

~~Protocol~~ 7748

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

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~~ACTION~~

February 25, 1970

MEMORANDUM FOR MR. KISSINGER

FROM: Michael A. Guhin *MAH*
THRU: Robert M. Behr *RB*
Richard T. Kennedy *RTK*

SUBJECT: Submission of the 1925 Geneva Protocol to the Senate

We have received the State/Defense/ACDA memorandum raising three issues for the President's decision preparatory to forwarding a recommendation to the Senate for ratification of the Geneva Protocol.

Two of these issues -- what form our reservation of the right of chemical retaliation should take, and whether we should reserve to the President authorization for use in the future of tear gas and herbicides -- are clear cut. We are drafting a memorandum from you to the President which defines these issues and their options and recommends Presidential decisions in each case.

The third issue -- how to inform the Senate and Parties to the Protocol of our interpretation that the Protocol does not prohibit the use of tear gas and herbicides in war -- is not as clear cut. Our use of tear gas and especially herbicides in Southeast Asia will probably be the prime issue in the Senate proceedings. There are three options:

Option I: Follow the normal treaty practice by having our understanding on tear gas and herbicides explicitly stated in the Senate resolution which would then be formally communicated to the Parties to the Protocol.

Option II: Advise the Senate of our understanding and of our intention to communicate it to other Parties as part of our instrument of ratification, but the understanding would not be referred to in the Senate resolution.

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Option III: Advise the Senate of our understanding on RCAs and herbicides, but with our understanding neither included in the Senate resolution nor communicated to other Parties in the form of a legal interpretation.

The choice really depends upon a sensing of the attitudes of the Senate. Option 3 carries a risk of legal problems later if, in response to a U. N. General Assembly request for an advisory opinion, the International Court of Justice were to rule that tear gas and/or herbicides were prohibited by the Protocol. In the event of such a ruling, if we had not formally transmitted our understanding to the other Parties and then used tear gas or herbicides in war, we could be considered in violation of the Protocol. Option 3, therefore, would be the preferred course only if it were essential to Senate ratification of the Protocol without restrictions on tear gas and herbicides.

Both Options 1 and 2 protect against the possible international legal problem which Option 3 risks. Our interpretation conveyed to the other Parties now would have the legal effect of a reservation in the event of a subsequent adverse ICJ opinion. The only difference between Options 1 and 2 is in our approach to the Senate. Option 1 would require the Senate to vote expressly on the question of tear gas and herbicides; Option 2 would not. However, under Option 2, if more than one-third of the Senators voting for the Protocol indicated that they did not consent to our transmitting our understanding on tear gas and herbicides to other Parties, we could not communicate this understanding.

The question is primarily one of tactics. All agencies recommend that, before final decisions on the form of the submission of the Protocol are made, coordinated preliminary Senate soundings be taken on Options 1 and 2. While not necessarily eliminating Option 3 as a fallback position, we agree that Senate soundings are required only on Options 1 and 2.

Attached at Tab A is a memorandum from you to the President which (1) informs him of the tactical question on presentation to the Senate of an understanding that the Protocol does not prohibit tear gas and herbicides and (2) recommends he approve preliminary soundings with the Senate to ascertain the preferred course.

If the President approves we recommend that Bill Timmons be asked to coordinate the taking of the Senate soundings.

RECOMMENDATIONS

That you sign the memorandum to the President (Tab A) and,

That, if the President approves preliminary soundings, Bill Timmons be requested to coordinate them.