

THE USE OF BIOLOGICAL AND CHEMICAL WEAPONS IN INTERNATIONAL AND INTERNAL CONFLICTS: THE ISSUE OF INDIVIDUAL CRIMINAL RESPONSIBILITY

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Abstract

A dispetto della proibizione dell'uso delle armi chimiche e biologiche, sancita in importanti convenzioni internazionali, gli Stati ricorrono spesso al loro impiego nei conflitti civili e internazionali. La qual cosa solleva un duplice interrogativo circa la responsabilità penale per crimini di diritto internazionale di coloro che ne ordinano l'impiego contro la popolazione civile, e la responsabilità per complicità di coloro che forniscono ai primi le materie prime che ne consentono la fabbricazione.

Despite the prohibition of the use of chemical and biological weapons, enshrined in important international conventions, States often resort to their use in civil and international conflicts. This raises a double question about the individual criminal responsibility for crimes under international law of those who order their use in war and against the civilian population, and of those who may be held accomplices, of the former ones, for supplying raw materials to manufacture those weapons.

Keywords: Chemical Weapon, Biological Weapon, International Crimes, International Criminal Tribunal, Individual Criminal Responsibility

1. Introduction

Although international conventions prohibit the use in war of asphyxiating and poisonous gases or analogous materials and ban bacteriological methods of warfare¹, States often used biological (bacteriological)² and chemical weapons³ in international and internal conflicts. The following are a few examples: Germany used such weapons in Belgium (1914); Italy in the Ethiopian war (1935); Japan in its war with China (1937, 1945); US in North Korea (1950), Vietnam (1960), Laos (1982) and in the Kampuchea war (1975); Egypt in Yemen (1967); Portugal

¹ See Art. 16 Lieber Code of 24 April 1863; The Hague Declaration on the Use of Projectiles the Object of which is the Diffusion of Asphyxiating or Deleterious Gases of 29 July 1899; Art. 23, The Hague Regulations, Annex to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907.

² For their definition see UN General Assembly, A/RES/2063 A (XXIV), 16 December 1969.

³ For their definition see Art. II of the Chemical Weapons Convention (*infra* fn 7).

in the conflicts in Angola, Mozambique and Guinea Bissau (1970-1971); Indonesia in East Timor (1976-1983); Iraq in the conflict with Iran (1980-1988); in the campaign against the Kurdish population (1988)⁴, and in the Syrian conflict⁵. Recently, a Ukrainian military unit denounced the shelling by drones of chemical weapons by the Russian army during the war of aggression⁶.

In response to this widespread usage of biochemical weapons the international community adopted the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare⁷ (1925 Geneva Protocol). This Protocol, which has 137 States Parties, was the first multilateral agreement prohibiting the use of chemical weapons and biological weapons.

However, it does not prohibit their development, production, or possession, hence the international community adopted the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction⁸ (BTWC) and then subsequently the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction⁹ (CWC).

2. Do the prohibitions on the use of biological and chemical weapons in conventional and customary international law imply individual criminal responsibility?

Despite these prohibitions, one may observe that the statutes of international criminal tribunals lack any specific reference to chemical and biological weapons.

⁴ For the historical reconstruction of these cases see H. LAUTERPACHT (ed.), *Oppenheim International Law, Disputes, War and Neutrality*, 7th ed., vol. II, London, 1952, p. 344; J. PERRY ROBINSON, *The Problem of Chemical and Biological Warfare, The Rise of Chemical and Biological Weapons*, vol. I, New York, 1971, p. 128; US Dept of Defense, *Conduct of the Persian Gulf War*, Washington DC, 1992, p. 15; A. ROBERTS, R. GUELF, *Documents on the Laws of War*, Oxford, 2000, p. 156; J.R. HILTERMANN, *A Poisonous Affair*, Cambridge, 2007, p. 34; Y. DINSTEIN, *The Conduct of Hostilities under the Law of International Armed Conflicts*, Cambridge, 2010, pp. 80-2; G.D. SOLIS, *The Law of Armed Conflict. International Humanitarian Law in War*, Oxford, 2010, p. 600.

⁵ UN Security Council, 23 September 2013, S/RES/2118 (2013); Letter from the UN Secretary-General addressed to the President of the UN Security Council, 30 June 2022, S/2022/530, which created the United Nations Joint Investigative Mechanism Reports on Chemical Weapons Use in the Syrian Arab Republic.

⁶ D. SABBAGH, *Did Russia Really Use Chemical WEapons in Ukraine? Experts are Skeptical*, 12 April 2022, in www.theguardian.com.

⁷ The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925.

⁸ London, Moscow and Washington, 10 April 1972.

⁹ Paris, 13 January 1993, on which see M. BOTHE, *The Chemical Weapons Convention: an Overview*, in M. BOTHE, N. RONZITTI, A. ROSAS (eds.), *The New Chemical Weapons Convention – Implementations and Prospects*, The Hague, Boston, 1998, p. 1.

This statutory gap creates ambiguity with regard to the criminalization of the use of these weapons by individuals in international and non-international armed conflicts. In fact, only Art. 3 (a) of the International Criminal Tribunal for former Yugoslavia (ICTY) Statute, and Art. 8 (2)(b)(*xvii*)–(*xviii*) and – after the Kampala Review Conference – Art. 8 (2)(e)(*xiii*)–(*xiv*) of the International Criminal Court Statute criminalize the use of prohibited weapons.

Specifically, under the ICTY Statute the use of poisoned weapons or weapons that cause unnecessary suffering constitutes a violation of the laws or customs of war, while under the International Criminal Court Statute the use of poison, poisoned weapons and of asphyxiating, poisonous or other gases constitutes a war crime both in international and internal conflicts.

Starting with this observation this article purports to ascertain whether under international conventional law and/or international customary law the use of these weapons – and their ancillary activities¹⁰ – is prohibited in international conflicts and/or in non-international strife. This article focuses on the potential individual criminal responsibility for such acts and analyzes the relevant international and national jurisprudence.

With respect to the imposition of individual criminal responsibility for the use of biological and chemical weapons, the 1925 Geneva Protocol is silent on the matter and so is Art. IV BTWC, while Art. VII CWC only obliges States Parties to criminalize such activities occurring in their territory or under their jurisdiction¹¹.

As far as chemical weapons are concerned, under Art. I of the CWC the 188 States Parties must not under any circumstances develop, produce, acquire, stockpile, transfer or use chemical weapons as a means of warfare, and they must not assist other States in these activities. These prohibitions are also enforceable extraterritorially, extending States' jurisdiction over prohibited acts committed by natural and legal persons who are nationals of a States Parties¹². The CWC and the BTWC are binding during peacetime and times of armed conflict, either international or internal in character¹³.

¹⁰ Ancillary activities refer, inter alia, to development, production, stockpile, purchase or transfer.

¹¹ T. DUNWORTH, R.J. MATHEWS, T.L.H. MCCORMACK, *National Implementation of the BTWC*, in *JC&SL*, 2006, p. 93 ff.

¹² Art. VII (1) CWC.

¹³ See A. GIOIA, *The Chemical Weapons Convention and its Application in Time of Armed Conflict*, in BOTHE, RONZITTI, ROSAS (eds.), *supra* fn 9, p. 383; L. TABASSI, *Impact of the CWC: Progressive Development of Customary International Law and Evolution of the Customary Norm Against Chemical Weapons*, in *Chemical and Biological Weapons Conventions Bulletin*, 2004, p. 4.

Furthermore, the importance of the criminal repression of the use of chemical and biological weapons was widely discussed by the United Nations Security Council resulting in the unanimous adoption, under Chapter VII, of Res. 1540, which urged Member States to adopt and enforce effective penal laws prohibiting the use of chemical and biological weapons¹⁴. Towards this end, the Resolution created a special *ad hoc* Committee (1540 Committee) to promote and verify compliance by Member States. Subsequently in another Resolution¹⁵, the UN Security Council required the '1540 Committee' to promote the issue of individual criminal liability and support complementary law enforcement efforts, including the implementation of controls aimed at stopping funds and services related to the production or use of these weapons.

In response to these resolutions and conventional obligations, some States Parties adopted, in their military manuals, specific rules prohibiting the use of chemical and biological weapons during international armed conflicts¹⁶.

The use of these weapons is also prohibited in non-international armed conflicts, as evidenced by the European Economic Community (EEC) Declaration of 7 September 1988 which condemned the use of chemical weapons by Iraq against civilians in 1988 as a violation of the 1925 Geneva Protocol and of international humanitarian law¹⁷.

This declaration was endorsed by a German Parliament Resolution from 27 October 1988¹⁸, by the statements of the British Foreign Office and by the German and Greek representatives on behalf of the EEC at the UN General Assembly¹⁹. These acts affirmed that the use of these weapons constitutes a serious and grave violation of international humanitarian law. Also States Parties military manuals incorporate this prohibition²⁰.

¹⁴ S/RES/1540, 28 April 2004.

¹⁵ S/RES/1673, 27 April 2006.

¹⁶ See *e.g.*, Australia's Commanders' Guide 1994, para 305; Canada's Code of Conduct 2005; Colombia's Basic Military Manual 1995; Côte d'Ivoire's Teaching Manual 2007 Book I (Basic instruction); Ecuador's Naval Manual 1989, para 6.2.5(10); France's LOAC Teaching Note 2000; Israel's Manual on the Rules of Warfare 2006; Netherlands' Handboek Militair 1995, 7-39, and Toepassend Humanitair Oorlogsrecht (1993 IV-8, para 14; New Zealand's Interim Armed Law Manual 1992, para 1704(5); US Presidential Statement on Chemical and Biological Weapons, 25 November 1969; Russian Federation Instructions of the Application of the Rules of IHL by the Armed Forces 1997, para 6 (b)(e); South Africa International Humanitarian Law, National Defence Force, 12, para 14; United Kingdom, Manual of the Law of Armed Conflicts, 2004, para 16.29, in www.icrc.org.

¹⁷ See *European Political Cooperation Documentation Bulletin* 1998, n. 92, p. 4.

¹⁸ An unofficial translation is partly available in C. LERCHE, *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1988*, in *Zeitschrift für Ausländisches und Öffentliches Recht und Völkerrecht*, 1990, p. 382 ff.

¹⁹ At 16, UN doc A/C.1/43/PV.31 (1988); A.V. LOWE, C. WARBRICK, C. GRAY, *The British Position with Regard to the Gulf Conflict (Iran-Iraq): PArt.2*, in *International and Comparative Law Quarterly*, 1991, p. 470.

²⁰ See Australia's Law of Armed Forces Manual, 2006, para 4.14-20; Cameroon's Instructor's Manual 2006, para 631; Canada's Code of Conduct 2000, Rule 3, para 10 (d); Israel's Rules of Warfare on the Battlefield 2006, 18;

Moreover, the District Court of Tokyo²¹ and the Colombian Constitutional Court declared that the prohibition against the use of chemical and biological weapons in internal conflicts constitutes customary international law and is a natural consequence of the general prohibition against attacking civilians²². The same prohibition – although expressly limited to chemical weapons – was affirmed by the ICTY Appeals Chamber in the *Tadić* Case²³ and by the European Court of Human Rights in the *Van Anraat* Case²⁴.

Furthermore, the US Second Circuit Court of Appeals in the *Agent Orange* case affirmed that international law prohibits the use of herbicide (which is chemical and/or biological in nature) when it is used as a poison designed to kill or target combatants or civilians. In sum the use of chemical and/or biological weapons as *a means or method of warfare* is forbidden and the violation of this prohibition implies individual criminal responsibility²⁵.

Accordingly, and as is apparent from States' practice, the prohibition on the use of chemical and biological weapons in international and non-international armed conflicts undoubtedly reflects customary international law²⁶, while sophisticated ancillary activities, such as financing and/or researching the development of these weapons, at present are not included in customary prohibitions but are instead outlawed by international conventions and national penal legislations²⁷.

Netherlands' Militair Juridische Dienst 2005, para 1038; UK, LOAC Manual 2004, para 15.28; US Air Force Pamphlet 110–13, International Law 1976, para 6-4(c).

²¹ *Shimoda et al v The State*, District Court of Tokyo, Judgement, 7 December 1963, para 2 (11).

²² Constitutional Court, Case n. C-225/95, LAT-40, Constitutional Revision of Additional Protocol II and the Law 171 of 16 December 1994 implementing this protocol, Judgement, 18 May 1995, para 119; Case n. C-291/2007, Judgement, 3 March 2007, paras 66-8.

²³ *Prosecutor v Tadić*, ICTY Case n. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 119-24.

²⁴ European Court of Human Rights, *Van Anraat v Netherlands*, App. n. 65389/09, Decision as to the Admissibility, 6 July 2010, paras 89-94.

²⁵ *Vietnam Association for Victims of Agent Orange/Dioxin v Dow Chemical Co*, US Court of Appeals of the Second Circuit, Judgement, 22 February 2008. See also the International Committee of the Red Cross (ICRC) study on customary IHL affirming that the use of herbicides is prohibited if they are of a nature prohibited as a chemical or biological weapon or both in international and non-international armed conflicts, J.-M. HENCKAERTS, L. DOSWALD-BECK, *Customary International Humanitarian Law*, vol. I, Cambridge, 2005, Rules 73, 74, 76, 256, 259.

²⁶ Rule 6 of the Humanitarian Policy and Conflict Research Manual on International Law Applicable to Air and Missile Warfare, 2009, in <http://www.ihlresearch.org/amw/manual>; The Commander's Handbook on the Law of Naval Operations, NWP 1-14M/MCWP 5-2.1/ COMDTPUB P5800.7, Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps. See also K. ALLEN, S. SPENCE, R.E. LEAL, *Chemical and Biological Weapons Use in the Rome Statute: a Case for Change*, 2011, p. 3, in www.vertic.org.

²⁷ See Argentina's Ley 26.247 of 2007, Armas químicas. Implementación de la Convención sobre la prohibición del desarrollo, de la producción, el almacenamiento y el empleo de armas químicas y sobre su destrucción, Art. 26; Azerbaijan's Criminal Code, Art. 206, paras 2-4; Burkina Faso's Loi n. 003-2006/AN portant application de la Convention sur l'interdiction de l'emploi des armes chimiques, 14 March 2006, Art. 3. For CW and BW, see

Although many States Parties legislations affirm that individuals using chemical and biological weapons are responsible for committing a war crime or a serious violation of the laws or customs of war, or a crime against the peace and security of mankind, depending on the target²⁸.

Specifically, the crime under international law of using chemical and biological weapons is a crime of conduct constituting a breach of international humanitarian law irrespective of whether this breach brings about a harm or injury to the prospective victims. As may be expected, the applicable legal regimes differ for ordinary national crimes and crimes under international law. This difference is highly relevant because in the latter scenario domestic courts may be competent not only on the basis of their domestic jurisdiction but also under the principle of universal jurisdiction (like Sweden, Germany and France). Moreover, with respect to crimes under international law courts are not bound by statutory limitations on prosecution.

Furthermore, States Parties may exercise their extraterritorial jurisdiction over the crime of using chemical and biological weapons when committed by foreigners abroad²⁹.

Colombia's Penal Code 2000, Art. 367; the Marshall Islands' Counter Terrorism Act 2002, Section 25; Ukraine's Criminal Code, Arts. 439-40; Uzbekistan's Criminal Code, Art. 246; Turkmenistan's Penal Code, Art. 254; Cuba's Decreto-ley n. 202 sobre la prohibición del desarrollo y del empleo de armas químicas 1999, Art. 26; Belarus's Penal Code 1999, Art. 129; Belgium's Law n. 185/1990 on new provisions that prohibit the manufacture, import, export and transit of CW and research designed for their production as well as the provision of the relevant technology; Tonga's Criminal Offences (Amendment) Act 2002, Section 78, vi).

²⁸ See Australia's Manual of the Law of Armed Forces 2006, para 13.30; Azerbaijan's Criminal Code, Art.116(1); Belarus's Criminal Code 1999, Art. 134; Bulgaria's Penal Code, Art. 415(1); Canada's Law of Armed Conflicts at the Operational and Tactical Levels 2005; BTWC Implementation Act 2004, Arts. 6-14, CWC Implementation Act 1995, c 25; Croatia's Penal Code 1997, Art. 163 (1) (2); Chile's Penal Code, Art. 437; Costa Rica's Arms and Explosives Act, n. 7530, 1995, Arts. 25, 15 and 83; Croatia's Criminal Law, 21 October 1997, Art. 163; Ecuador's Naval Manual 1989; Estonia's Penal Code 2001, paras 93, 103; Finland's Criminal Code 39/1889, amended in 2008, Chapter 1, Section 5, para 12; Germany's Code of Crimes against International Law (2002), section 12, para 1.2; New Zealand's Interim Armed Law Manual 1992, para 1704(5); Serbia's Law on the Prohibition of the Development, Production, Stockpiling, and Use of CW 2009, Arts. 3 and 45, Regulations on Implementing the Rules of International Law of War in Armed Forces of SFRY 1988, Arts. 98-9, and Armed Forces' Rules of Engagement 2007, Art. 4.4, para 82; Singapore's CW Act 2000, Section 8, and Biological Agents and Toxins Act 2005, Art. 5; South Africa's Presentation on the SA Approach to IHL, Appendix A, Chapter 4, National Defence Force 1996, para 34(f); Spain's Orientaciones. El Derecho de los Conflictos Armados, Publicación OR7-004, 2 Tomos, aprobados por el Estado Mayor del Ejército, 18 March 1996, para 3.2.c.(1) and (2); Switzerland's Federal Law on War Material 1996, Art. 7; Turkey's Criminal Code, Law n. 5237/2004, Arts. 37-9, and Law on the Prohibition of the Development and Use of CW 2006, Art. 5; UK's Manual of the Law of Armed Conflict, Ministry of Defence 2004, para 15.28.

²⁹ See Australia's Criminal Code 2003, Arts. 14-15; BiH's Criminal Code, Art. 12, para 1, c) on extraterritorial application; Latvia, Criminal Law 1999, Art. 4; Malta, Ratification of CWC Act 1997, Art. 4; FYROM's Criminal Code 2004, Art. 118; Trinidad and Tobago's Anti-Terrorism Act, Section 22 (2); Swiss Federal Law on War Material, 13 December 1996; UK's Anti-terrorism, Crime and Security Act 2001, amended 2007, Art. 7, Section 44; US Crimes and Criminal Procedure Code, Title 18, Chapter 11B, 2 on CW of 2 January 2010. See also L. TABASSI, *Legal Assistance Under the Chemical Weapons Convention: a Proposal for an Optional Protocol to the Convention?*, 2001, in www.opcw.org.

For example, this extraterritorial jurisdiction is provided for in the US Patriot Act³⁰, as amended by the Trade Sanctions Reform and Export Enhancement Act. It imposes sanctions on foreign persons who contribute to the efforts of a foreign country or entity to use chemical and biological weapons³¹. It is widely accepted that the extraterritorial extension of a State's criminal jurisdiction over the commission of grave breaches, as codified in Art. 146 of the IV Geneva Convention, is further evidence of an internationally accepted practice that connotes the existence of a rule of customary international law prohibiting the use of chemical and biological weapons.

3. Biological and chemical weapons as prohibited means of warfare under the International Criminal Court Statute: problems of interpretation

Whether the International Criminal Court's jurisdiction over crimes related to prohibited weapons should include individual criminal responsibility for the use of chemical and biological weapons was one of the controversial issues debated at the Rome Conference³². This debate resulted in a compromise among the States participating in this Conference on the text of Art. 8 (2)(b)(*xvii*)–(*xviii*) of the International Criminal Court Statute. The latter criminalizes only the use of 'poison or poisoned weapons' and 'asphyxiating, poisonous or other gases' as a war crime. This wording is akin to that used in the earliest conventions and laws regulating war and thus creates interpretation issues³³. The considerations stemming from this wording are twofold: first, the prohibited means of warfare under the International Criminal Court Statute are narrower than those under customary international law, which specifically outlaw chemical and biological weapons; and second, the lack of any specific reference to chemical and biological weapons raises

³⁰ Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Section 26, 221.

³¹ See 22 *USC*, Chapter 70 (2010), in <http://uscode.house.gov>.

³² R. CLARK, *Methods of Warfare that Causes Unnecessary Sufferings or Are Inherently Indiscriminate: A Memorial Tribute to Howard Berman*, in *California West International Law Journal*, 1998, p. 379; M. COTTIER, *Article 8*, in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., Baden Baden, 2008, p. 410.

³³ UN International Criminal Court Diplomatic Conference of Plenipotentiaries, *Summary Records of the 4th Meeting*, A/CONF.183/C.1/SR.4, SR.9, 17 June 1998, paras 16, 53. See C. DE THAN, E. SHORTS, *International Criminal Law and Human Rights*, London, 2003, p. 156; G. WERLE, *Principles of International Criminal Law*, 2nd ed., Amsterdam, 2009, p. 457.

the crucial question of what is included in the terms ‘poison or poisoned weapons’ and ‘asphyxiating, poisonous or other gases’, which are rarely featured in modern warfare³⁴.

With respect to the second consideration it was suggested that the use of chemical and biological weapons, even if it causes superfluous or unnecessary suffering, or is inherently indiscriminate³⁵, cannot amount to a crime under the International Criminal Court Statute unless chemical and biological weapons are annexed to the Statute by an amendment under Articles 121 and 123³⁶.

On the contrary, at the Kampala Review Conference the following paragraphs were included in Art. 8 (2)–(e): ‘(xiii) Employing poison or poisoned weapons; and (xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices’, to cover the use of these weapons also in internal conflicts.

Alternatively, some authors argue that the inconsistency or ambiguity³⁷ between the International Criminal Court Statute and the international customary law prohibition against the use of biological weapons and chemical weapons may be resolved by interpreting Articles 8 (2)(b)(xvii)–(xviii) and 8 (2)(e)(xiii)–(xiv) of the Statute as only including chemical arms³⁸, or only including biological contaminated with poisonous agents³⁹, or lastly as incorporating both chemical and biological weapons.

³⁴ W. SCHABAS, *The International Criminal Court. A Commentary on the Rome Statute*, Oxford, 2010, p. 244.

³⁵ As outlawed under Art. 8 (2)(b)(xx) International Criminal Court Statute.

³⁶ A. CASSESE, *International Criminal Law*, 2nd ed., Oxford, 2008, p. 95; *Draft Amendments to the Rome Statute on War Crimes, Amendment 2*, 29 September 2009 and Resolution RC/Res 5, Amendments to Article 8 International Criminal Court Statute and States Parties Assembly, Eighth Session, *Report of the Bureau on the Review Conference*, ICC-ASP/8/43, 15 November 2009, p. 33. See WERLE, *supra* fn 33, at 460, who states: ‘Even if the wording of the Statute permits the inclusion of CW and BW as “poison”, it would contradict the structure and the negotiating history of Art.8 (2)(b) ICC Statute for the use of chemical weapons and biological weapons of mass destruction to be included under Art.8 (2)(b)(xvii)’.

³⁷ Allen, Spence, Escauriaza Leal, *supra* fn 26, at 3.

³⁸ A. BOSERUP, *The Problem of Chemical and Biological Warfare, CBW and the Law of War*, vol. III London, 1971, pp. 93-6; J. GOLDBLATT, *The Biological Weapons Convention: An Overview*, 1997, in *IRRC*, 1997, p. 251; HENCKAERTS, DOWWALD-BECK, *supra* fn 25, at pp. 251-4; COTTIER, *supra* fn 32, at pp. 414–20; TABASSI, *supra* fn 13, at 2; A. CASSESE, P. GAETA, J. JONES (eds.), *The Rome Statute of the International Criminal Court*, vol. I, Oxford, 2002, pp. 406-607; S. KADELBACH, *Nuclear Weapons and Warfare*, in R. WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford, 2009, affirming that the prohibition of poisonous weapons applies exclusively to chemical warfare, in <http://www.mpepil.com>.

³⁹ I. DETTER, *The Law of War*, 2nd ed., Cambridge, 2000, p. 252.

This last interpretation was confirmed by a UN General Assembly Resolution on the interpretation of the 1925 Geneva Protocol⁴⁰, by the South African Constitutional Court in the *Basson Case*⁴¹ and by the US Second Circuit Court of Appeals in the *Agent Orange Case*. The latter prohibits the use of herbicide because it constitutes a poison made of a chemical or biological substance, confirming the blurred distinction between the prohibition of the two substances because both may be defined as poison⁴².

Indeed reading the ‘Elements of Crimes’ of Articles 8 (2)(b)(*xvii*)–(*xviii*) and 8 (2)(e)(*xiii*)–(*xiv*) of the International Criminal Court Statute on the definition of ‘poison or poisoned weapons’, and of ‘prohibited gases’ it seems that the drafters considered the effects of the employed weapons – releasing a toxic substance or a gas that causes death or serious damage to health in the ordinary course of events – as a fundamental element supporting the prohibition⁴³.

It is worth noting that the relevance of a weapon’s effects was previously also considered by the International Court of Justice in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* (1996), in which it stated that poison or poisoned weapons ‘have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate’⁴⁴. Thus, permitting the inclusion of chemical and biological weapons in this category when they cause such effects. Based on these interpretations the use of chemical and biological weapons may be *per se* a war crime.

⁴⁰ A/RES/2603 A(XXIV), 16 December 1969 on the interpretation of 1925 Geneva Protocol; Robinson, *supra* fn 4, 128; SCHABAS, *supra* fn 34, 247, noting that the ‘difference may be more cosmetic than substantive, because biological weapons and chemical weapons probably fall under the terms “asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices”’.

⁴¹ *The State v Wouter Basson (Basson case)*, Constitutional Court of South Africa, Case n. CCT30/03, Judgement, 9 September 2005, paras 179-80, affirms that the 1925 Geneva Protocol prohibits the use of chemical and biological weapons. On States’ practice, see the *Rapport fait au nom de la Commission des Lois constitutionnelles, de législation, du suffrage universel, du Règlement et d’administration générale (1) sur le projet de loi portant adaptation du droit pénal à l’institution de la Cour pénale internationale, Annexe au procès-verbal séance 14 mai 2008* and *Manuel de droit des conflits armés*, Ministère de la Défense de la République Française, Direction des Affaires Juridiques, 2001, n. 326 2007-2008, 22-3. See also US Air Force Manual of 1976, International Law: the Conduct of Armed Conflict and Air Operation, 5-6; Korea’s ICC Act 2007, Art. 14, Section 1.

⁴² See *Agent Orange Case*, *supra* fn 24, at 32.

⁴³ Germany’s Soldiers’ Manual, 1991, p. 5; Portugal’s Law n. 31/2004 adapting legislation to conform with the International Criminal Court Statute, in www.iccnw.org.

⁴⁴ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, (1996) ICJ Reports, p. 248.

4. Jurisprudence on individual criminal responsibility for the use of chemical and biological weapons and on accomplice liability

With regard to the prosecution of individuals criminally responsible for the use of chemical and biological weapons, there are few cases useful in ascertaining the relevant international legal principles, which also demonstrates the gap between the international prohibitions against their use and their effective implementation and adjudication.

This gap is probably due to the unwillingness of States to prosecute their own officials who employed such weapons, and their potential immunity, as was the case for the members of Unit 731, a Japanese military unit operating in Manchuria during World War II and accused of airdropping germs that caused contamination and epidemic outbreaks killing almost ten thousand Chinese⁴⁵.

Another case dealing with the prohibition of biological warfare is the *Basson* case. Dr. Wouter Basson was formerly the head of South Africa's chemical and bacterial weapons program during the apartheid regime. He was accused of manufacturing and providing cholera bacteria that was inserted into the water supplies of the Namibian refugee camps in the 1980s, in order to contaminate opponents of the Pretoria government.

In its judgement the South African Constitutional Court defined the placement of cholera bacteria into the water supply as one of the 'means of warfare abhorrent to humanity and forbidden by international law', recalling that 'the Geneva Protocol prohibited the use of chemical and bacteriological weapons' and that 'in 1972 the ban on bacteriological means of warfare was restated and strengthened by a specific convention designed to prohibit the manufacture and stockpiling of these agents of destruction'⁴⁶. Consequently, the South African Constitutional Court reversed the decision of the Supreme Court of Appeal of South Africa of 11 April 2002, which rejected Basson's murder charge based on section 18(2) of the Riotous Assemblies Act (1956), which excludes from South African jurisdiction conspiracies to commit serious crimes outside the borders of South Africa⁴⁷.

⁴⁵ Letter of 17 December 1998 of the Director of the Department of US Justice's Office of Special Investigation cited in fn 91 of GK Reynolds, *US Prisoners of War and Civilian American Citizens Captured and Interned by Japan in World War II: the Issue of Compensation by Japan*, Congressional Research Service US Library of Congress, 2002.

⁴⁶ See *Basson* case, para 91.

⁴⁷ *Ibid.*, paras 87, 91, 95 and 117.

The South African Constitutional Court reasoned that international obligations binding South Africa, as well as the International Covenant on Civil and Political Rights' definition of legality, allow for the adjudication of crimes committed extraterritorially even in the absence of any analogous domestic legislation.

It is worth noting that individual criminal responsibility has been imposed for the use of chemical weapons, for ordering their use and for complicity in the supply of chemical weapons' precursors⁴⁸. With respect to the use and order of the use of this weapon one may cite the *Anfal* case before the Iraqi High Tribunal (IHT)⁴⁹.

Both the trial and the appeal judgements condemn the officers of the Iraqi regime's chain of command as responsible for the 'Al-Anfal military operation' against the Kurdish population in Northern Iraq from 1987 to 1988⁵⁰, but only the trial verdict contains an in-depth analysis of the use of chemical weapons, while the appeal verdict merely affirms the sentencing.

Due to their status as officials the IHT Trial Chamber held the defendants responsible as organizers, planners, participants and executors of the attacks on the civilian population, which employed chemical weapons. The counts were adjudicated on the basis of Articles 11-13 of the Law of The Iraqi Higher Criminal Court⁵¹ on genocide, crimes against humanity and war crimes respectively. Surprisingly although these articles do not mention the 1925 Geneva Protocol, to which Iraq acceded on 8 September 1931⁵², the IHT Trial Chamber amassed a huge quantity of evidence documenting the chemical weapons strikes and held the Iraqi officials accountable based on the indiscriminate and lethal effects of the arms employed and their nature as prohibited weapons⁵³.

Hence these judgements are the first instances of a domestic court prosecuting the use of chemical weapons as crimes under international law and declaring their nature as prohibited means

⁴⁸ Art. II (3) CWC: "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 multicomponent chemical system'.

⁴⁹ *Al Anfal* case, IHT, Trial Judgement, 24 June 2007 (*Al Anfal* Trial judgement), 43; Appeal Judgement, 4 September 2009. For a comment, see J. TRAHAN, *Guide to Iraqi High Tribunal's Anfal Judgement*, in *Michigan Journal of International Law*, 2009, p. 308.

⁵⁰ *Al Anfal* Trial Judgement, 43 ff, 57 ff.

⁵¹ Law n. 10 of 2005, in law.case.edu/saddamtrial.

⁵² The Trial Chamber convicted Al-Majid for having issued a Decree in 1987 to carry on Al-Anfal operations, to use 'special ammunition' meaning chemical weapons, *Al Anfal* Trial Judgement, and to attack civilians, *ibid.*, p. 67 and p. 269. The Trial Chamber also convicted Sabir Abd-al-Aziz Al-Duri who authorized the use of chemical weapons, *ibid.*, 427.

⁵³ *Al Anfal* Trial Judgement, pp. 257, 267, 279-80, 384, ff. 71.

of warfare. Moreover, these judgements together with the *Van Anraat* case, adjudicating individual criminal responsibility for complicity in the use of chemical weapons, constitute the national jurisprudence repressing the use of chemical weapons⁵⁴.

With reference to the *crime of complicity* in the use of chemical weapons, on 23 December 2005 the District Court of The Hague convicted Mr Van Anraat, a Dutch trader of chemicals, for complicity in war crimes for aiding and abetting the violations of the laws and customs of war – using chemical weapons in the Iran-Iraq war and in the Al-Anfal campaign – perpetrated by Saddam Hussein and Al-Majid⁵⁵.

The *Van Anraat* case is one of the seminal developments in the jurisprudence related to chemical weapons as it holds a supplier of a chemical weapons precursor⁵⁶ accountable as an accomplice to war crimes. The first case of liability for aiding and abetting of the industrialists in the post-World War II trials was decided by the British Military Court in the case of *Zyklon B*. The defendant, Dr. Bruno Tesch, was convicted for supplying the Zyklon B gas to the Nazi Schutzstaffel (SS) during World War II that was used for the extermination in concentration camps.

For the Court the defendants must have been aware that the quantity of gas purchased by the SS was too large for mere pest control within the camps⁵⁷. For the Judge Advocate the fact that the accused had provided materials to the perpetrators used to commit crimes, was the *actus reus* of the criminal behavior; and the fact that the accused knew that the material they provided was being used to commit crimes, was its *mens rea*. In the summing up, the Judge Advocate discussed a “deliberate avoidance” or “conscious avoidance” principle.

Similarly, in the *Van Anraat* case the offence is not mere complicity in a crime but accomplice liability through the provision of the means used to commit a crime with the awareness that such means are the raw materials necessary for creating chemical weapons. Pursuant to Art. II (1)(a) CWC, chemical weapons mean, together or separately, ‘toxic chemical and their precursor, except where intended for purposes not prohibited under the CWC, as long as the types and quantities are consistent with such purposes’. The District Court of The Hague found that the use of chemical

⁵⁴ *Public Prosecutor v Van Anraat*, District Court of The Hague, Case n. 09/751003-04, Judgement, 23 December 2005 (*Van Anraat* DC Judgement); *Public Prosecutor v Van Anraat*, Court of Appeal of The Hague, Case n. 2200050906-2, Judgement, 9 May 2007, in www.haguejusticeportal.net.

⁵⁵ W. HUISMAN, E. VAN SLIEDREGT, *Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity*, in *Journal of International Criminal Justice*, 2010, pp. 806-7.

⁵⁶ The relevant precursor was employed to create chemical weapons that were used to commit war crimes.

⁵⁷ *Prosecutor v Tesch and others*, 18 March 1946, 1 LRTWC 93, British Military Court at Hamburg, Zyklon B Case.

weapons is prohibited under the 1925 Geneva Protocol and customary international law because it inflicts unnecessary suffering, constitutes an indiscriminate attack and violates Art. 147 IV Geneva Convention as well as common Art. 3 of the four Geneva Conventions⁵⁸.

This verdict was confirmed by the Court of Appeal of The Hague on 9 May 2007 and by the Supreme Court of the Netherlands on 30 June 2009⁵⁹. The Court of Appeal considered the crucial significance of the quantity of the precursor – thiodiglycol (TDG) – supplied by the defendant from 1985 until 1988, that provided the Iraqi regime the opportunity and the means to commit gross violations of the laws and customs of war and of the principles of international humanitarian law⁶⁰. As the mere production or stockpiling of poisonous gas is not necessarily a crime, the Dutch courts analyzed the supply of TDG to establish a causal link with the principal perpetrator and determine the criminality of the underlying conduct. When Mr Van Anraat applied to the European Court of Human Rights, on the basis that the Dutch judgements violated Art. 7 of the European Convention on Human Rights (*lex certa*), because there is no international norm prohibiting the supply of precursors, the Court stated: ‘it cannot be maintained that, at the time when the applicant was committing the acts which ultimately led to his prosecution, there was anything unclear about the criminal nature of the use of mustard gas either against an enemy in an international conflict or against a civilian population present in border areas affected by an international conflict. The applicant could therefore reasonably have been expected to be aware of the state of the law and if need be to take appropriate advice’⁶¹.

5. Concluding remarks

In the light of the international practice and jurisprudence examined above it is possible to affirm that the use of biological or chemical weapon in international and non-international armed

⁵⁸ See *Van Anraat* DC Judgement, para 1.2. See M. ZWANENBURG, G. DEN DEKKER, *Prosecutor v Frans Van Anraat, Case n. 07/10742.2009 Nederlandse Jurisprudentie*, in *American Journal of International Law*, 2010, p. 87; E. BORGWARDT, *Bernath Lecture: Commerce and Complicity: Corporate Responsibility for Human Rights Abuses as a Legacy of Nuremberg*, in *Diplomatic History*, 2010, p. 627.

⁵⁹ *Public Prosecutor v Van Anraat*, Dutch Supreme Court, Case n. 07/10742, Judgement, 30 June 2009.

⁶⁰ *Van Anraat* Court of Appeal Judgement, para 16.

⁶¹ *Van Anraat v The Netherlands*, App. n. 65389/09, ECtHR Decision, para 96. See M. ZWANENBURG, G. DEN DEKKER, *Introductory Note to the European Court of Human Rights: Van Anraat v the Netherlands*, in *International Legal Materials*, 2010, p. 1268.

conflicts is a crime under international law, and that individuals deploying these weapons may be held accountable for war crimes.

The same cannot be affirmed for their ancillary activities, unless they imply accomplice liability for the production and/or supply of these weapons. Lastly, the quasi-universal criminalization of these activities, along with the repressive case law of domestic jurisdictions – which will hopefully serve as a means of preventing related offences and of shaping individual and corporate conduct, particularly identifying import-export procedures that companies must follow in accordance with a culture of compliance and prevention – supplements the absence of jurisdiction over the employment of chemical and biological weapons under the International Criminal Court Statute, ensuring that the use of such weapons remains a crime under international law⁶².

In conclusion, the aforementioned international norms and jurisprudence are a clear warning to those who think to be immune from individual criminal responsibility, in international and domestic jurisdiction, when ordering the use of chemical and biological weapons.

It is undeniable that this is one of the few solutions to combat the impunity of the Assad Syrian regime, accused of widely using chemical weapons against its population. It is noteworthy that the actual impunity is due to the lack of recognition of the International Criminal Court jurisdiction, and to the veto expressed by two permanent member States (China and Russian Federation) for the referral of the Syrian case by the UN Security Council to the Court⁶³.

Nevertheless, the cited “post-World War II jurisprudence” may be at the origins of prosecuting industrialists and corporate actors and may give them a warning that selling goods or materials (that can be used to produce chemical weapons) may lead to their criminal accountability.

⁶² ALLEN, SPENCE, ESCAURIAZA LEAL, *supra* fn 26, p. 4; L. TABASSI, E. VAN DER BORGHT, *Chemical Warfare as Genocide and Crimes Against Humanity*, in *Hague Justice Journal*, 2007, p. 7; M. ŞENER, *Chemical Weapons and the International Criminal Court*, in *The American Journal of International Law*, 2014, p. 436. By the end of 2006, 62 percent of the 181 States Parties to the CWC had adopted national implementing legislation criminalizing acts prohibited by the Convention and 40 percent of them criminalized ancillary acts related to chemical weapons, except of course destruction.

⁶³ Independent International Commission of Inquiry on the Syrian Arab Republic, Report, 13 April 2018, in <https://www.ohchr.org>. A draft resolution that would have had the Security Council refer the situation of Syria to the International Criminal Court, was proposed by France in 2014 and was vetoed by the Russian Federation and China. See Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, UN Doc. SC/11407, 22 May 2014. T. MC CORMACK, *Chemical Weapons and Other Atrocities: Contrasting Responses to the Syrian Crisis*, in *International Law Studies*, 2006, p. 62; D. AKANDE, *Can the ICC Prosecute for Use of Chemical Weapons in Syria*, in *EJIL: Talk!*, 2013.

Therefore, businessmen may no longer hide themselves behind the *façade* of “just doing business”, and they will be obliged to abide to the UN principles of Corporate Social Responsibility⁶⁴.

This solution will also help to prevent attacks using chemical products which States are *not* required to declare or destroy under the CWC, due to their *dual-use nature* and ubiquitous commercial use. To avoid this misuse, the UN Security Council clearly condemned “any use of any toxic chemical, such as chlorine, as a weapon” in Syria and established a Joint Investigative Mechanism of the UN and the Organization for the Prohibition of Chemical Weapons, which would identify “to the greatest extent feasible” individuals, entities, groups or Governments perpetrating, organizing, sponsoring or otherwise involved in the use of chemicals as weapons in Syria⁶⁵. It may sound also a clear warning to eventual chemical or biological attacks by the Russian Federation Army in the Ukraine war.

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⁶⁴ K.R. JACOBSON, *Doing Business with the Devil: the Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, in *Air Force Law Review*, 2005, p. 171; J.S. KADYAN, *United Nations Global Compact and Corporate Social Responsibility*, in *International Journal of Science and Research*, 2016, p. 478; H. REID, *The Zyklon B Legacy and the Case for Investigating Arms Dealers Responsible for International Crimes in Myanmar*, in *The New Zealand Journal of Public and International Law*, 2020, p. 32.

⁶⁵ S/RES/2235(2015), 7 August 2015.