

MEMORANDUM

THE WHITE HOUSE  
WASHINGTON

27 January 1970

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MEMORANDUM FOR DR. KISSINGER

FROM: Michael A. Guhin *MAH*

THRU: Robert M. Behr *RB*

SUBJECT: Current Status of the Geneva Protocol Package

*Where is the Geneva Protocol package?  
When can we move it?*

Pursuant to your request, here is the current status of the Geneva Protocol package as of this morning.

Commitment. NSDM 35 states that (1) the Administration will submit the Geneva Protocol to the Senate; (2) an appropriate interpretative statement will be prepared by State in coordination with Defense to the effect that the U.S. does not consider the Protocol prohibits the use of chemical herbicides and riot control agents in war; and (3) the statement will be unilateral in form and will not be a formal reservation.

Current Status. A lengthy State-Defense memorandum has been in the bureaucratic process since November 25 because of disagreements between the politically-minded and the legally-minded. The memorandum was forwarded to Secretary Laird's office for clearance on January 22. If he approves, the Secretary of State will forward the memorandum to the President.

Note: This memorandum is not the formal package or interpretative statement for submission to the Senate. It is a memorandum requesting decisions on two or more issues where State and Defense disagree.

These issues require decision before the formal Protocol package can be forwarded to the President. Once these issues are decided, it will take only a few days to have the formal papers sent to the White House.

However, since the memorandum setting forth the issues is quite involved, it may be held up for some time. We understand that Secretary Laird may request a meeting with you, Secretary Rogers and the President on this matter. As you know, Secretary Rogers is leaving for Africa in about ten days. An early meeting could perhaps move these

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matters off the dime.

Attached at Tab A is a description of the issues along with some of the major arguments and agency positions. (The issues may be modified after Secretary Laird considers them.) The issues center about (1) how we handle our understanding on riot control agents and herbicides; (2) what type of "no first use" reservation we take; and (3) whether, as promised in NSDM 35, the follow-on NSDM on authorization for use of riot control agents and herbicides in war should be issued before the Protocol is submitted to the Senate.

At any rate, State, Defense and ACDA are agreed that final decisions on the form of the submission of the Protocol to the Senate should not be made until a decision is reached whether the U. S. should preserve the option to retaliate with toxins. (This relates to "2" above.) We agree that the decision on toxins should be made before actually submitting the Protocol to the Senate, but there is no reason why this subject should hold up the issues memorandum.

[FYI: Japan hopes to submit the Protocol to the Diet for ratification sometime between February 14 and the end of March (Tab B). Japan will also be taking the position that the Protocol does not prohibit the use of riot control agents and herbicides in war. In order to coordinate this matter, we are making arrangements to send advance copies of the Secretary of State's report to the President and the President's message to the Senate to the GOJ.]

Conclusion. Since November 25, we have been pushing this matter daily at the bureaucratic level. Unless it receives a high level boost, it could be another two-four weeks before the issues arrive at the White House for decision.

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## OUTSTANDING ISSUES ON THE GENEVA PROTOCOL

[The information below comes from an informally transmitted draft of the State-Defense Memorandum and from working group meetings.]

### Issue A. Understanding on Riot Control Agents (RCAs) and Chemical Herbicides

There appears to be three options for handling our understanding that the Protocol does not prohibit the use in war of RCAs and chemical herbicides.

Options 1 and 2 involve communication of our understanding to other States but differ with respect to Senate action. This understanding would be in the legal form of a formal interpretation; but, of course, it could be treated as a reservation by other States. Both Options 1 and 2 are based primarily on legal considerations. Option 3 is based primarily on political considerations in that we would not formally communicate our understanding on RCAs and herbicides to other States.

Option 1. Request the Senate to give its advice and consent to ratification with the understanding on RCAs and herbicides explicitly stated in the Senate Resolution. The Resolution would then be formally communicated to the other States as part of the instrument of ratification.

The working group had originally agreed to drop this approach, but DOD persisted in its support for this option being addressed. This option would be the most legally effective internationally to preserve our position on RCAs and chemical herbicides in the event of an adverse advisory opinion by the International Court on the scope of the Protocol. If the International Court were requested to deliver an opinion, it might be rendered within four-six months after a request.

It is also argued that this approach would avoid any possibility of later charges that the Senate was misled.

In short, the Senators would be asked to vote particularly on the issue of RCAs and herbicides. At worst, the Senate could pass an opposite understanding by majority vote which would make it impossible to ratify with our understanding.

It is also very likely that, under both Options 1 and 2, a substantial number of States would make public their disagreement with our interpretation. Other States would in effect have to choose between

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rejecting our interpretation, thereby treating it as a reservation and modifying the treaty relations to that extent, or being deemed to have acquiesced in our understanding. (Other States could reject us as a Party, but this does not appear very likely.)

(Comment: We believe this approach, by placing the monkey on the Senators' backs, could both complicate the proceedings and lose some votes on the Protocol.)

Option 2. Same as Option 1, except the Senate would be advised of our understanding but it would not be referred to in the Senate Resolution. Senate would be advised, however, of our intent to communicate this understanding to the other Parties in the form of a note along with the instrument of ratification.

DOD probably supports this as a fallback position, depending upon the results of Congressional soundings. This may be the first choice of State and ACDA. However, again depending upon Congressional soundings, both State and ACDA ~~will~~ have a fallback position in Option 3.

This option is also designed to protect the U.S. legally should the International Court be requested to deliver an advisory opinion on the scope of the Protocol and in the event the Court went against our interpretation. If we had given formal notification of our interpretation to the other Parties, it could not then be said that we were legally in violation of a treaty obligation as our interpretation would become a formal reservation.

While this would protect the legal position, we would still face the political problems surrounding the use of RCAs and herbicides in war. Also, other States would have to choose between rejecting our interpretation, thereby treating it as a reservation, or being deemed to have acquiesced in our understanding.

Option 3. We would advise the Senate of our understanding, but our understanding would neither be included in the resolution of the Senate's advice and consent nor communicated formally to other Parties.

State and ACDA prefer this option as a fallback position if it appears to be the only way of obtaining Senate consent. The option would place neither the Senate nor other Parties in the position of accepting or rejecting the interpretation.

DOD probably considers this option unacceptable for legal reasons. In the event of an adverse International Court opinion, we could not legally make use of RCAs and herbicides in war.

Issue B. No First Use Reservation

There appears to be three alternatives regarding how to deal with our policy of no first use of chemical weapons.

Option 1. Reserve the right to retaliate with chemical weapons but not with biological weapons.

State and ACDA prefer this option as being most consistent with U. S. policy. Unlike the reservations of all but one other reserving government, the reservation does not assert the right to use biological weapons in retaliation. DOD probably opposes this option.

There are those who are worried about legally giving up the right of retaliation with biologicals. While we would indeed be doing such in terms of this reservation to the Protocol, we understand there is always the more limited right of reprisal under the Laws of Land Warfare. There is also a legal position which, in the event of a violation of the Protocol, could contend that the whole agreement was suspended with regard to the violating party.

However, this option could leave questions as to whether we had the right to retaliate with toxins since, in terms of the negotiating history of the Protocol, other Parties might claim that toxins should be considered bacteriological methods of warfare in interpreting the Protocol.

Option 2. Reserve in effect the right to retaliate with chemicals and biologicals by stating that the Protocol ceases to be binding upon any State or its allies which violate the Protocol.

This is similar to the reservation by the U. K., France and the USSR. The U. S. would be reserving the right to retaliate with both chemicals and biologicals, and the question of toxins would not arise.

DOD probably supports this position. State and ACDA probably oppose it.

Option 3. Ratify without any explicit reservation on the right of retaliation.

With respect to the 39 States which have taken reservations, we would legally have the benefit of their reservations in our relations with them to retaliate with chemicals or biologicals. With respect to the States which have not taken reservations, the U. S. could still say that any violation of the instrument would mean its termination and we would have the right to retaliate with either chemicals or biologicals.

This seems to be the fallback position of State, DOD and ACDA.

Issue C. Follow-On NSDM on RCAs and Chemical Herbicides

NSDM 35 stated that a follow-on NSDM on the use of RCAs and chemical herbicides would be issued.

State and ACDA recommend (1) that a follow-on NSDM covering the use of RCAs and herbicides be issued before final decisions on the form of the submission of the Protocol to the Senate are made, and (2) that the NSDM include guidance on public statements. State and ACDA think a statement to the effect that use in war would require Presidential authorization and that more restrictive guidelines for their use had been instituted might reduce both Senate and international opposition to our position.

DOD 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 their use in specific tactical situations.