

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED  
Authority AWO 979503  
By JW NARA Date 11/1

~~SECRET~~

## THE 1925 GENEVA PROTOCOL

### A. INTRODUCTION

In response to Mr. Kissinger's memorandum dated June 28, this memorandum reviews pertinent background information (Sections B and C) and discusses the underlying question of whether or not at this time we should continue to preserve the option to initiate the use of RCAs and herbicides in war (Section D). The answer to this question will depend upon whether or not the military utility in retaining a first-use option for RCAs and herbicides outweighs the political costs of preserving this option. One of the major elements to be considered in arriving at a final decision--the alternative methods that are available for implementing a decision--is discussed in Section E.

### B. BACKGROUND

1. The Senate Foreign Relations Committee's (SFRC) hearings on the 1925 Geneva Protocol were completed on March 26. The focus of the debate was on the Administration's position that the Protocol should be interpreted as not

~~SECRET~~

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED

Authority AWO 77903By JW NARA Date 11/1~~SECRET~~

2

covering riot control agents (RCAs) and chemical herbicides and, therefore, as not prohibiting the first use of these agents in war.

2. A substantial majority of the SFRC favors U.S. adherence to the Protocol, but disagrees with the Administration's position on RCAs and herbicides. A majority of the Senate may also disagree.

3. Senator Fulbright has written the President requesting him to reconsider the Administration's position, indicating that unless there were some change no further action would be taken by the SFRC at least until the Administration's announced study of the post-Vietnam military utility of RCAs and herbicides (NSSM 112) was completed and made available (Tab A).

4. On April 15, a nonsubstantive reply was made to Senator Fulbright's letter, indicating that this matter would be brought to the attention of the President (Tab B).

5. By memorandum dated June 28, Mr. Kissinger requested a careful review of the situation, alternative responses (including advantages and disadvantages), and agency positions for the President's consideration by August 1 (Tab C).

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED  
Authority AWO 979803  
By JW NARA Date 11/1

~~SECRET~~

3

6. The NSSM 112 study is expected to be completed in mid-October, 1971. This will include a progress report on DOD's internal study on military utility of herbicides. DOD's study on the ecological and physiological aspects of herbicide use, conducted by the National Academy of Science (NAS), will not be fully completed before the spring of 1972, at the earliest. Unless these DOD studies were to lead to a substantial change in the conclusions and analyses concerning military utility in this report, which is not expected, the basis for making the decision on the RCA and herbicide issue and the issue itself will not be changed from the present. DOD has indicated that its studies to date will augment and substantiate the military utility of RCAs and herbicides reflected in the NSSM 59 response and in this report.

7. Senators Nelson, Humphrey and Brooke have introduced resolutions in the Senate on this subject. The Nelson resolution (Tab D) proposes that our ratification be accompanied by a formal understanding to the effect that the Protocol covers chemical herbicides. The Humphrey resolution (Tab E), which is a sense-of-the-Senate resolution that could

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED  
Authority 110779503  
By JW NARA Date 11/1

~~SECRET~~

4

be voted on before the resolution of ratification, proposes that the Senate support a broad interpretation of the Geneva Protocol. In so doing it recommends that the U.S. be willing, on the basis of reciprocity, to refrain from the use in war of all toxic chemical weapons whether directed against man, animals, or plants. The Brooke resolution (Tab F) would also be a separate sense-of-the-Senate resolution to the effect that the dispute over RCAs and herbicides should be referred to the International Court of Justice (ICJ); that we should be bound by its decision with respect to other parties accepting it; but that if the ICJ finds that the agents are not covered by the Protocol, we should seek an international agreement banning their use in war. Chairman Fulbright of the SFRC asked the Department of State on July 27 and August 3 for coordinated Executive Branch comments on the Brooke and Humphrey Resolutions respectively. His letters were acknowledged on July 30 and August 5.

8. On July 16, Senator Fulbright noted on the Senate floor the absence of a substantive reply to his letter and commented on indications that continued use of herbicides in Vietnam is being considered by the Administration (Tab G).

~~SECRET~~

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED  
Authority NW072503  
By JW NARA Date 11/1

~~SECRET~~

5

On August 6 Senator Fulbright notified the Senate that the Foreign Relations Committee would hold hearings following the August recess to discuss the draft Convention on Biological Weapons. These hearings would include the consideration of the Humphrey and Brooke resolutions relating to the Administration's restrictive interpretation of the Geneva Protocol on the use of tear gas and herbicides (Tab H).

9. On December 26, 1970, the White House announced Secretary Laird's report that an orderly yet rapid phase-out of the herbicide operations in Vietnam had been initiated. In February 1971, MACV announced the termination of the use of herbicides for anti-crop operations and of the use of fixed-wing aircraft for defoliation missions.

10. During this phase-out period, herbicide use was restricted to perimeters of fire bases and U.S. installations or remote, unpopulated areas. There have been no U.S. herbicide operations since May 1, 1971, though authority to extend the phase-out period until December 1, 1971 (for use of herbicides by helicopters and ground-based spray equipment

~~SECRET~~

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED

Authority AWO 77203By JW NARA Date 11/1~~SECRET~~

6

as needed around fire bases and installations) has been requested and subsequently approved for base perimeter clearing in cases where other means are not available or possible.

C. CONGRESSIONAL SITUATION

1. It is forecast by the Congressional Relations Bureau of the Department of State that:

-- The Protocol would fail to receive a two-thirds majority of the Senate with the Administration's interpretation excluding RCAs and herbicides.

-- The Protocol would probably fail to receive the Senate's advice and consent to ratification with an understanding including RCAs and herbicides as long as the Administration remained opposed to including these agents.

-- If the Administration endorsed an interpretation of the Protocol to include RCAs and herbicides, the Senate would almost undoubtedly vote by a majority of two thirds for ratification.

2. Rather than risk U.S. failure to ratify the Protocol a second time, it is unlikely that the Protocol will be reported out in the near future unless there were to be a

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED  
Authority AWO 77903  
By JW NARA Date 11/1

~~SECRET~~

7

change in the Administration's position. If, however, there were a prolonged delay without a change in the Administration's position (e.g., beyond January of 1972), the Protocol might be reported out by the SFRC with some understanding contrary to that of the Administration, or the Senate may make its views known in a sense-of-the-Senate resolution. Even if it were reported out with an understanding contrary to the Administration's, it is unlikely that it would be brought to a vote by the Senate leadership unless there were a sufficient change in the Administration's position on RCAs and herbicides to ensure the support of two thirds of the Senate for its advice and consent to ratification.

D. THE UNDERLYING QUESTION

1. Several alternatives for responding to the letter from Senator Fulbright are discussed below in Section E. The choice among them requires a fundamental decision on the underlying question of whether or not at this time we wish to continue to preserve the option to initiate the use of RCAs and herbicides in war.

2. Substantively speaking, the question turns on whether or not the military utility in retaining a first-use

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED  
Authority AWO 972503  
By JW NARA Date 11/1

~~SECRET~~

8

option for RCAs and herbicides outweighs the political costs of preserving this option.

### 3. Military Utility

#### a. Herbicides

The utility of herbicides in Vietnam to increase vertical visibility and enhance aerial observation for the detection of base areas, infiltration routes, firing positions, and ambush sites is well documented. This is a unique capability to assist in reducing concealment over large areas without the presence of friendly troops on the ground.

It is the considered judgment of the JCS, based on many field intelligence reports and command evaluations that selective anti-crop operations have resulted in significant logistic problems to the enemy and have required the diversion of substantial numbers of combat troops to food production. There have also been reports by a number of U.S. CORDS officials that crop destruction has had a net adverse effect on pacification in South Vietnam. This problem indicates that, as we extrapolate our Vietnam experience to other possible areas of conflict, the military applications of herbicides, while very useful in certain tactical situations, may in the long run prove detrimental to our overall military

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED

Authority AWO 77803By JW NARA Date 11/1~~SECRET~~

9

objective should they work against such major efforts as our Vietnam pacification program.\*

The JCS also believes that casualties to friendly forces from ambush have been greatly reduced as a result of marked reductions in frequency and size of ambushes following defoliation. Herbicides have also proven effective in the removal of foliage in the vicinity of installations and base camps to deny concealed routes of approach to sappers or infiltrators and to provide open fields of fire for defense. In this regard herbicides are the most efficient where mine-fields or other explosive devices prohibit clearing by hand (Tab I).

Finally, it should be noted that in wide area application, effective dissemination of herbicides requires air superiority and sufficient lack of enemy mobility or a

---

\*Regarding the military utility of herbicides, ACDA calls attention to the views of the Embassy in Saigon, as expressed in the cable at Tab J, i.e., that the military value of area spraying of herbicides has not been clearly established. DOD notes that the Embassy views on military utility were submitted without coordination with any military authorities in Vietnam. Current studies are documenting military utility so the current absence of formal documentation must not be the basis for conclusions as to military utility. State and Defense agree that the views expressed in Embassy Saigon's telegram are not determinative of the issue of military utility.

~~SECRET~~

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED

Authority AWO 77203By JW NARA Date 11/1~~SECRET~~

10

sufficiently stabilized military situation to allow the time for herbicides to become effective.

b. Riot Control Agents

RCA's have been widely used in combat operations in Southeast Asia since 1965.\* In this environment, against an enemy with little protective equipment or retaliatory capability, the military utility is unquestioned. Their use there has resulted in increased ability to accomplish military goals without excessive civilian casualties when civilians are intermixed with the enemy, and an enhanced capability to counter an enemy concealed in fortifications, caves, or tunnels. In this role, RCA's saved U.S., allied and enemy lives and forced the enemy to make a decision between surrender or continuing to fight under adverse conditions by driving him from his fortified position. RCA's also provide effective area denial.\*\*

---

\*While no precise data on past or present usage is available, the figures on procurement and issuance to Southeast Asia are at Tab K.

\*\*During operation DURHAM PEAK, Marines rendered an entire tunnel complex unusable for at least four months through the use of micropulverized CS, dusting and scattering CS crystals with C-4. Other tunnels and caves denied with CS were found effectively contaminated after 3 months. Contaminated in this case means untenable for unmasked personnel. In warm climates, a mask was not total protection since the agent produced discomfort on exposed, damp skin which made the contamination marginally effective even on masked personnel and at least made comfortable long-term use of the area unlikely.

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED

Authority AWO 77903By JW NARA Date 11/1~~SECRET~~

11

The use of RCAs to assist in the recovery of downed airmen has frequently been the decisive factor when the downed crew was under direct enemy attack. RCAs have sometimes resulted in significant reduction in U.S. and allied casualties when the enemy was entrenched or in bunkers. The use of RCAs in South Vietnam has been unique in specific operations where there was no other weapons system which would accomplish the mission.\*

RCAs serve as a unique alternative to other munitions in that they provide a non-lethal "search" capability to the commander in the field. Even screening smoke cannot offer this flexibility in that it is often lethal in enclosed areas and does not necessarily force the occupant from his position as do RCAs.

The Working Group was unable to quantify the frequency with which the various types of uses have occurred.\*\*

RCA effectiveness is substantially decreased when the enemy has respiratory protection. However, masking in

---

\*For example, a North Vietnamese Army regiment resisted conventional assaults for two days resulting in heavy casualties to two companies in spite of air, artillery, and even B-52 attacks. Two helicopter loads of CS grenades effectively dislodged the enemy and his position was taken in two hours with only two casualties.

\*\*OST notes that without some such quantification it is very difficult to assess objectively both the net contribution of  
(Cont. page 12)

~~SECRET~~

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED

Authority AWO 77903By JW NARA Date 11/1~~SECRET~~

12

itself tends to limit mobility and, additionally, RCAs can cause discomfort in closed areas. In combat actions against an enemy which has a comparable capability to use RCAs or defend against them (e.g., the USSR, Warsaw Pact, and PRC), RCAs may not confer an advantage to U.S. forces. Any advantage gained by either side would depend, among other things, upon the tactical environment.\*

The military advantages of RCAs against a guerrilla-type operation (and of herbicides in geographic

---

RCA use in Southeast Asia to our objectives there, and the importance of this contribution in view of other national objectives. The JCS recognize the OST note but caution that a lack of data by which usage could be quantified should not contribute to a deprecation of the utility of RCAs.

\*As a result of its technical studies, OST believes that if the initiation of RCAs (or herbicides) resulted in widespread use of lethal or incapacitating agents in conflicts with the USSR or Warsaw Pact nations (who consider RCAs and herbicides as elements of chemical warfare, and hence banned by the Geneva Protocol, and whose combined offensive and defensive capabilities and the ability to operate in a toxic environment probably significantly exceeds that of U.S. forces and undoubtedly greatly exceeds that of our allies), U.S. and allied forces would be placed at a serious military disadvantage. Thus OST believes that the situations in which herbicides or RCAs could be initiated in the confident expectation of obtaining a military advantage are sharply limited both by this risk of escalation and by the defensive capability of the Warsaw Pact nations to operate in a toxic environment. DOD believes that initiation of the use of lethal or incapacitating chemicals involves a fundamental political decision, especially for any party to the Protocol, and would not be based on U.S. use of RCAs or herbicides.

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED  
Authority AWO 77803  
By JW NARA Date 11/1

~~SECRET~~

13

areas similar to Vietnam) may be comparable to those experienced in Vietnam although these will be substantially decreased if other nations elect to treat their use as the initiation of chemical warfare and retaliate with chemical agents (either lethal or incapacitating) or develop an effective defense (e.g., masks). In Vietnam use of RCAs and herbicides has not led to escalation to lethal or incapacitating chemical weapons.

#### 4. Political Costs

The Vietnam experience suggests that extensive use of herbicides may carry high political costs in terms of impact on public opinion at home and abroad and some political costs in terms of impact on civilians in combat areas. The environmental effects of herbicide usage can range from insignificant to widespread depending on the terrain, the type used, the extent and type of usage, and the precautionary and reparative measures taken. The environmental and physiological effects of herbicide usage in general and specifically in Vietnam are currently being studied by the National Academy of Sciences at the request of Congress, with the concurrence of the Administration. Though a progress report is

~~SECRET~~

DECLASSIFIED

Authority AWO 77903

By JW NARA Date 1/5/1

~~SECRET~~

14

expected in March, 1972, the full study is not expected to be completed until much later.

To continue to preserve the option to initiate the use of RCAs and herbicides in armed conflicts would probably result in continuation of the impasse with the SFRC over ratification of the Protocol, but might even lead at some point to their reporting it out in a form directly contrary to the Administration's position. In the event the Senate leadership then brought it to a vote, it might fail to obtain the requisite action by the Senate for its advice and consent to ratification. On the other hand, Senate approval would make it impossible for the Administration to complete the ratification process without reversing its position.

Failure of the U.S. to ratify the Geneva Protocol would (a) deflate domestic and international expectations aroused by the President's decisions of November, 1969, and could undercut the net political impact of these decisions since the Protocol is basic to these policy decisions; (b) leave the U.S. (which originally sponsored the Protocol) the only important country that has not become a party to it (there are presently 98 parties); (c) continue to deprive

~~SECRET~~

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED

Authority 11077803By JW NARA Date 11/1~~SECRET~~

15

the U.S. of a treaty undertaking by others not to use chemical or biological weapons against the U.S.; and (d) be used by some countries for political or propaganda purposes to cast doubt on U.S. policy in this area.

The U.S. is negotiating at the Geneva Disarmament Conference a BW convention that would commit others to follow a policy on BW and toxins similar to that which the U.S. adopted in 1969. As currently being negotiated, this BW convention would rely on and not duplicate or affect the Protocol's prohibitions on use. The negotiations with the Soviets and Warsaw Pact countries are moving forward, and U.S. delay in ratification of the Protocol has not complicated this process to date. We have no positive indications as to what positions the non-aligned nations will take on the BW convention with or without U.S. ratification of the Geneva Protocol.

Should it become possible to ratify the Protocol with the Administration's interpretation that it does not prohibit the use of RCAs and herbicides in war, the U.S. interpretation would still be contrary to that of a

~~SECRET~~

DECLASSIFIED  
 PA/HO Department of State  
 E.O. 12958, as amended  
 August 6, 2007

DECLASSIFIED

Authority 11/07/2003  
 By JW NARA Date 11/1

~~SECRET~~

16

majority of the present parties to the Protocol\* and, therefore, could draw wide criticism by such countries though possibly less than continued failure to ratify the Protocol at all. Ratification on this basis might also lead to a request from the UNGA or UNSC for an advisory opinion of the ICJ, which would probably be adverse at

---

\*As evidenced by the 1969 UNGA vote (80-3-36) on a resolution stating that international law as embodied in the Geneva Protocol prohibited the use of all chemical and biological agents in war:

-- 51 countries party to the Protocol voted contrary to the view of the U.S. [including Spain, Pakistan, the USSR and the other Warsaw Pact countries, most of the Latin American countries (e.g., Argentina, Brazil and Mexico), and most of the other non-aligned countries (e.g., the Arab countries, Finland, India, Indonesia and Sweden)];

-- 2 parties voted with the U.S. (Australia and Portugal);

-- 30 parties abstained (e.g., almost all of the Western European countries, Japan and several other Asian nations, and Israel);

-- 5 parties were absent; and

-- 10 parties are not members of the UN.

Among the abstaining parties to the Protocol, France clearly indicated a view contrary to the U.S. position; Japan later indicated a view similar to the U.S. and the U.K. has taken the position that one type of RCA is not prohibited. Italy and Turkey had expressed the view, in 1930, that lachrymatory agents were prohibited and are not known to have changed this view.

Among the UN members not party to the Protocol, 27 voted contrary to the U.S. view, 6 abstained and 2 were absent.

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED  
Authority ANNO 77903  
By JW NARA Date 11/1

~~SECRET~~

17

least to our position on RCAs, and would in any event highlight our dispute with other parties on this matter. (While such an advisory opinion would not be legally binding on the U.S., we could not ignore it without undermining our general efforts to strengthen international law and encourage use of the ICJ.)

Ratification in a manner preserving a first-use option for RCAs and herbicides would not make the Protocol as good a legal and psychological barrier against chemical warfare as would ratification on the basis that it provided a flat "no gas in armed conflict" firebreak. Under reservations taken by a number of parties (including members of the Warsaw Pact), our use of RCAs or herbicides against them could relieve them of their responsibilities under the Protocol toward the U.S. and our allies and could provide them a justification for escalation to chemical or biological warfare if they so desired.

While many countries would welcome a modification of our views on the use of RCAs and herbicides, a change in the U.S. position could cause some difficulty with those countries which have taken more or less similar positions to that of

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED

Authority AWO 77903By JW NARA Date 11/1~~SECRET~~

18

the U.S. (i.e., Australia, Japan, Portugal and the United Kingdom), depending on how the U.S. actually modified its position.\* Consultations with these governments before any modification of our views is made public could of course minimize these difficulties.

5. In summary, the general arguments favoring preservation at this time of the option to initiate the use of RCAs and herbicides in war are as follows:

-- The military use of RCAs and herbicides has demonstrated military utility and saved U.S. and allied lives in Vietnam in purely military operations. This utility might be extrapolated to analogous conflicts in the future.

-- RCAs are useful in situations where the adversary is intermingled with the civilian population and the battlefield is undefined.

---

\*Australia and Portugal joined us in voting against the 1969 UNGA resolution interpreting the Protocol to cover RCAs and herbicides. Ratification proceedings in the Japanese Diet made clear the Japanese position that the Protocol did not cover RCAs. While the Japanese agree with us on herbicides, they have not taken this position publicly. The former Labor Government of the U.K. took the position that CS (as distinguished from earlier types of RCAs) was not covered by the Protocol; the U.K. has taken no public position on herbicides.

~~SECRET~~

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED  
Authority AWO 779503  
By JW NARA Date 11/1

~~SECRET~~

19

-- A change in our present position, while it may not legally prohibit continued use of RCAs and herbicides in Vietnam, would pave the way for increased domestic and international pressure to stop the use of these agents in Southeast Asia.

-- It can be considered incongruous to allow the controlled use of RCAs and herbicides domestically while prohibiting similar and different uses in war for the purposes of conserving U.S. lives.\* (The Protocol would not prohibit the use by U.S. armed forces in wartime on U.S. bases of RCAs for riot control purposes or of herbicides for vegetation clearance.)

-- Though no substantial change in our current assessments is expected, deferring a definitive choice on this question would enable the Administration to take advantage of whatever additional light might be cast on this subject by the studies referred to in the background section.

---

\*ACDA and State assert that military uses can be readily distinguished from controlled domestic uses of similar agents as the latter uses are far more limited in their objectives, subject to the inherent limitation of what governments believe their own citizens will tolerate, and do not involve the risks of escalation to other forms of CBW.

~~SECRET~~

~~SECRET~~

20

6. The general arguments favoring relinquishing the option to initiate the use of RCAs and herbicides in war can be summarized as follows:

-- It could result in securing Senate advice and consent to ratification of the Protocol, which would a) fulfill domestic and international expectations, and b) provide the U.S. with a treaty undertaking by others not to use chemical or biological weapons against us.

-- It would eliminate the international and domestic political costs of maintaining a position inconsistent with the majority of the parties to the Protocol as to how the Protocol should be interpreted.

-- It could help reduce the chances that any form of chemical weapons would be used in future conflicts while not depriving us either of the right of retaliation or of maintaining the capability to retaliate with chemical weapons.

-- Continued use of RCAs or herbicides by the U.S. could be claimed by many possible adversaries as a violation of the Geneva Protocol, freeing them from the obligations of the Protocol and providing them a justification for using any form of chemical or bacteriological agent in war against the U.S.

~~SECRET~~

~~SECRET~~

21

D. OPTIONS AND ALTERNATIVES

1. Option A. Preserve the Option to Initiate the Use of RCAs and Herbicides in Armed Conflict without Restriction

If the decision is to continue to preserve the option to initiate the use of RCAs and herbicides in war, the alternative at this stage would be to inform Senator Fulbright that the issues raised in his letter will be carefully considered in our current studies, of which the SFRC is informed, and that the Administration's conclusions will be forwarded upon completion of this review.

The advantage of this course of action is that it would keep our understanding intact, pending further decision, without heightening the issue and precluding flexibility in the future. DOD believes that the completion of their studies now in progress, barring unforeseen changes, will afford another opportunity to attempt to make a persuasive case for the Administration's position to the Senate. (On the other hand, the NSSM 112 study, which encompasses the DOD studies and other considerations, when completed, may not provide an opportunity to make any persuasive case for the Administration's position.) The disadvantage of this option is that the Administration is

~~SECRET~~



~~SECRET~~

22

in effect deferring action on the Protocol until it supplies the conclusions of the studies under way (expected in late 1971 at the earliest).\*

2. Option B. Relinquish the Option to Initiate the Use of RCAs and Herbicides in Armed Conflict

If the decision is to express our willingness to relinquish the option to initiate the use of RCAs and herbicides under the circumstances indicated below, there are four ways in which this might be accomplished, each with distinct advantages and disadvantages.\*\* However, all these alternatives involve the following common denominators:

-- All of them are contemplated as prospective only, and need not imply that our past interpretations and conduct have been contrary to the Protocol.

---

\*Since Option A represents a "no change in current policy" option, there is only one alternative to be listed. The number of alternatives to Option B is not to be considered as indicating the relative merit of either Option. The basic decision is between Option A and Option B. Everything following is concerned with techniques of implementing that basic decision.

\*\*The Working Group examined alternatives which treated RCAs and herbicides separately but considered that such alternatives would be less legally and politically viable than the alternatives presented herein and would have far less chance in overcoming the impasse on the Protocol. (Cont. page 23)

~~SECRET~~

~~SECRET~~

23

-- We would retain the right to retaliate in kind.

-- The prohibitions of the Protocol would not cover the use of RCAs within our own bases for maintaining order, or the use of chemical herbicides for control of vegetation within our bases under the same restrictions imposed domestically in the United States.

-- Should this option be accepted it is assumed that a final choice among the alternatives would be preceded by appropriate consultation with the Congress.

Alternative 1: Reaffirm our current understanding of the Protocol, but agree not to make first use of RCAs and chemical herbicides against states that officially confirm they are bound on the same basis.\* Other states could offer

---

For example, USIA considers that of the two agents, only herbicides pose a significant overseas public opinion problem, and offers two alternatives which retain RCAs and drop herbicides. These alternatives, which could be worth serious consideration if RCAs are deemed too valuable militarily to give up, are:

1) The President could unilaterally renounce herbicides as he did biological weapons. (Favorable public impact could make it easier to defend our interpretation on RCAs, using our previous arguments excluding them from the Protocol.)

2) The U.S. could take the position that herbicides are covered by the Protocol, but RCAs are not covered. This alternative would be very difficult legally and less striking psychologically.

\*Both Alternatives 1 and 2 would be consistent with the testimony of Secretary Rogers on the Protocol, that our (Cont. page 24)

~~SECRET~~

24

confirmation either by notice to the depositary of the Protocol (France) that they so understand the scope of their obligations, or by an exchange of diplomatic notes with us at our initiation,\* or possibly by other means.

Pros:

a. It would insure that we would not end up with a legal obligation to extend the Protocol in this manner to any party that did not have a comparable obligation to us.

b. It would not, as a legal matter, undercut the position of those allies who have shared more or less similar interpretations, although it could be politically awkward for some of them if they did not plan to follow suit.

---

position on both RCAs and chemical herbicides is without prejudice to the position the U.S. might take in any future international agreements dealing with chemical agents.

\*The first method offers the advantage of making clear that the understanding of the scope of the obligation is multilateral in context and applies to all other parties to the Protocol. However, some other states may object to notifying the depositary now of an interpretation they have maintained for a long period of time. The second method offers the advantage of not requiring that other states notify the depositary; since it could be accomplished by the United States, as a new party to the Protocol, inquiring of other parties whether they consider the Protocol to include non-first-use of RCAs and chemical herbicides. The responses would clarify our obligation with respect to each state party, but this method might leave some ambiguity as to the obligations of other states inter se.

~~SECRET~~

~~SECRET~~

Cons:

a. While our legal obligation to refrain from using RCAs and herbicides in war would be limited to states who confirmed their corresponding obligation to us, this initiative would make it more politically difficult than it now is to justify either initiating use against others with whom we have no agreement or continuing their use in Southeast Asia.

b. Some states would object to providing any official confirmation in view of their established positions that the Protocol prohibits first use of RCAs and chemical herbicides and others might object to confirming on a bilateral rather than a multilateral basis.

Alternative 2: Reaffirm our current understanding, but accompany United States ratification with a proposal calling for an Annex to the Protocol, providing that first use of RCAs and chemical herbicides is prohibited, which would come into force upon adherence by a specified number of parties to the Protocol.

Pros:

a. The United States could assure that a certain number of states and their allies were similarly bound before being obligated not to initiate use of RCAs and chemical herbicides.

~~SECRET~~

~~SECRET~~

26

b. The Annex would enable the contracting parties to share precisely identical restraints worked out in negotiation, having the full binding force of a treaty, and avoiding any ambiguity regarding scope and applicability to allies.

Cons:

a. This Annex would constitute a new treaty requiring submission by the President to the Senate for advice and consent to ratification.

b. Some states would object to becoming parties to a new Annex in view of their established positions that the Protocol prohibits first use of RCAs and chemical herbicides, especially since this procedure would require other states to go through their constitutionally required internal mechanisms requisite to ratification of a new treaty.

c. The scope of the legal obligation between parties to the Annex and nonparties would be left unresolved.

d. Since a significant amount of time might be required for the parties to the Protocol to adopt an Annex and thereafter for a sufficient number of them to ratify it before it came into force, other states and domestic and international

~~SECRET~~

~~SECRET~~

public opinion (including the SFRC) might view this tactic merely as a position taken in order to delay and possibly totally to prevent the United States from ever being obligated to give up RCAs and herbicides.

e. While our legal obligation to refrain from using RCAs and herbicides in war would be limited by the terms of the Annex, this initiative would make it more politically difficult than it now is to justify the initial use against others with whom we have no agreement. Moreover, though we would consider there were no prohibitions on use until the Annex came into force, it would be politically difficult to justify using these agents while supporting a ban on their use.

Alternative 3: Reaffirm our current understanding but state that we would agree to abide by an advisory opinion of the ICJ, to be requested by the United Nations General Assembly or Security Council.\* As an advisory opinion cannot be

---

\*This does not include the qualification in the Brooke resolution that we should consider the opinion binding only "with regard to any other states adhering to the Protocol and accepting the Court's interpretation." However, the Brooke resolution urges the President to take the initiative in obtaining an early opinion and recommends that in the (Cont. page 28)

~~SECRET~~

~~SECRET~~

28

sought by individual countries, a request would have to come in the form of a resolution of the United Nations General Assembly or Security Council. We could persuade a group of friendly states to sponsor such a resolution and declare that we would be bound by an advisory opinion if such a resolution were adopted.

Pros:

a. It would provide the clearest legal basis of any of the alternatives for continuing to use RCAs or herbicides, and for defending our past positions and practices, until such time as an opinion was rendered.

b. It would highlight the President's support for international law and use of the ICJ.

Cons:

a. The discussion in the UNGA or SC of whether to ask for an advisory opinion could be the occasion for attacks

---

event that the ICJ finds that either RCAs or herbicides are not covered by the Protocol, the United States should initiate international negotiations to prohibit their use in warfare. While the adoption of this resolution would not present a legal obstacle to our continued use of these agents in war pending such an advisory opinion, it would seem to present a serious political obstacle to our doing so.

~~SECRET~~

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
August 6, 2007

DECLASSIFIED

Authority AWO 77803By JW NARA Date 11/1~~SECRET~~

29

on our past and present use of these agents. (In 1969, the UNGA voted 80-3-36 to the effect that international law as embodied in the Protocol prohibits the use of any chemical and biological agents in war.)

b. Defending our present position in written and oral statements during the ICJ proceedings might aggravate domestic and international criticism of our present position and make potential defeat on the substance, which is very likely, more embarrassing.

c. It would seem the least likely of the alternatives to break the impasse in the Senate, since it could lose both the votes of those who might object to our maintaining our present position pending the ICJ decision and of those who might object to leaving the decision to the ICJ.

d. It might be considered inconsistent with the indications given in Secretary Rogers' testimony that he did not at that time favor submitting the question to the ICJ.

Alternative 4: Announce that, while we continue to believe that our understandings are legally and substantively

~~SECRET~~

~~SECRET~~

30

correct, we will hereafter treat the Protocol as prohibiting the first use of RCAs and herbicides.\*

Pros:

- a. The SFRC would undoubtedly send the Protocol to the Senate for a vote recommending advice and consent for ratification.
- b. If the Administration openly endorses this interpretation, the Senate in all probability would muster the necessary two-third vote for ratification.
- c. It would avoid the complexity of the other alternatives, and the difficulties of getting other states to accept them, while still preserving our right to use

---

\*This differs from the solution suggested in the Nelson resolution, which (1) only applies to herbicides, and (2) would require our instrument of ratification to include a formal "understanding" that herbicides are covered. No other party has taken the latter step.

If Alternative 4 were chosen, it might be desirable to take the initial precaution of seeking a vote on the Humphrey resolution so that we could tell whether or not we could be sure of obtaining the necessary two-thirds majority. (This would, however, also suggest that the reason for the Administration's change in position was the Senate's opposition. The Humphrey resolution as currently worded, however, would make it difficult to defend past United States positions and practices with respect to the use of RCAs and herbicides in war.

~~SECRET~~

~~SECRET~~

31

these agents against any other party that used them in war against us or our allies.

Cons:

- a. It would be the most vulnerable of the four alternatives to being interpreted as an admission that our past statements and conduct have been wrong, and that the use of these agents in Southeast Asia by the U.S. and Australia was contrary to a widely accepted international standard.
- b. It could antagonize those allies and those Senators who have supported the Administration's interpretations.

Attachments:

- Tab A - Senator Fulbright's letter to the President
- Tab B - Letter of April 15 to Senator Fulbright
- Tab C - Mr. Kissinger's memorandum of June 28
- Tab D - Senator Nelson's resolution
- Tab E - Senator Humphrey's resolution
- Tab F - Senator Brooke's resolution
- Tab G - Senator Fulbright's statement of July 16
- Tab H - Senator Fulbright's statement of August 6
- Tab I - Cables from COMUSMACV and CINCPAC

~~SECRET~~

32

Attachments: (Cont.)

- Tab J - Cable from American  
Embassy, Saigon
- Tab K - Procurement figures for  
FY 1966 through FY 1971

~~SECRET~~