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Authority FO 12958  
By 88 NARA Date 5-1-01

MEMORANDUM

ACTION - 7586  
& 7163

THE WHITE HOUSE

WASHINGTON

SECRET/SENSITIVE

7-9-70

MEMORANDUM FOR THE PRESIDENT

FROM: Henry A. Kissinger *AK*SUBJECT: Issues for Decision re Submission of the Geneva Protocol  
to the Senate for Its Advice and Consent to Ratification

Acting Secretary Richardson forwarded a joint State/Defense/ACDA memorandum (Tab C) requesting your decision on three issues preparatory to forwarding a recommendation to the Senate for its advice and consent to ratification of the 1925 Geneva Protocol.

The issue of how we handle our interpretation on tear gas and chemical herbicides is the most complex. On March 10, I recommended that you authorize Senate soundings on this matter (Tab D). You approved in principle but requested that, before any action on soundings, I come back to you in 30 days (Tab D, Page 2). In the meantime, the following events have occurred:

- Agriculture, Interior and HEW have announced the suspension of the herbicide 2,4,5-T for all uses except in remote areas as tests indicate it could constitute a hazard to human fetuses.
- Deputy Secretary Packard immediately suspended the use of 2,4,5-T by US forces pending a further evaluation. [2,4,5-T and 2,4-D have been the most widely used defoliants in Vietnam; 2,4-D is also used with other chemicals; it is suspect and being studied further.]
- The Vietnamese General Staff embargoed the use of 2,4,5-T by their forces.
- Senator Fulbright, whose committee will handle the Protocol, has written you (Tab E) expressing his concern about a possible reservation on tear gas and herbicides and his belief that our long-term interests would be better served by a uniform interpretation.
- A House Foreign Affairs Subcommittee issued a report recommending that (1) the Protocol be submitted to the Senate as soon as possible; (2) the question of using tear gas and herbicides in war be left open by the Executive and/or the Senate; and (3) the US, after becoming a Party, seek agreement on a uniform interpretation of the Protocol either through a special international conference among the Parties or through established international juridical procedures.

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Issue A. How to inform the Senate and the Parties to the Protocol of our understanding that we do not consider the Protocol to prohibit the use of tear gas and herbicides in war.

NSDM 35 directed State and Defense to prepare an appropriate interpretive statement on tear gas and herbicides. The statement is to be unilateral in form and not a formal reservation.

The direction was the genesis of Option 3 below. But State and Defense Legal Advisers subsequently raised a question of legal ambiguity in the event of an adverse International Court of Justice (ICJ) opinion. This question prompted Options 1 and 2 below.

Option 1. Ask the Senate for its advice and consent to a resolution proposed by the Administration with our understanding explicitly stated therein, which resolution would be formally communicated to the other Parties.

Option 2. Advise the Senate of our understanding and of our intention to communicate it to other Parties as part of our instrument of ratification, but it would not be placed in the Senate resolution proposed by the Administration.

Options 1 and 2 are designed to protect against any possible international legal ambiguity regarding our right to use tear gas and herbicides in war. Our interpretation, communicated to other Parties formally, would have the legal effect of a reservation in the event of a subsequent ICJ advisory opinion that such agents are prohibited by the Protocol.

Communicating our understanding would place all other Parties in the position of having to choose among rejecting us as a Party, objecting to our understanding and treating it as a reservation, or being deemed to have acquiesced in our understanding.

Options 1 and 2 differ only in our approach to the Senate. Option 1 would require a Senate vote expressly on the question of tear gas and herbicides. Option 2 attempts to avoid the direct vote, but the Senators would be informed that we intend to communicate our interpretation as part of our instrument of ratification.

Option 3. Advise the Senate of our understanding, but it would be neither included in the Senate resolution proposed by the Administration nor communicated to other Parties as part of our instrument of ratification.

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Option 3 has the advantages of (1) not placing other Parties in the position of having formally to declare their opposition to our interpretation, and (2) not placing the US in the position of being the only formally interpreting Party to the Protocol with respect to the exclusion of certain agents.

The UK, Portugal, Japan and Australia have unilaterally announced policies on tear gas similar to our policy, but none has formally communicated its understanding to the other Parties. [The Japanese Diet recently gave its advice and consent to ratification of the Protocol; the UK, Portugal and Australia ratified in 1930.]

Option 3 carries some risk of an ambiguous legal right to use such agents in war if the ICJ were requested for an opinion and were to rule that the use of these agents in war was prohibited by the Protocol. If the ICJ were so to rule and we then used such agents in war, we could be considered in violation of our treaty obligations.

State and Defense Legal Advisers maintain, as does the joint State/Defense/ACDA memorandum, that such an ICJ opinion would foreclose the option to use these agents in war if we selected Option 3 as we would then have no legal right for such use.

On the other hand, ICJ advisory opinions are not legally binding though we have stated in the past, particularly when rulings were adverse to the position of the Soviet Union, that such opinions should be considered authoritative and followed by nations.

State, Defense and ACDA recommend that, before final decisions on the form of the submission are made, preliminary Senate soundings be taken on Options 1 and 2. State and ACDA believe Option 3 should be considered at least as a fallback position if it appears necessary to obtain Senate ratification. Defense considers Option 3 unacceptable.

#### Recommendation and Rationale

I recommend Option 3.

Upon reexamining the legal issues and in light of the herbicides problems and Senator Fulbright's letter, I do not think Senate soundings would accomplish much. There may be a possibility of obtaining agreement among the Senate leadership that the primary issue is US ratification of the Protocol and that no interest will be served by having the Protocol bogged down in a "Vietnam-Laos-Cambodia-tear gas-herbicides" debate, though full hearings would be expected.

I believe Option 3 provides the best mechanism for possible Senate leadership agreement. We would make our position clear in the hearings, but not by formal language in a proposed Senate resolution or in communication to the other Parties.

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On the other hand, it is normal treaty practice, for good reason, to inform other Parties of interpretations on controversial matters (Option 1 or 2). An interpretive statement would be of doubtful international legal effect unless formally communicated to the other Parties. Therefore, if we did not communicate our interpretation (Option 3) and if the ICJ were to deliver an opinion contrary to our position, I believe that we would be accused of violating our treaty obligations if we were to use these agents in war.

Nevertheless, I consider the ICJ issue largely a "red herring". While Options 1 and 2 would clearly legally reserve against an adverse opinion, in a practical sense neither would mitigate the political and psychological flak we would take in continued use of such agents. An unfavorable ICJ opinion would be embarrassing under all three options. Moreover, depending upon the circumstances and further analysis of the utility of these agents in war, we would still retain the option of abiding by such an ICJ opinion should we deem it in our interest.

Though there may be risks of international legal ambiguity later, Option 3 does not place the US in the position of being the only Party formally to submit an interpretation on the scope of the Protocol. Other Parties (e.g., Britain) have announced policies similar to our understanding, but none has formally communicated its understanding to the other Parties. Option 3 neither flags the tear gas-herbicides issue nor places every Party in the position of having to react or acquiesce, thus leading to a complex web of interlocking legal relationships.

On balance I recommend that you approve Option 3, whereby the Administration will inform the Senate of its understanding but it will neither be included in the proposed Senate resolution nor formally communicated to the other Parties.

APPROVE  DISAPPROVE \_\_\_\_\_ SEE ME \_\_\_\_\_

Issue B. Whether Presidential authorization should be required for the future use of tear gas and herbicides in war and whether some restrictions should be placed on current use in Southeast Asia.

Option 1. Require Presidential authorization for future use of these agents in war and place some general restrictions or guidelines upon their use (e.g., no use for offensive purposes in conjunction with high explosives).

Option 2. Require Presidential authorization for the future use of these agents in war, but do not affect current authorities in Southeast Asia.

Option 3. Require no authorization except that of the Secretary of Defense.

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NSDM 35 states that a follow-on NSDM on authorization will be issued.

Those favoring Presidential authorization argue that (1) the political implications of unrestricted use of these weapons are grave as demonstrated by our experience in Vietnam; (2) we should not authorize future use in war unless the need is unequivocal; and (3) these weapons may have utility in Vietnam, but their utility in other potential conflicts may be less evident.

Others argue that (1) these non-lethal weapons are of proven utility for both offensive and defensive purposes in Southeast Asia; and (2) maximum flexibility for their use should be retained.

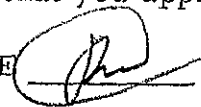
State and ACDA recommend Option 1. Defense recommends Option 3.

### Recommendation and Rationale

I recommend Option 2: that is, require Presidential authorization for future use in war without restricting present authorities and uses in Southeast Asia.

A policy of Presidential level review and decision could be very helpful in approaching the Senate. Moreover, the future utility of these weapons is still under study and, therefore, no bases exist to judge whether the weapons should constitute part of the US arsenal for the future. Since the political costs are even now high and could be higher in terms of longer-range effects, Presidential level review and decision should precede any introduction of these weapons in other theaters or conflict situations.

I recommend that you approve Option 2.

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Issue C. What rights of retaliation, if any, should the United States expressly reserve in ratifying the Protocol.

Option 1. Expressly reserve the right of retaliation with respect to chemical weapons but not with biological weapons.

This option would reflect your new policy and also codify this policy with respect to the Protocol. State and ACDA recommend this option.

Option 2. Take a reservation which states that the Protocol as a whole shall cease to be binding on us with respect to any State or its allies which fail to respect the prohibitions of the Protocol.

This option would reserve the right to retaliate with either chemical or biological weapons. It parallels reservations which all but one of the 39 reserving States have adopted since 1925. Defense prefers this option.

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Option 3. Ratify without any formal reservation respect to either chemical or biological weapons.

With respect to the 39 reserving States, we would have the reciprocal benefit of their reservation on retaliation with chemical or biological weapons. With respect to non-reserving States, we could rely upon a general rule of law, if occasion arose, to regard a material breach of the Protocol as suspending Protocol relations with any violating State.

All agencies have a fallback position in Option 3, though they agree that it does not establish our legal position as clearly as either Options 1 or 2.

### Recommendation and Rationale

I recommend Option 1, expressly reserving the right of retaliation with chemical weapons but not biological weapons. It is clear reaffirmation of your policy and would internationally signal your renunciation of biological weapons, whereas Option 2 might be interpreted as a qualification of your renunciation.

Option 3 could involve complicated explanations of our legal position, but I can live with Option 3 as a fallback position.

I recommend that you approve Option 1.

APPROVE *JR*

DISAPPROVE \_\_\_\_\_

SEE ME \_\_\_\_\_

### Summary

Attached at Tab A is a proposed memorandum to the Secretary of State for your approval which informs him of your decisions along the lines recommended.

Attached at Tab B is a draft NSDM which states that the use in war of tear gas and chemical herbicides shall require Presidential approval, but that present authorities for use in Southeast Asia are not affected. The NSDM clarifies which agents are considered in this category and reaffirms the policy of Presidential approval for the use of all other chemical weapons.

Following your decisions, I will prepare a scenario leaving the timing flexible. The proposed NSDM and memorandum to the Secretary of State will be held pending a further decision on timing.

Timmons' Office (Ken BeLieu) concurs in forwarding the issues to you for decision, but stresses that there is no current sensing of Congress because of Cambodia. His main concerns are that there should be no inconsistency with your statement of November 25 and that we should do whatever possible to take the steam out of the tear gas-herbicides issue.

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