of assassination as an instrument of U.S. policy.¹⁰⁹

Yet, in the aftermath of the Persian Gulf conflict, an increasing number of scholars have suggested that assassination has become a legitimate preemptive strategy in light of the growing destructiveness of current weapons.¹¹⁰ By analogy with the domestic criminal law concept

103. *Id.*

104. *Id.* at 20.

105. President's Address to the Nation, DEP'T ST. BULL., June 1986, at 1-2 (Apr. 14, 1986).

106. Of America's traditional allies, only Britain, Israel, and South Africa supported the raid. Almost every other State, including many of the United States' allies, resoundingly rejected the legitimacy of the United States' reliance on Article 51 as legal authority for the Libya raid. The United Nations General Assembly adopted a resolution condemning "the armed attack by the United States of America in violation of the Charter of the United Nations and the norms of international law," and the United States had to exercise its veto to prevent a similar resolution from being adopted by the Security Council. Baker, *supra* note 70, at 101, 103-04, 105-06.

107. Parks, *supra* note 95, at 8. The Clinton Administration has recently reconfirmed this position. *Deadly Force Against Terrorists is Legal, White House Officials Assert*, THE BOSTON GLOBE, October 29, 1998, at A29.

108. Robert F. Turner, *Killing Saddam: Would it be a Crime?*, THE WASHINGTON POST, October 7, 1990, at D1.

109. When Secretary of Defense Richard Cheney learned of Dugan's remarks, he immediately fired him, explaining to reporters that Dugan's comments constituted a potential violation of the U.S. ban on assassination. Johnson, *supra* note 100, at 403.

110. See Louis R. Beres, *The Permissibility of State-Sponsored Assassination During Peace and War*, 5 TEMPLE INT'L & COMP. L. J. 231, 240 (1992); Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 646 (1992); Turner, *supra* note 108, at D1.

of "necessity,"¹¹¹ these commentators argue that assassination can be justified under a balance of harms analysis, provided that the following conditions are satisfied.

First, a state must make a good faith effort to circumscribe potential targets to include only those authoritative persons in the prospective attacking state. Second, the assassination must comply with the settled rules of warfare as they concern discrimination, proportionality, and military necessity. Third, state-gathered intelligence must evidence, beyond a reasonable doubt, preparations for unconventional or other forms of highly destructive warfare projected against the acting state. Finally, the state must have decided after careful deliberation that an assassination would in fact prevent the intended aggression, and that it would cause substantially less harm to civilian populations than alternative forms of self-help.¹¹²

While anticipatory self-defense can be subject to abuse, the risk of unleashing the assassination genie from the bottle is even greater. The prohibition on assassination provides protection to the country's own leaders who would otherwise be vulnerable to assassination plots by other states. A reversal of this customary restraint "could unleash a chain reaction of transnational assassinations and a substantial breakdown of diplomatic relations."¹¹³ In addition to the risk of retaliation, targeting specific individuals may unintentionally strengthen enemy morale and resolve. Finally, the targeted individuals are likely to be replaced by others who will continue their threatening policies or by even less acceptable alternatives. According to Professor Michael Reisman of Yale Law School, "while tyrannicide might present a compelling justification for assassination, assassination in any form presents a cascading threat to world order."¹¹⁴ For this reason, large numbers of other States are likely to oppose the use of assassination as a means of enforcing international law, even if it can be legally justified as a legitimate act of self-defense.

It is noteworthy, however, that there was almost no international opposition to the August 20, 1998, U.S. cruise missile attack against

111. See Model Penal Code, Section 3.02 (1985) (providing that conduct believed necessary to avoid some harm is justifiable if "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."); Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & C. 289 (1974).

112. Beres, *supra* note 110, at 240.

113. *Id.*, at 231, 241.

114. W.M. Reisman, *Covert Action*, 20 YALE J. INT'L L. 419, 424 (1995).

terrorist bases in Khost, Afghanistan in an attempt to eliminate Osama bin Laden and his lieutenants.¹¹⁵ International outrage has focussed entirely on the attack on the Al-Shifa plant in Sudan, which was launched on the same day.

C. Criminalization

The prohibitions embodied in the 1908 Hague Convention, the 1925 Geneva Protocol, the Biological Weapons Convention, and the Chemical Weapons Convention are directed to the actions of states, not individuals. Although the Biological and Chemical Weapons Conventions contain provisions obliging each State party to prohibit persons under their jurisdiction from undertaking activities that are forbidden by the treaties, these provisions fail to deal with the situation in which an offender is present in a state that has not established or otherwise lacks jurisdiction to prosecute, or is complicit with the offender.¹¹⁶ An approach with great potential, but which has not yet been pursued is to apply international criminal law to prosecute and punish offending leaders before an international tribunal or domestic courts.

1. Prosecution Before International Criminal Tribunals

On May 25, 1993, the U.N. Security Council, acting under Chapter VII of the United Nations Charter, established the International Criminal Tribunal for the Former Yugoslavia (the Tribunal) to prosecute persons responsible for war crimes, genocide, and crimes against humanity during the Balkan conflict.¹¹⁷ This was the first international war

115. See CNN Interactive, *U.S. Missiles Pound Targets in Afghanistan, Sudan*, Aug. 21, 1998, (visited Sept. 16, 1998) <<http://www.cnn.com/US/9808/20/us.strikes.02/index.html>>.

116. Unlike the Grave Breaches provision of the Geneva Convention, there is no universal jurisdiction or a duty to prosecute persons who violate the 1908 Hague Convention, the 1925 Geneva Protocol, the 1972 Biological Weapons Convention, or the 1992 Chemical Weapons Convention. See Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41 (1996).

117. S.C. Res. 827, U.N. SCOR, 48th Sess., at 29, U.N. Doc. S/INF/49 (1994), reprinted in 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 177 (1995) [hereinafter MORRIS & SCHARF, INSIDER'S GUIDE]. See also the record of the debate leading to the adoption of Resolution 827, U.N. SCOR, 48th Sess., 3217th mtg. at 16, U.N. Doc. S/PV.3217 (1993), reprinted in MORRIS & SCHARF, INSIDER'S GUIDE, *supra* at 179, 188. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, annexed to UNITED NATIONS, REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 (1993), U.N. Doc. S/25704 (1993), reprinted in MORRIS & SCHARF, INSIDER'S GUIDE, *supra* at 1.

crimes tribunal established since the Nuremberg and Tokyo Tribunals following World War II.

During the next two years, the judges for the Tribunal were elected, Rules of Procedure and Evidence were promulgated, a Headquarters Agreement was entered into, the Tribunal's Prosecutor and Registrar were appointed, courtrooms, offices, and a jail were constructed at The Hague, a staff of over 500 persons was hired, seventy persons were indicted, and trials were commenced.¹¹⁸ The expenses of the Yugoslavia Tribunal (\$60 million in 1998) are covered by a combination of the assessed contributions of the Member States of the United Nations and the voluntary contributions of States, international organizations, and private entities.¹¹⁹

A year after the Security Council decided to establish an ad hoc tribunal for the former Yugoslavia, it created a second ad hoc tribunal to prosecute those responsible for the genocidal murder of 800,000 members of the Tutsi Tribe in the small central African country of Rwanda.¹²⁰ The creation of the Rwanda Tribunal demonstrated that the international judicial machinery designed for the Yugoslavia Tribunal could be employed for other specific circumstances and offenses, thereby avoiding the need to reinvent the wheel in response to each humanitarian crisis of similar magnitude.

The two ad hoc Tribunals have jurisdiction over *inter alia* violations of the 1908 Hague Convention, which as stated above, prohibits the use of poisonous weapons, as well as the deployment of weapons "calculated to cause unnecessary suffering." In addition to the use of biological and chemical weapons, the Tribunals' jurisdiction also covers planning and preparation which includes production and stockpiling.¹²¹ The Security Council could go even further and expressly endow a new ad hoc tribunal with subject matter jurisdiction over breaches of the Biological Weapons Convention and the Chemical Weapons Convention, in addition to the 1908 Hague Convention.¹²²

118. See generally MORRIS & SCHARF, INSIDER'S GUIDE, *supra* note 117.

119. *Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, at 43-44, U.N. Doc. A/51/292-S/1996/665 (1996).

120. Statute of the International Tribunal for Rwanda, annexed to S.C. Res. 955, U.N. SCOR, 3453rd mtg. at 20, U.N. Doc. S/RES/955 (1994), reprinted in 2 VIRGINIA MORRIS AND MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 3 (1998) [hereinafter MORRIS & SCHARF, TRIBUNAL FOR RWANDA].

121. Yugoslavia Tribunal Statute, art. 7(1), U.N. Doc. S/25704 (1993); Rwanda Tribunal Statute, art. 6(1), U.N. Doc. S/RES/955 (1994).

122. Given the large number of parties, these conventions could be said to reflect customary international law. But even if they do not, it is perfectly fair to use them as the basis

On March 13, 1998, the U.S. Senate passed Concurrent Resolution 78 by a vote of 93 to 0, "call[ing] for the United Nations to form an international criminal tribunal for the purpose of indicting, prosecuting, and imprisoning Saddam Hussein and any other Iraqi officials who may be found responsible for . . . violations of international humanitarian law."¹²³ Iraq, which has produced, stockpiled, and used biological and chemical weapons, would seem to be an ideal candidate for a third Security Council created Tribunal. After all, the Security Council has repeatedly condemned Iraq's violations of international humanitarian law generally and violations of the conventions prohibiting biological and chemical weapons in particular. It has warned Iraq that individuals, as well as the Government of Iraq, would be held liable for such violations. It has called on Member States to submit information about Iraqi violations of international humanitarian law committed during the Gulf War,¹²⁴ and it has established a Commission to document subsequent Iraqi violations of the biological and chemical weapons conventions.¹²⁵

It is important to bear in mind that the effectiveness of such a tribunal does not require that the violating State be vanquished and that the victor State(s) have custody of those accused of violating the biological and chemical weapons conventions. There would be utility in obtaining an international indictment of Saddam Hussein, even if, as would undoubtedly be the case, Iraq refused to surrender him to an international tribunal for trial. The indictment would render Hussein a virtual prisoner in his own country, subject to arrest if he ever steps outside its borders.¹²⁶

The procedures for indictment and the issuance of arrest warrants set forth in the Statute and Rules of the ad hoc International Criminal Tribunals may be used to stigmatize and constrain accused persons, even if the accused cannot be arrested and tried immediately. Moreover, the tribunal's process for confirmation of indictments, which has been

of an international court's subject matter jurisdiction if the country where the acts were committed is a party to them.

123. See 144 CONG. REC. S1907-105.

124. U.N. Security Council Resolution 674 (1990) 29 October 1990.

125. See *supra* note 45, at para. 8.

126. Michael Scharf and Valerie Epps, *The International Trial of the Century? A "Cross Fire" Exchange on the First Case Before the Yugoslavia War Crimes Tribunal*, 29 CORNELL INT'L L. J. 635, 661 (1996); Remarks of Dr. Roy S. Lee, Principal Legal Officer at the United Nations, Office of the Legal Counsel, *Symposium on War Crimes Tribunal*, 6 PACE INT'L L. REV. 93, 101 (1994).

described as akin to a "televised grand jury proceeding,"¹²⁷ would go a long way in documenting the international violations.

Yet, the other members of the Security Council have resisted U.S. proposals for the establishment of additional hoc tribunals. There are several reasons why the Security Council has been unwilling or unable to continue with the ad hoc approach to international criminal justice that was employed for Yugoslavia and Rwanda. The first reason, which is sometimes referred to as "tribunal fatigue," is that the process of reaching a consensus on a tribunal's statute, electing judges, selecting a prosecutor, and appropriating funds has turned out to be extremely time-consuming and politically exhausting for the members of the Security Council.¹²⁸ One Permanent Member of the Security Council, China, has openly expressed concern about using the Yugoslavia Tribunal as a precedent for the creation of other ad hoc criminal tribunals.¹²⁹ Second, the creation of ad hoc tribunals by the Security Council is viewed as inherently unfair by many countries, because the Permanent Members of the Security Council can veto any substantive action by the Security Council and thereby shield themselves and their allies from the jurisdiction of such tribunals, notwithstanding any atrocities that might be committed within their borders. The final reason for the reluctance to create additional ad hoc tribunals is economic. The expense of establishing ad hoc tribunals is seen as too much for an organization whose budget is already stretched thin.

With the overwhelming approval of the Rome Statute for a Permanent International Criminal Court in July 1998,¹³⁰ it is unlikely that the members of the Security Council would be willing to support the establishment of an ad hoc tribunal covering violations of the biological and chemical weapons regimes. Instead, they would insist that such persons be prosecuted before the new Permanent International Criminal Court. However, with U.S. opposition to the Permanent International Criminal

127. MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 151 (1997) [hereinafter SCHARF, *BALKAN JUSTICE*].

128. See MORRIS & SCHARF, *INSIDER'S GUIDE*, *supra* note 117, at 33–34 (explaining compromises necessary to gain support for the statute), 144–145 (describing difficulties in electing judges), 161–163 (discussing controversy in appointing the prosecutor).

129. *Id.* at 344 n.901, quoting statement of Mr. Li Zhaoxing of China at the time of voting on Security Council Resolution 827 (1993), which established the Yugoslavia Tribunal. U.N. Doc. S/PV.3217, 25 May 1993, at 33–34. China later abstained on Security Council Resolution 955 (1994), which established the Rwanda Tribunal.

130. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998. The Statute was approved by a vote of 120 to 7, with 20 abstentions. Of the Permanent Members of the Security Council, the United States and China voted against; France, Russia, and the United Kingdom voted in favor.

Court,¹³¹ the fate of the new tribunal remains in doubt. At a minimum, it will be several years, perhaps as long as a decade, before the Statute for a Permanent International Criminal Court receives the 60 ratifications required for it to enter into force. Even when the Permanent Court is established, its jurisdiction over use of biological and chemical weapons will be largely restricted to cases of an international armed conflict.¹³² Further, the jurisdiction of the Permanent Court would not apply to the production, transfer, or stockpiling of such weapons, unless they were ultimately used in combat.¹³³

2. Domestic Assertion of Universal Jurisdiction

In the absence of a new ad hoc tribunal or a permanent international criminal court, individual states can accomplish many of the same goals through the exercise of extraterritorial criminal jurisdiction over persons who violate the biological and chemical weapons conventions. The United States recently enacted legislation which takes a step in this direction.¹³⁴ Title 18, Section 2332a of the United States Code provides

131. Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, ASIL INSIGHT, August 1998; *Prepared Statement of Professor Michael P. Scharf Before the Senate Foreign Relations Committee*, FEDERAL NEWS SERVICE, July 23, 1998; Thomas W. Lippman, *America Avoids the Stand: Why the U.S. Objects to A World Criminal Court*, WASHINGTON POST, July 26, 1998, at C1.

132. The Permanent International Criminal Court would have jurisdiction over "serious violations of the laws and customs applicable in international armed conflict" including:

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are subject of a comprehensive prohibition . . ."

Supra note 130, at art. 8(2)(b) (xvii), (xviii), and (xx). In the case of an internal armed conflict, the Court has jurisdiction over, inter alia, persons responsible for "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities." *Id.*, at art. 8(2)(e)(i).

133. *Id.*, art. 25.

134. The provisions creating U.S. jurisdiction over biological and chemical weapons attacks against U.S. nationals were part of a package of anti-terrorism provisions enacted in the aftermath of the bombing of a federal building on April 19, 1995 in Oklahoma City. See Roberta Smith, *America Tries to Come to Terms With Terrorism: The United States Anti-Terrorism and Effective Death Penalty Act of 1996 v. British Anti-Terrorism Law and International Response*, 5 CARDOZO J. INT'L & COMP. L. 249, 260-262 (1997); Thomas C. Martin, Note, *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEGIS. J. 201, 205-06 (1995). There is scant legislative history for the provisions on biological and chemical weapons, which at the time were not viewed as among the more important aspects of the legislation. See H.R. CONF. REP. NO. 104-518, at 119-27 (1996), reprinted in 1996 U.S.C.C.A.N. 924, 952-60.

that any person who, "without lawful authority," person uses or threatens, attempts, or conspires to use a weapon of mass destruction, including any biological agent, toxin, or vector, against a national of the United States shall be punished, whether such national is within the United States or not.¹³⁵ Section 2332c of that Title similarly punishes any person who, "without lawful authority," uses, or attempts or conspires to use a chemical weapon against a national of the United States while such national is outside or within the United States.¹³⁶ These criminal provisions are based on the "passive personality" theory of jurisdiction, which provides jurisdiction to the United States based on the nationality of the victim.¹³⁷

There are several potential defenses to criminal proceedings under 18 U.S.C. Sections 2332a and 2332c for a person such as Saddam Hussein. First, the law does not cover production or stockpiling; it covers only the *use* of biological or chemical weapons, and then only when such use is against a U.S. citizen.¹³⁸ On the other hand, production and stockpiling could be deemed overt acts which are part of a conspiracy to use such weapons, which is covered. Second, as leader of Iraq, Hussein's decision to order the production, stockpiling, or use of biological or chemical weapons would be within the scope of his Presidential authority, thereby falling outside the statute's prohibition. However, since such acts are in violation of international law, a court might conclude that "lawful authority" is absent. Finally, Saddam Hussein could rely on Head of State immunity to quash an indictment brought under this statute while he continues to serve as President of Iraq.¹³⁹ However, recent cases involving Ferdinand Marcos of the Philippines, Manuel Noriega of Panama, and Radovan Karadzic of Bosnia¹⁴⁰

135. 18 U.S.C. § 2332(a) (1997).

136. 18 U.S.C. § 2332(c) (1997).

137. See generally Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1 (1993).

138. This in part explains why Osama bin Laden has been indicted for his role in the Kenya and Tanzania embassy bombings, but not for producing chemical weapons at the Al Shifa plant. See Colum Lynch, *US Indicts Bin Laden in Killings*, THE BOSTON GLOBE, November 5, 1998, at A9.

139. See generally Shobha Varughese George, *Head-of-State Immunity in the United States Courts: Still Confused After All These Years*, 64 FORDHAM L. REV. 1051 (1995).

140. See *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("[T]here is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American law."); *U.S. v. Noriega*, 746 F. Supp. 1506, 1519 n.11 (S.D. Fla. 1990) ("[T]here is ample doubt whether head of state immunity extends to private or criminal acts in violation of U.S. law."); *Cf. Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994) ("[W]e doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state."). But see *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994) (rejecting

suggest that U.S. courts might find the doctrine inapplicable in a criminal case involving flagrant violations of international and U.S. law.¹⁴¹

The Harvard Sussex Program on Chemical and Biological Warfare Armament and Arms Limitation has proposed a "Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological or Chemical Weapons" (hereinafter Harvard Draft Convention).¹⁴² The Harvard Draft Convention, which is appended at the end of this article, is modeled upon the several anti-terrorism conventions which provide for universal jurisdiction and require States to either prosecute or extradite (*aut dedere aut judicare*) offenders found within their territory.¹⁴³

The Harvard Draft Convention avoids the deficiencies inherent in the current U.S. legislation in three ways. First, the Harvard Draft Convention is based on "universal jurisdiction," which provides State Parties jurisdiction over individual offenders present in their territory irrespective of any nexus to the offense. Like pirates, those who violate the international prohibitions related to chemical and biological weapons would thereby become *hostis humani generis* "an enemy of all humankind." Any State party in which such persons are found would have a duty "without exception whatsoever" to either prosecute or extradite the alleged offender to another State or international tribunal for prosecution. Second, the Harvard Draft Convention explicitly covers the

the dicta of *In re Doe* and finding that such a "theory for circumventing head-of-state immunity is unacceptable.")

141. Head-of-state immunity is based on the doctrine of comity. Thus, U.S. courts traditionally defer to the State Department's view as to whether head-of-state immunity should apply in a particular case. See George, *supra* note 139, at 1061, 1067. In contrast to a civil suit brought by a private party, in a criminal matter brought by the United States a court should assume, even without specific State Department guidance, that the U.S. Government has weighed the foreign policy implications and determined that head-of-state immunity would be inappropriate under the circumstances.

142. Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological or Chemical Weapons, *drafted* Aug. 15, 1998 (on file with the author).

143. See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988), 27 I.L.M. 672; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 23 I.L.M. 1027, 24 I.L.M. 535; Convention on the Physical Protection of Nuclear Material (1980), 18 I.L.M. 1422, T.I.A.S. 11080; International Convention Against the Taking of Hostages, Dec. 4, 1979, 18 I.L.M. 1456, T.I.A.S. 11080; Convention on the Prevention of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 8532 T.I.A.S. 1975, 1035 U.N.T.S. 167; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 25 U.S.T. 564, 7570 T.I.A.S. 590; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. 7192, 860 U.N.T.S. 105. The latest anti-terrorism convention with the prosecute or extradite formula is the International Convention for the Suppression of Terrorist Bombings, which was opened for signature in January, 1998. A/RES/52/164.

development, production, stockpiling, and transfer, as well as actual use, of biological or chemical weapons. Third, it expressly provides that Head of State or diplomatic immunity is inapplicable to these crimes,¹⁴⁴ and denies the defense of superior orders.¹⁴⁵

While it would certainly help close the gap between the international law prohibiting chemical and biological weapons and the enforcement of that law, the Harvard Draft Convention should not be viewed as a panacea. In light of past politically-motivated, false accusations of violations of the chemical and biological weapons conventions,¹⁴⁶ proceedings before domestic courts exercising universal jurisdiction may not possess the same credibility or carry with them the same international reprobation as proceedings before a neutral international tribunal would. A second weakness inherent in a regime requiring

144. Other international conventions which exempt offenders from claiming diplomatic or head-of-state immunity include: Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 4, 78 U.N.T.S. 277 (1951) ("Persons committing genocide or any of the other acts enumerated . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."); and International Convention on the Suppression and Punishment of the International Crime of Apartheid (1973), 28 U.N. GAOR, Supp. No. 30, U.N. Doc. A/9030 ("International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State"). The Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda similarly provide, "[T]he official position of any accused person, whether as head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment." *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, art. 7(2), annexed to UNITED NATIONS, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25704 (1993), reprinted in MORRIS & SCHARF, *INSIDER'S GUIDE*, *supra* note 117; *Statute of the International Tribunal for Rwanda*, art. 6(2), annexed to S.C. Res. 955, U.N. SCOR, 3453 mtg. At 6, U.N. Doc. S/RES/955 (1994), reprinted in MORRIS & SCHARF, *TRIBUNAL FOR RWANDA*, *supra* note 120.

145. The illegitimacy of the defense of superior orders for international crimes was recognized in the Charter of the Nuremberg Tribunal and has been reaffirmed in the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. See MORRIS & SCHARF, *TRIBUNAL FOR RWANDA*, *supra* note 120, at 262-68. Current U.S. law, in contrast, recognizes the defense of superior orders unless the order was manifestly illegal, that is "a man of ordinary sense and understanding" would know the order was illegal. See *United States v. Calley*, No. 26875, 1973 WL 14894 (C.M.A. Dec. 21, 1973); see also JORDAN PAUST ET AL., *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* 1373-76 (1996).

146. For years, the United States government maintained that it had evidence of Soviet responsibility for the use of biological weapons known as "yellow rain" in Indochina from 1982 to 1986. See Zilinskas, *supra* note 25, at 984, 986. While many commentators continue to cite the yellow rain episode as a breach of the biological weapons convention, there is reason to believe that the story was fabricated by the United States as part of its cold-war disinformation campaign and as a way to justify further U.S. biowar research and handsome congressional appropriations. Julian Robinson, Jeanne Guillemin & Matthew Meselson, *Yellow Rain in Southeast Asia: The Story Collapses*, in *PREVENTING A BIOLOGICAL ARMS RACE*, Ch. 10 (Susan Wright ed. 1990).

domestic prosecutions concerns protection of sensitive intelligence sources and methods. It is one thing to share satellite surveillance photos, telephone intercepts and information gathered by undercover operatives with other governments in a closed session of the Security Council, which may be necessary to justify use of force or imposition of sanctions; it is quite another to have to divulge such information in open court as would be required in a criminal prosecution.¹⁴⁷ Finally, international adoption of the Harvard Draft Convention would have a significant deterrent effect, but it could no more guarantee an end to all chemical and biological weapons use than the Genocide Convention¹⁴⁸ has prevented outbreaks of genocide in the years since its adoption in 1948.¹⁴⁹

CONCLUSION

So far there have been three main stages in the evolution of international law governing chemical and biological weapons. First, an international treaty regime prohibiting these weapons was established, a prohibition that is now recognized as customary international law. Second, this treaty regime was expanded and fortified by filling in existing gaps. Third, a verification regime was created, which enabled the international community to detect and publicize non-compliance. To retain vitality, the prohibition on chemical and biological weapons requires that there be an expectation of consequences to its violation. The next stage in the evolution will focus on strengthening the means of enforcement.

The traditional means of enforcement relies on the United Nations Security Council, which may impose a range of sanctions, including the use of force, to enforce the international prohibition on chemical and biological weapons. However, the Security Council's robust response to Iraq's possession of biological and chemical weapons in the aftermath of its invasion of Kuwait has been the exception. More often, the Security Council has been paralyzed by the threat or use of the veto by the

147. This prospect may deter governments from making extradition requests or indicting persons for violations of the chemical and biological weapons conventions.

148. *Supra* note 144.

149. The existence of the widely ratified Genocide Convention, with its similar universal jurisdiction regime and extradite or prosecute requirement, did not prevent the extermination of 750,000 Ugandans (1971–1987), the annihilation of 2 million Cambodians (1975–1979), the massacre of 200,000 East Timorans (1971–1987), the gassing of 100,000 Kurds in Iraq (1987–1988), the slaughter of 250,000 Muslims in Bosnia (1992–1995), or the mass murder of 800,000 Tutsis in Rwanda (1994). *See* SCHARF, *BALKAN JUSTICE*, *supra* note 127, at xiii–xiv.

permanent members, and has taken no action in response to repeated violations of the chemical and biological weapons conventions.

In light of the Security Council's repeated failure to take effective action to eliminate the threat posed by a State's possession of chemical or biological weapons, States may increasingly be tempted to act unilaterally, following the example of the American attack on the Sudanese chemical weapons plant in August 1998. However weak the evidence concerning the Al-Shifa plant turns out to be, the attack sets an important precedent on which States may choose to rely in dealing with terrorist or state-sponsored biological and chemical weapons threats. The danger of abuse created by an expansive interpretation of Article 51 to permit assassination is even greater than it is where it is interpreted to permit attacks on suspected chemical and biological weapons. But at some point, the danger to international stability created by permitting radical leaders such as Saddam Hussein to use biological and chemical weapons with impunity exceeds the danger posed by the potential for nations to abuse an expanded interpretation of Article 51 for their own illegitimate ends.¹⁵⁰

Deterrence and enforcement of the chemical and biological weapons conventions presently relies on the threat or imposition of sanctions or military force, both of which are blunt instruments which tend to harm the innocent population and infrequently succeed in altering the policies of the responsible rulers. A third means of enforcement, which would supplement rather than replace the traditional approaches, is to apply international criminal law to prosecute and punish offending leaders in domestic courts or international tribunals.

The international criminalization of chemical and biological weapons violations through the establishment of ad hoc international tribunals and/or a regime of universal jurisdiction, using the Harvard Draft Convention as a model, would have many benefits. First, it could potentially strengthen the norm against chemical and biological weapons, enhance deterrence of potential offenders, and facilitate international cooperation in suppressing the prohibited activities. Unlike sanctions and the use of force, criminalization avoids collective punishment by directly targeting those responsible for the international violations. In addition, criminalization can strengthen international political will to maintain sanctions and take more aggressive actions if necessary. A criminal indictment can also serve to isolate offending leaders diplomatically and strengthen the hand of domestic political

150. Baker, *supra* note 70, at 116.

rivals.¹⁵¹ Just imagine if every time Saddam Hussein's name appeared in the international press, it was followed by the moniker "indicted international criminal."

Ultimately, the success of the anti-chemical and biological weapons regimes requires the reestablishment of what author Richard Price calls the "chemical and biological weapons taboo."¹⁵² The addition of criminalization to the existing means of enforcement will go a long way toward that end.

151. This has proven effective with respect to Radovan Karadzic, the once powerful leader of the Bosnian Serbs who has been forced into hiding and politically marginalized by the international indictment and warrant for his arrest. *See* Interview with General William Nash, former Commander of the U.S. forces in Bosnia (Sept. 29, 1998) (transcript on file with the author).

152. PRICE, *supra* note 17.

APPENDIX

[Harvard-Sussex Draft, 15 August 1998]

DRAFT CONVENTION ON THE PREVENTION AND
PUNISHMENT OF THE CRIME OF DEVELOPING,
PRODUCING, ACQUIRING, STOCKPILING, RETAINING,
TRANSFERRING OR USING BIOLOGICAL
OR CHEMICAL WEAPONS

PREAMBLE

The States Parties to this Convention,

Recalling that States are prohibited by the Geneva Protocol of 1925, the Biological Weapons Convention of 1972 and the Chemical Weapons Convention of 1993, and other international agreements, from developing, producing, stockpiling, acquiring, retaining, transferring or using biological and chemical weapons, and that these prohibitions reflect a worldwide norm against these weapons;

Recognizing that any development, production and use of biological and chemical weapons is the result of the decisions and actions of individual persons, including government officials, and that these activities are now within the capability not only of States but also of other entities and of individuals;

Affirming that all persons and entities should be prohibited from engaging in these activities, and should be subject to effective penal sanctions, thereby ensuring and enhancing the effectiveness of the Geneva Protocol, the Biological Weapons Convention and the Chemical Weapons Convention;

Reaffirming that any use of disease or poison for hostile purposes is repugnant to the conscience of humankind;

Consider that biological and chemical weapons pose a threat to the well-being of all humanity and to future generations;

Resolving that knowledge and achievements in biology, chemistry and medicine should be used exclusively for the health and well-being of humanity;

Desiring to encourage the peaceful and beneficial advance and application of these sciences by protecting them from adverse consequences that would result from their hostile exploitation;

Determined, for the sake of human beings everywhere and of future generations, to eliminate the threat of biological and chemical weapons;
Have agreed as follows:

ARTICLE I

1. Any person commits an offence who knowingly:
 - (a) develops, produces, otherwise acquires, stockpiles or retains any biological or chemical weapon, or transfers, directly or indirectly, to anyone, any biological or chemical weapon;
 - (b) uses any biological or chemical weapon;
 - (c) engages in preparations to use any biological or chemical weapon;
 - (d) assists, encourages or induces, in any way, anyone to engage in any of the above activities;
 - (e) orders or directs anyone to engage in any of the above activities;
 - (f) attempts to commit any of the above offenses.

ARTICLE II

1. Nothing in this Convention shall be construed as prohibiting activities that are not prohibited under:
 - (a) the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, of 10 April 1972, or
 - (b) the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Paris on 13 January 1993, or that are directed toward the fulfillment of a State's obligations under either Convention and are conducted in accordance with its provisions.
2. In a prosecution for an offence set forth in Article 1, it shall be a defence that the accused person reasonably believed that the conduct in question was not prohibited under this Convention.

3. It is not a defence that a person charged with an offence set forth in Article I acted in an official capacity, under the orders or instructions of a superior, or otherwise in accordance with internal law.

ARTICLE III

For the purposes of the present Convention:

1. "BIOLOGICAL WEAPONS" means:
 - (a) 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;
 - (b) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.
2. "CHEMICAL WEAPONS" means the following, together or separately:
 - (a) toxic chemicals and their precursors, except where intended for:
 - (i) industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;
 - (ii) protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;
 - (iii) military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;
 - (iv) law enforcement including domestic riot control purposes. As long as the types and quantities are consistent with such purposes.
 - (b) munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;

- (c) any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).
3. "TOXIC CHEMICAL" means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.
 4. "PRECURSOR" means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multi component chemical system, that is to say, the precursor which plays the most important role on determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multi component system.
 5. "PERSON" means any natural person or, to the extent consistent with internal law as to criminal responsibility, any legal entity.

ARTICLE IV

Each State Party shall adopt such measures as may be necessary:

- (a) to establish as criminal offenses under its internal law the offenses set forth in Article I;
- (b) to make those offenses punishable by appropriate penalties which take into account their grave nature.

ARTICLE V

1. Each State Party to this Convention shall take such measures as may be necessary to establish its jurisdiction over the offenses set forth in Article I in the following cases:

- (a) when the offence was committed in the territory of that State or on board a ship or aircraft registered in that State;
 - (b) when the alleged offender is a national of that State;
 - (c) when, if that State considers it appropriate, the alleged offender is a stateless person whose habitual residence is in its territory;
 - (d) when the offence was committed with intent to harm that State or its nationals or to compel that State to do or abstain from doing any act;
 - (e) when the offence involved the use of biological or chemical weapons and victim of the offence was a national of that State.
- 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offenses set forth in Article I in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to Articles VI and VII.
 - 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.
 - 4. Jurisdiction with respect to the offenses set forth in Article I may also be exercised by any international criminal court that may have jurisdiction in the matter in accordance with its Statute

ARTICLE VI

- 1. Upon receiving information that a person who has committed or who is alleged to have committed an offence as set forth in article I may be present in its territory, a State Party shall take such measures as may be necessary under its internal law to investigate the facts contained in the information.
- 2. If it is satisfied that the circumstances so warrant, a State Party in the territory of which an alleged offender is present shall take that person into custody or shall take such other

measures as are necessary to ensure the presence of that person for the purpose of prosecution or extradition.

3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:
 - (a) communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;
 - (b) be visited by a representative of that State;
 - (c) be informed of that person's rights under subparagraphs (a) and (b).

The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, provided that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

When a State Party, pursuant to the present article, has taken a person into custody, it shall promptly notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article V, paragraph 1, and, if it considers it advisable, any other interested States Parties, of the fact that person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 of the present article shall promptly inform those States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

ARTICLE VII

1. The offenses set forth in Article I shall be deemed to be included as extraditable offenses in any extradition treaty existing between States Parties. States Parties undertake to include those offenses as extraditable offenses in every extradition treaty subsequently concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may, if it decides to extradite, consider this Convention as

the legal basis for extradition in respect of the offenses set forth in Article 1. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offenses set forth in Article I as extraditable offenses as between themselves subject to the conditions provided by the law of the requested State.
4. The offenses set forth under Article I shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with paragraph 1 of Article V.
5. The provisions of all extradition treaties and arrangements between States Parties with regard to offenses set forth in Article I shall be deemed to be modified as between State Parties to the extent that they are incompatible with this Convention.

ARTICLE VIII

The State Party in the territory of which the alleged offender is found shall, if it does not extradite such person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

ARTICLE IX

1. States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offenses set forth in Article 1, including assistance in obtaining evidence at their disposal which is necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their internal law.

ARTICLE X

None of the offenses set forth in Article I shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

ARTICLE XI

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offenses set forth in Article I or for mutual legal assistance with respect to such offenses has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

ARTICLE XII

States Parties shall cooperate in the prevention of the offenses set forth in Article 1, particularly by:

- (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those offenses within or outside their territories;
- (b) exchanging information and coordinating the taking of administrative and other measures as appropriate to prevent commission of those offenses.

ARTICLE XIII

1. Each State Party shall inform the Secretary-General of the United Nations of the legislative and administrative measures taken to implement this Convention. In particular, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established under its domestic law in accordance with paragraph 3 of Article V. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.
2. Each State Party shall, in accordance with its national law, promptly provide to the Secretary-General of the United Nations any relevant information in its possession concerning:
 - (a) the circumstances of any offence over which it has established its jurisdiction pursuant to paragraph I of Article V;
 - (b) the measures taken in relation to the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.
3. The State Party where an alleged offender is prosecuted shall communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.
4. Each State Party shall designate a contact point within its government to which other States Parties may communicate in matters relevant to this Convention. Each State Party shall make such designation known to the Secretary-General. .

ARTICLE XIV

Any dispute between States Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of justice.

ARTICLE XV

1. Ten years after the entry into force of this Convention, or earlier if it is requested by a majority of Parties to the Convention by submitting a proposal to this effect to the Secretary-General of the United Nations, a Conference of States Parties shall be held at [Geneva, Switzerland], to review the operation of the Convention with a view to assuring that the purposes of the preamble and the provisions of the Convention are being realized.
2. At intervals of seven years thereafter, unless otherwise decided upon, further sessions of the Conference may be convened with the same objective.

ARTICLE XVI

1. This Convention shall be open for signature by all States from [DATE] until [DATE] at United Nations Headquarters in New York.
2. This Convention is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.
3. This Convention shall be open to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE XVII

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the [NUMBER] instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the [NUMBER] instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day

after deposit by such State of its instrument of ratification, acceptance, approval or accession.

ARTICLE XVIII

The Articles of this Convention shall not be subject to reservation.

ARTICLE XIX

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at United Nations Headquarters in New York on [DATE].