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Memorandum received from Mr. Kissinger to the Secretary dated 8/5/70

Attention Mrs. [unclear] Keep this study together

DEPARTMENT OF STATE WASHINGTON February 18, 1970

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Copies To: U J C S/PC L ACDA S/S-S:CMS

S/S - 2534

MEMORANDUM FOR THE PRESIDENT

Subject: Submission of 1925 Geneva Protocol to Senate

POL 27-10

ACDA - C POD - C NSC - C

Recommendations:

(1) No First Use Reservation

This memorandum discusses three alternative ways of dealing with our policy of no first use of chemical weapons. State and ACDA recommend the first alternative discussed under this heading; Defense recommends the second alternative; each prefers the third alternative as a second choice.

First alternative Approved
Second alternative Approved
Third alternative Approved

(2) Follow-on NSDM on RCAs and Chemical Herbicides

NSDM 35 stated that a follow-on NSDM on use of riot-control agents (RCAs) and chemical herbicides would be issued. State and ACDA recommend that a follow-on NSDM covering use of RCAs and chemical herbicides be issued before final decisions on the form of the submission of the Protocol to the Senate are made, and that the NSDM include guidance on public statements. Defense sees no need for the NSDM prior to submission of the Protocol to the Senate and in any event objects to any public statement of restrictions on use of RCAs and chemical herbicides in specific tactical situations.

State/ACDA position Approved
Defense position Approved

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DEPARTMENT OF STATE FORMS/CR/IR Date: 5/15/97
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(3) Understandings on RCAs and Chemical Herbicides

(a) This memorandum discusses three options for handling our understanding that the Geneva Protocol does not prohibit the use in war of RCAs and chemical herbicides. The first two (Options 1 and 2) include communication of our understanding to other Parties but involve different formal action by the Senate. Option 3 would involve no formal communication of our understanding to other Parties. State, Defense and ACDA agree that Options 1 and 2 have the same international legal effect and that the choice between them should be made on the basis of Congressional soundings. State, Defense and ACDA recommend that, before final decisions on the form of the submission of the Protocol are made, coordinated preliminary Congressional soundings be taken on Options 1 and 2 (but not on Option 3).

Approved \_\_\_\_\_ Disapproved \_\_\_\_\_

(b) State and ACDA believe you should be prepared to consider Option 3 at least as a fall-back position if it appears to be the only way of obtaining Senate consent to ratification of the Protocol. Option 3 is considered unacceptable by Defense since it would not be legally effective internationally to preserve our position on RCAs and chemical herbicides in the event of an adverse ICJ opinion.

State/ACDA position on Option 3:

Approved \_\_\_\_\_

Defense position on Option 3:

Approved \_\_\_\_\_

(4) Chief Coordinator.

State, Defense and ACDA recommend that the Legal Adviser of the Department of State should be designated chief coordinator of the Administration's presentation of the Protocol to the Senate.

Approved \_\_\_\_\_ Disapproved \_\_\_\_\_

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Discussion:

Implementation of NSDM 35 with respect to Protocol

NSDM 35 records your decision to submit the Geneva Protocol of 1925 to the Senate for its advice and consent to ratification.

With respect to the renunciation of the first use of lethal and incapacitating chemical weapons, the NSDM contains no directive as to the procedure to be followed in making the Administration's policy in this respect legally effective internationally, i.e., it is silent as to whether ratification should be subject to a reservation.

With respect to legal preservation of a right to make first use of RCAs and chemical herbicides, the NSDM directs that our interpretation of the Protocol not be made by means of a "formal reservation" and that it be "unilateral in form".

Since, for reasons of brevity, the NSDM did not treat the legal distinction between reservations and interpretive statements (or understandings), nor discuss the domestic and international law requirements applicable, we need your further decision as to how to proceed in the context of the considerations outlined below.

A reservation under international law is by definition a formal statement made by a State before it becomes bound by a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. A reservation must be communicated in writing to the Parties. If no objection is made to the reservation, the treaty is modified to the extent of the reservation on a reciprocal basis between the reserving State and a non-objecting Party. A Party formally objecting to the reservation may regard the treaty as not in force at all between it and the reserving State or may elect to regard all of the treaty except for the reserved provisions as in force between them. Under United States practice, a reservation proposed by the President must receive the advice and consent of the Senate, and the Senate may also, on its own initiative, formulate a reservation as part of its resolution advising and consenting to ratification.

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An interpretive statement (or understanding) under international law is a declaration which indicates the meaning that a State attaches to a provision of a treaty but which it does not regard as changing the legal effect of the provision. Such a statement would be of doubtful international legal effect unless formally communicated to the other Parties. Under customary treaty law and the Vienna Convention on the Law of Treaties, any statement by which a ratifying State seeks to limit or otherwise condition its legal obligations under a treaty must be communicated to the Parties. Unless other Parties to the treaty formally object to the interpretation communicated to them, they are bound by it in their relations with the declaring State. If a Party disagrees with the interpretation, it may treat the interpretive statement as a reservation and apply the rules on reservations.\* Under United States law, an interpretive statement which the President proposes to communicate to other Parties must be made known to the Senate, which can either concur or acquiesce in such communication or prevent it by making clear that it does not consent to ratification with such a statement. The Senate may also, on its own initiative, formulate an interpretive statement as part of its resolution of advice and consent.

If the Senate, on its own initiative, formulates a reservation or an interpretive statement as part of its resolution of advice and consent, the President must include the reservation or interpretive statement in the instrument of ratification if he decides to ratify the treaty.

#### No First Use Reservation

The Protocol itself prohibits any use of chemical and bacteriological agents in war among Parties. The Protocol is frequently described as prohibiting "first use" since thirty-nine (including France, the United Kingdom, the Soviet Union and other major powers) of the eighty-four Parties have ratified subject to a reservation that expressly preserves the right to retaliate should chemical or bacteriological weapons be used by another State or its allies.

\* Regardless of the phrasing or designation of the statement (whether interpretation, understanding or some other name), any Party has the right to consider the substance of the statement and to treat it as a reservation if the Party considers that it excludes or modifies the legal effect of any provision of the treaty.

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There are three alternative means of dealing under the Protocol with our policy of renunciation of any use of biological weapons and first use of chemical weapons.

First, we could ratify with a reservation in the following form:

"That the said Protocol shall cease to be binding on the Government of the United States with respect to the use in war of asphyxiating, poisonous or other gases and analogous liquids, materials or devices in regard to any State if such State or any of its allies de jure or de facto fails to respect the prohibitions laid down in the Protocol."

This reservation is designed to implement our policy of no first use of chemical weapons, since the Protocol itself proscribes any use of such weapons in war. Unlike the reservations of all but one other reserving government, however, the proposed reservation does not assert the right to use biological weapons in retaliation, and thus reflects your recent announcement that we would renounce any use of such weapons. Furthermore, it does not state that the United States is bound only toward other Parties to the Protocol. Such a qualification might be redundant (in the light of the language of the Protocol itself) and seems undesirable since it would be narrower than our announced policy of no first use of chemical agents.

Second, we could ratify with a reservation in the following form:

"That the said Protocol shall cease to be binding on the Government of the United States in regard to any State if such State or any of its allies de jure or de facto fails to respect the prohibitions laid down in the Protocol."

This reservation is similar to the reservations by France, the United Kingdom, the Soviet Union and other major powers. However, like alternative 1, it does not state that the United States is bound only toward other Parties to the Protocol. It reserves the right to use both chemical and bacteriological agents in retaliation.

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Third, we could ratify without any reservation. With respect to the thirty-nine States that have ratified with reservations, we would legally have the benefit of their reservations in our relations with them to retaliate with chemicals or biologicals. With respect to each of the non-reserving States, the United States could rely upon the right under international treaty law to regard a first use by another State of materials prohibited by the Protocol as constituting a breach of that instrument which gave us the right to consider that instrument as suspended or terminated in our relations with the State committing the breach.

If this alternative is selected we should make our position clear in the President's submission of the Protocol to the Senate that we nevertheless had the retaliatory rights described above in order to offset the possible argument that, having ratified without any reservation in the face of reservations by thirty-nine other States, the United States intended to apply the prohibitions of the Protocol in all circumstances without any exception as to "first use".

State and ACDA prefer alternative 1. They consider alternative 2 undesirable since it would appear to undercut the United States renunciation of biological methods of warfare, and since they do not believe that preserving the legal right to use such methods of warfare would be necessary or particularly helpful to the negotiation of the U.K. draft convention on the prohibition of biological means of warfare. In addition, alternative 1 would establish our legal position more clearly than alternative 3, especially with respect to Parties who ratified without any reservations. Their second choice would be alternative 3, since it would not require the formal communication to other Parties of a reservation that could be claimed to be inconsistent with the United States renunciation of biological methods of warfare.

[REDACTED]

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Defense prefers alternative 2. A reservation such as alternative 1 which would assert only the right to retaliate with chemical weapons is an unnecessary unilateral international legal codification of a policy decision, and would create a significant legal imbalance between the United States and other major powers. It is unlikely to result in similar initiatives under the Protocol by the other Parties to the Protocol and would deprive the United States of a bargaining point in upcoming arms control negotiations on biological warfare. Further, since most other Parties who have made reservations have adopted the standard broad reservation, they would not be in a position to criticize us for using the same formulation. These same considerations lead Defense to prefer alternative 3 over alternative 1. As between alternatives 2 and 3, Defense prefers alternative 2 since it would more clearly establish our legal position.

#### Understanding on RCAs and Chemical Herbicides

The most sensitive issue is how we handle our understanding that the Protocol does not apply to RCAs or chemical herbicides. While the United States has maintained since at least 1930 that the Protocol does not prohibit the use of RCAs in war, a large number of other States will not agree with this understanding. Any formal communication of the United States position should be in the form of an understanding (rather than a reservation), to sustain our position that we are interpreting, rather than modifying, the Protocol. Three possible ways of handling this matter are as follows:

Option 1 - Follow the normal treaty practice of requesting the Senate to give its advice and consent to ratification with such understanding explicitly stated in its resolution, which would then be formally communicated to the Parties to the Protocol.

Option 2 - Same as Option 1 except that, while you would advise the Senate of the understanding and of your intention to communicate it to other Parties, it would not be referred to in the resolution of advice and consent. However, you could not communicate the understanding in this event if the Senate made it clear that it did not consent to your doing so, and even serious Senatorial criticism of this understanding could make its communication difficult politically.

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Option 3 - While you would advise the Senate of the understanding, it would neither be included in the resolution of advice and consent nor communicated formally to other Parties.

Whichever option is chosen, disagreement with this understanding by the Senate might be expressed in the report of the Committee on Foreign Relations or otherwise. At worst, the Senate could, by majority vote, add to the resolution of advice and consent an amendment expressing the opposite understanding. If it did so, and the resolution were passed in this form, we would be unable to carry out the decision to ratify the Protocol while preserving the right to use RCAs and chemical herbicides.

It is virtually certain that a substantial number of Parties to the Protocol will make public their disagreement with our understanding. The way in which they do so would, of course, be affected by the way in which we record our view (through formal communication or otherwise). Beyond this registering of disagreement, the most serious risks with respect to countries that disagree with our position are (i) that some Parties might refuse to accept us as a Party to the Protocol on this basis; or (ii) that the UN General Assembly might request an advisory opinion of the International Court of Justice as to the correctness of our understanding. (Such an opinion might be rendered as soon as four to six months after it is requested.)

The likelihood of such a UNGA request is difficult to judge, but it might be affected by which of the options we pursue. There is a substantial risk that the ICJ, if requested to rule, would decide that the Protocol prohibits the use of RCAs in war. It is not likely that the ICJ would determine that the Protocol prohibits the use of chemical herbicides in war. It is probable that, in any event, the ICJ would have more difficulty in ruling that customary international law prohibits the use of RCAs or chemical herbicides.

If the United States formally communicates its understanding to other Parties (Options 1 or 2), our views would have the legal effect of a reservation in the event of an adverse opinion by the ICJ. Accordingly, our legal position would be preserved as against other Parties, although we would still face difficult political problems if we wished to act contrary to the Court's opinion. If our views are not formally communicated (Option 3), we could not legally make use of RCAs or chemical herbicides in war after the ICJ decision.

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The pros and cons of the three options are briefly described below:

Option 1 (Included in Senate resolution and formally communicated)

Pros:

(1) Is consistent with our normal treaty practice of stating in Senate resolution United States understanding on important ambiguous issues and formally communicating this understanding to other Parties.

(2) Avoids any question as to the Senate's acquiescence in our understanding.

(3) Makes the issue clear in Senate consideration, thus avoiding later charges (as in Tonkin Gulf Resolution) that Senate was misled.

(4) Preserves legal right to use RCAs in war in event of adverse interpretation of the Protocol by the ICJ. (An interpretation formally communicated to other Parties would be treated as a reservation in this event.)

Cons:

(1) Requires Senate vote on our understanding, which might lead to impasse with, or rejection by, Senate.

(2) Requires other Parties to choose between rejecting United States as Party, objecting to United States interpretation and treating it as a reservation modifying the treaty to that extent, or being deemed to have acquiesced in our understanding in treaty relations with them. (Facing them with this choice would probably intensify international controversy over this issue.)

(3) Might not be effective politically (even though effective legally) in protecting the option to use RCAs and chemical herbicides in the face of an adverse ICJ opinion on the scope of the Protocol.

Option 2 (Not included in Senate resolution but formally communicated)

Pros:

(1) Does not require Senate to vote on resolution expressly stating understanding that Protocol does not prohibit use in

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war of RCAs and chemical herbicides, but would require you to advise Senate, before its vote, that you intended to communicate formally our understanding to other Parties.

(2) Same as Pro 4, Option 1.

Cons:

(1) If more than an aggregate of one-third of the Senators voting and present either voted against such a resolution of advice and consent or indicated that their affirmative vote did not constitute consent to your communicating the understanding to other Parties, you could not properly effect such communication.

(2) Could lead to charge that you are trying to mislead the Senate or limit the exercise of its constitutional prerogative in advising and consenting to a treaty.

(3) Same as Con (2), Option 1.

(4) Same as Con (3), Option 1.

Option 3 (Neither included in Senate resolution nor formally communicated)

Pros:

(1) Does not require Senate to vote on resolution expressly stating understanding that Protocol does not prohibit use in war of RCAs and chemical herbicides.

(2) Does not require other Parties to choose between rejecting United States as Party, objecting to United States understanding and treating it as a reservation, or being deemed to have acquiesced in our understanding in their treaty relations with us, and thus might avoid some of the adverse international political consequences of Options 1 and 2.

(3) Is consistent with practice of all other Parties (none have formally communicated understanding on RCAs or chemical herbicides).

(4) Would provide a possible way out of impasse if Senate unwilling to consent to ratification with our understanding on RCAs and chemical herbicides. Thus we could take the position that, unless and until an adverse ruling of the ICJ were obtained, we would continue to act in accordance with

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the understanding we have had for many years that the Protocol does not cover RCAs and herbicides, but that we would be willing to abide by a ruling of the ICJ on this question. This approach might mollify those Senators who disagreed with our understanding; our use of RCAs and herbicides pending the ICJ decision could at worst be claimed to be a mistake of law (rather than a deliberate violation of our treaty undertakings); and the political impact of an adverse ruling would be softened by our willingness to abide by it. This approach would also add to the stature of the ICJ and demonstrate our respect for international law.

Cons:

(1) Would result in foreclosing use of RCAs and chemical herbicides in future wars if adverse advisory opinion by ICJ were obtained. (If the United States were to disregard its treaty obligations as interpreted by the Court, this would seriously undermine the position of the Court and the basic cornerstone of treaty law that pacta sunt servanda.)

(2) While not requiring a Senate vote, it would not preclude a Senate debate on the issue and, as under Options 1 and 2, the Senate could on its own initiative formally or informally reject our understanding.

(3) While not requiring other Parties to take a position on our understanding, other Parties will inescapably become aware of the reaffirmation of our position during the course of the Senate hearings and debates and hence international controversy is not likely to be substantially foreclosed.

(4) If adverse opinion by ICJ is issued while Viet-Nam war is still in progress, it could be used for propaganda purposes to substantiate charges previously made that our operations have been in disregard of the laws of war in many respects. In addition, there is a substantial risk that a "mistake of law" might not be regarded as a defense (as distinguished from mitigation of punishment) in a war crimes trial of personnel sanctioning or using RCAs after our ratification of the Protocol should such persons be captured by Hanoi.

Follow-on NSDM on Use of RCAs and Chemical Herbicides

State and ACDA believe that a follow-on NSDM on the use of RCAs and chemical herbicides should be issued prior to submission

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of the Protocol to the Senate. It is their view that both Senate and international opposition to our understanding on RCAs and chemical herbicides might be reduced if Administration witnesses could testify that as a matter of policy, Presidential authorization would be required for specific uses of such agents in specific theatres, or could describe some general guidelines for such use.

Defense sees no need for the issue of a NSDM prior to submission of the Protocol to the Senate. Defense agrees that Washington level authorization would be required for the use of RCAs and chemical herbicides in specific theatres. Presidential authorization, however, appears unnecessary; Secretary of Defense authorization is considered adequate.

However, Defense believes that, with respect to public announcement of restrictions on specific use of these weapons, any statement of restrictions would be inadvisable. First, it would communicate our battlefield rules of engagement to an enemy, or to a prospective enemy, without any compensating benefit to us. Second, the utility of such a public statement in securing Senate support for ratification of the Geneva Protocol appears illusory since the initial impact of such a statement would be dissipated as soon as debate on the issue began. The result might be to create pressure for the imposition of further restrictions which, if imposed, could result in increased United States casualties in Viet-Nam and future conflicts.

The Deputy Secretary of Defense and the Director, ACDA, join in this memorandum.

  
Acting Secretary

Enclosure:

Text of the Geneva Protocol  
with list of Parties and  
Texts of Reservations.



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