

# 琉球大学学術リポジトリ

## 米軍基地による環境変化が与える自然および社会への影響に関する複合的研究

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Pros:

1. Herbicides have been used effectively in Vietnam to clear the sides of roads, canals and rivers and around encampments, thereby reducing the possibility of enemy ambush and concealment, and providing more protection to US and SVN forces.

2. Herbicides have been used effectively in Vietnam to destroy crops, thereby making it more difficult for the enemy to secure food supplies.

Cons:

1. The use of herbicides in an anti-crop role blurs a "no first-use" doctrine.

2. If the US continues to take the position that these agents are excluded from a "no first-use" policy, it could make international control of CW more difficult.

3. It is difficult to determine that crops are solely for the consumption of the armed forces which is the sole target sanctioned by international law.

I. Should the use in war of all chemical and biological agents, including tear gas (riot control agents) and/or herbicides, require Presidential authorization?

Pro:

The political implications of the unrestricted use of tear gas and/or herbicides in war could be of such magnitude that it would be unwise to have them introduced without Presidential authority.

Cons:

1. These non-lethal weapons should not be singled out of the US arsenal for special authorization.

2. This type decision should be predelegated in order for adequate planning and logistics support, if RCA is to be used.

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### III. The Geneva Protocol of 1925

#### A. The Geneva Protocol of 1925: "Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare."

The position which the US Government takes with respect to the Protocol will depend upon:

1. The decisions reached on the policy issues described above, and in particular the decision with respect to tear gas; and
2. Legal interpretations of the scope and status of the Protocol which are considered at the end of this section.

#### B. Background

1. At present, 84 States are Parties to the Geneva Protocol, including the USSR and Communist China. All major States are Parties except the United States and Japan.\* The United States signed the Protocol in 1925 but never ratified it. In operative part, the Protocol reads as follows:

"Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world;

"Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and

"To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

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\*Since 1965, 20 States have become Parties to the Protocol and Japan has recently indicated its willingness to consider ratification.

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"Declare:

"That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition of the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration."

2. Thirty-nine States accompanied their ratifications with reservations or declarations which declare the prohibitions of the Protocol, as to the reserving State, to be inapplicable as to non-Signing States or toward Signing States which have first violated its provision (i.e., "no first-use"). Some reservations also include "Allies of Signing States" in this exception.

3. Since many States (including the United Kingdom, France and the USSR) have ratified with reservations, the United States may wish to add a "standard reservation" similar to the operative portions of prior reservations relating to "no first use" and "allies". Although there is no consensus as to the scope and exact language of a proposed U.S. reservation, all agree that ratification by the U.S. should be accompanied by a reservation which limits the undertaking to a "no first use", but would permit retaliation in the event of use by another state or its allies.

4. If the United States ratifies the Protocol, it will probably be desirable to include with ratification (and any reservation which it might wish to make) an interpretive statement. Such a statement would set forth the United States position and interpretation as to the Geneva Protocol's effect on the use of C agents such as herbicides, defoliants, the use in warfare of RCA's, and any other points which require interpretation. Interpretive statements which differ from generally accepted interpretations of the Protocol may be considered by Parties as reservations subject to acceptance or rejection.

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5. Ratification would not prohibit, restrict, or regulate any research and development, production, deployment, and stockpiling of chemical and biological weapons deemed necessary by the United States.

C. Should the US ratify the Geneva Protocol of 1925 "Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare", with -- (four options)\*

1. A reservation or interpretive statement permitting the United States to use chemical and biological incapacitating agents (Presumably such a reservation/interpretation also would include tear gas and other non-lethal RCA's for which pros and cons are in #2 below.)

Pro:

It would make clear our intent to preserve the option, wherever necessary and appropriate, to employ incapacitating agents to reduce overall casualties.

Cons:

(a) Ratification under such conditions would run contrary to the expressed views of nearly all other members of the international community and adherents to the Protocol, and is likely to be rejected by many Parties to the Protocol, thus raising serious questions whether ratification would advance US interests.

(b) First use of chemical or biological incapacitants would be viewed by many countries as contrary to customary international law and any attempt to reserve an option for such use as legally ineffective.

(c) It could be construed as inconsistent with past US statements of policy.\*\*

\* Legal issues underlying the pros and cons are discussed in Section E, below.

\*\* DOD does not believe that past US official statements of no-first-use of lethal agents apply equally to non-lethal agents.

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2. A reservation or interpretive statement permitting the United States to use tear gas and other non-lethal RCA's in wartime without restrictions?

Pros:

(a) It would accomplish the positive step of ratifying the Protocol while at the same time preserving for the United States the wide latitude for the military use in wartime of tear gas and other non-lethal RCA's, ensuring that whenever necessary and appropriate, we would have the option to employ some non-lethal agents instead of other more lethal means of warfare.

(b) Ratification would signal US interest in reinforcing the barriers against CBW, and could enhance the US position as regards the possible initiation or negotiation of any further arms control measures in the CBW area.

(c) A reservation or interpretive statement or both is desirable to clearly state that we do not regard our use of RCA's and herbicides in Vietnam as contrary to the Protocol.

(d) Such a reservation or interpretive statement would coincide with the practice in Vietnam of the US and certain of its allies (Republic of Vietnam, Republic of Korea, Thailand and Australia, the last two of which are parties to the Protocol.)

Cons:

(a) Ratification under such conditions would be contrary to the view of many members of the international community and Parties to the Protocol that unrestricted military use of tear gas and other non-lethal RCA's in wartime is prohibited by the Protocol. Ratification under such a statement of interpretation might be regarded by Parties to the Protocol as an attempt to change the actual nature of the existing obligations.

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(b) Ratification under such restrictions would limit "first-use" options for CW and BW incapacitating agents which have some military value.

(c) It could be construed as inconsistent with past US official statements.\*

3. An interpretive statement or reservation setting forth the United States view that the Protocol does not prohibit the use of tear gas and riot control agents in wartime for "humanitarian purposes."

Pros:

(a) It would preserve some latitude for the use of tear gas and other non-lethal RCA's in wartime for genuine humanitarian purposes.

(b) Ratification would: (i) strengthen the legal forces of the Protocol and international restraints on the use and proliferation of CW and BW agents; (ii) be interpreted as a positive, welcome step by the international community; (iii) reinforce past US official statements on the "no first-use doctrine"; (iv) reaffirm past US votes in favor of resolutions calling for strict adherence to the principles and objectives of the Protocol; (v) and could enhance the US position as regards the possible initiation or negotiation of any further arms control measures in the CBW area.

Cons:

(a) Ratification under these conditions, because of the difficulties of actually determining "humanitarian purposes", would, of necessity, tightly restrict the military use of tear gas and other non-lethal RCA's in wartime effectively limiting their use to crowd control and base security. In some cases where non-lethal agents might otherwise be used, lethal conventional weapons would have to be employed instead.

\* DOD does not believe that past US official statements of no-first-use of lethal agents apply equally to non-lethal agents.

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(b) Ratification under such restraints would restrict "first-sue" options for non-lethal RCA's and CW and BW incapacitating agents which we might wish to retain.

(c) A ratification without an interpretive statement regarding RCA's and herbicides (i) could lead to doubts on the legality of our present use of tear gas in Vietnam and (ii) preclude future use of this weapon with the consequent loss of its military value.

4. "Without any attempt to expressly reserve the right to use RCA's in war?"

Pros:

(a) Ratification without additional reservation or interpretation would accord with the view of many States that the widest latitude ought to be given to the prohibitions of the Protocol.

(b) Ratification would: (i) strengthen the legal force of the Protocol and international restraints on the use and proliferation of CW and BW agents; (ii) be interpreted as a positive, welcome step by the international community; (iii) reinforce past US official statements on the "non first-use doctrine"; and (iv) reaffirm past US votes in favor of resolutions calling for strict adherence to the principles and objectives of the Protocol.

(c) Ratification would signal US interest in reinforcing the barriers against CBW, and could enhance the US position as regards the possible initiation or negotiation of any further arms control measures in the CBW area.

Cons:

(a) A ratification without an interpretive statement regarding RCA's and herbicides (i) could cause grave doubts on the legality of our present use of tear gas in

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Vietnam\* and (ii) preclude future use of this weapon with the consequent loss of its military value.

(b) In the view of many members of the international community and Parties to the Protocol, it would restrict certain "first-use" options for tear gas, other non-lethal RCA's in wartime, and CW and BW incapacitating agents which we might wish to retain, ruling out the use of these agents even for "humanitarian purposes".

D. Should the United States decide not to ratify the Geneva Protocol, choosing perhaps to make official pronouncements reaffirming United States CBW policy?

Pros:

1. It would avoid taking any firmer official position on the Protocol, particularly before the Senate during the ratification process, which might result in a restrictive interpretation of the Protocol and deny useful military options. (State and Defense differ over the scope of the prohibitions in the Protocol. See legal views at the end of this section.)

2. Ratification is not strictly necessary to establish US support for the principles and objectives of the Protocol in view of past official statements supporting and announcing adherence to those principles and objectives.

\* This disadvantage could be overcome if the decision were accompanied by a statement indicating this was a unilateral policy change not required by international law. (ACDA)

This disadvantage may, in part, be justified by an official pronouncement declaring that the United States has made a unilateral policy change toward the legal content of the Geneva Protocol. On the other hand, such an official pronouncement would not overcome the propaganda effects which unfriendly States would enjoy. As such, an official statement of this kind would be harmful rather than beneficial (DOD)

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3. It would avoid the disadvantages of ratifying the Protocol with a reservation that might not have international acceptance.

Cons:

1. Non-ratification would be regarded by many nations who are aware of our current policy review as representing a negative outcome to this review, and would leave us vulnerable to propaganda exploitation by the Soviet Union.

2. Non-ratification would be seen as a blow to progress in disarmament and arms control measures in the CBW field.

3. Non-ratification would represent loss of an opportunity to: (a) strengthen the legal force of the Protocol and international restraints on the use and proliferation of CW and BW agents; (b) take a positive step, which would be welcomed by the international community; (c) reinforce past US official statements on the "no first-use doctrine"; and (d) reaffirm past US votes in favor of resolutions calling for strict adherence to the principles and objectives of the Protocol.

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#### E. Legal Issues

##### 1. The Department of State

(a) While the interpretation of the Geneva Protocol, as qualified by standard reservations, is not free from ambiguities, the most persuasive interpretation is that it prohibits the first-use in warfare among parties of (i) all biological weapons and agents and (ii) all chemical agents and weapons except (i) herbicides and (ii) those riot-control agents widely used for domestic law enforcement purposes when they are used for "humanitarian purposes." Most States, including the US in official statements at the UNGA in December 1968 and at the CCD, maintain that the term "bacteriological" in the Protocol includes all "biological" agents and weapons.

(b) While use of "asphyxiating" and "poisonous" gases is clearly prohibited by the 1925 Protocol, the term "other gases" is ambiguous. Some have suggested that a distinction may be drawn between lethal and non-lethal chemical agents. However, there is no basis in the negotiating history of the Geneva Protocol for making this distinction. In addition, there is no objective way to differentiate lethal from supposedly non-lethal chemical weapons. Many States, and the Secretary-General of the United Nations, interpret the words "other gases" in the Protocol as prohibiting the use in warfare of any C weapon or agent, including herbicides and tear gas, under all circumstances. The United States, speaking through the US Ambassador to the United Nations, has taken the position that the Protocol does not prohibit the use in warfare, for humanitarian purposes, of anti-personnel C gases which are widely used by governments to control riots by their own people. Today, this would permit the use of tear gas for humanitarian purposes, since it is the only riot-control agent presently widely used by governments domestically.

(c) The central purpose of the Protocol is humanitarian--to prevent the use of a class or classes of agents in warfare that cause unnecessary suffering. Wide domestic use of tear gases for riot control purposes and the absence of permanent or long-term damaging effects provide

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grounds for arguing that use of these agents in warfare is not inconsistent with the purpose of the Geneva Protocol. The primary rationale for an interpretation amounting to a total ban on chemical agents--that there is no reliable and non-controversial distinction between legal and illegal agents on the basis of their harmless nature--may be overcome if legal agents are limited to those widely used by governments for domestic law enforcement purposes. Moreover, the humanitarian purposes of the Protocol are not offended, but rather furthered when these agents are used in combat in a manner calculated to reduce enemy and civilian casualties. It cannot, however, be argued that use of these agents in conjunction with other weapons to facilitate the killing or wounding of the enemy furthers the humanitarian purposes of the Protocol. Any attempt to distinguish between the use of poisonous gas itself to create casualties, and the use of non-poisonous gas in conjunction with other deadly weapons to create casualties, is not persuasive in the context of the purposes of the Protocol, and would almost certainly be widely condemned.

(d) The Department of State has also taken the position that the principles of the Protocol have become part of customary international law. Thus, in Congressional correspondence in 1967, it was stated that "We consider that the basic rule set forth in this document -- has been so widely accepted over a long period of time that it is now considered to form a part of customary international law." While the establishment of these principles as customary international law is not free from doubt, this conclusion is based on the practice and statements of States, including the United States, and the nature and purpose of the Protocol. Most recently, over 90 States, including the United States, have voted for UN resolutions (in 1966 and 1968) that demand strict and unconditional compliance with the "principles and objectives" of the Protocol. The establishment of the principle of the Protocol as customary international law renders inoperative reservations of some States which seek to apply the Protocol only to other Contracting States. All States, whether or not Parties to the Protocol, are bound to observe rules of customary international law.

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(e) Some have argued that there is no "humanitarian purposes" limitation either in the Protocol or under customary international law on the ways in which RCAs can be used in warfare. The United States has <sup>not</sup> sought to establish a broader exception that would permit the use of such agents in connection with conventional fire to kill enemy troops. Most states which have expressed views and the Secretary-General take the position that the Protocol prohibits any use of tear gases in warfare. Accordingly, if the United States determines to ratify the Protocol and wishes to maintain the option to use tear gas "for humanitarian purposes," an express interpretation to this effect should accompany ratifications.\*

(f) If the United States were to determine to maintain the option for unrestricted use of tear gas and other incapacitants, it would be necessary not only to include (with the advice and consent of two-thirds of the Senate) an express interpretation or reservation to this effect in ratifying the Protocol, but also to take the position that the United States does not recognize any customary international law restriction on such uses and to oppose UN resolutions evidencing such a customary law limitations.

## 2. The Department of Defense

The Department of Defense does not agree with the Department of State position that the Geneva Protocol now states principles of customary international law and that its prohibitions extend to the type of agents now being employed by the United States in Vietnam.

First, the Protocol language, itself, only purports to bind the Parties "as between themselves," and the many reservations limiting its application further deprive it of any general law declaring effect and convert

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\*It is State's view that if this position is adopted, any public statements on the extent of the United States obligations under customary international law could and should be avoided.

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it into a confusing array of contractual relationships. That there is, at the least, major disagreement on the Protocol's legal effect is reflected in the UK study tabled at the ENDC in Geneva in August 1968:

"(ii) Jurists are not agreed whether the Protocol represents customary international law or whether it is of a purely contractual nature."

The reason for this disagreement is obvious. The reservations to the Protocol create the following congeries of differing contractual relationships, depending upon the substance of the reservation, and upon whether other ratifying States have accepted or objected to the reservations.

(a) States which have ratified the Protocol without reservations have an unqualified commitment with all other such States, in which no use of the prohibited weapons is legal, except, the limited right of reprisal.

(b) All States taking reservations concerning non-party States have qualified their obligations to permit use against a State which is not a party.

(c) Reserving States have qualified their legal obligation so that a use of the prohibited weapon is legal if another State or its allies have first used it against them. The language of the reservations regarding this "second use" however, is not clear, i.e., whether any and all CW or BW agents may be employed as a second use or whether the second use is limited to the specific CW or BW agent used by the first using State.

(d) All States which have objected to the State or States making reservations, have either prevented the Protocol from coming into force between them, or have established a contractual relationship modified in terms of the reservation and objection.

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These varying contractual relationships, which confuse the interpretation and application of the Geneva Protocol, clearly show that the States which have ratified it did not intend to declare rules of customary international law. Further, they deprive the Protocol from being an adequate "source" of customary international law. This conclusion is buttressed by a recent study conducted for ACDA by the noted publicists Ann and A. J. Thomas, of Southern Methodist University School of Law. After surveying the confusion, they concluded:

"The best that can be said, therefore, of the Geneva Protocol is that it does not constitute a completely legal obligation even between its signatories. It establishes a whole host of legal regimes which seem to be impossible to untangle." (At page 102)

Second, while it is true that the practice of States since the 1925 Protocol has generally shown compliance coinciding with its provision, there is no evidence to show that such compliance was based on legal restraints rather than policy reasons, facts which must be shown to deduce a rule of law from State practice. Nor is there evidence to show that compliance was necessarily linked to the Geneva Protocol. Indeed, the United States representative recently stated categorically in the United Nations that the United States considered that non-use of C&B agents during WW II was based upon the fear of retaliation rather than on the Protocol's legal restraint. (Ambassador Fisher, November 27, 1967.)

Finally, recent discussions of Western disarmament experts in NATO (US Mission NATO 4454) demonstrates no consensus on the subject of whether or not the Geneva Protocol now states customary international law. Only the Netherlands was willing to come out affirmatively

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on this point. The UK opinion was that there was "some evidence" of a customary rule, while Italy and Belgium expressed doubt. Denmark stated categorically that no such customary rule existed.

Third, with regard to the type of agents which are prohibited by the Protocol, the DOD agrees with the DOS that the Protocol language is ambiguous. The DOD is of the further view that the Protocol does not prohibit the use of incapacitants, RCA, herbicides or defoliants.

There is, in fact, considerable disagreement among States on the Protocol's coverage, i.e., whether all gases, or whether only those which are lethal in nature are prohibited. This is a matter which is not resolved by the Protocol. A UK study tabled at the ENDC in August 1968, stated, in this regard:

"(IV) There is no consensus on the meaning of the term "gases" in the phrase "asphyxiating, poisonous or devices." The French version of the Protocol renders "or other" as "ou similaires" and the discrepancy between "other" and "similaires" has led to disagreement on whether non-lethal gases are covered by the Protocol."

The Department of Defense view is supported not only by the Practices which have been sanctioned by the United States Government for the use of RCA in Vietnam, but also by many statements of policy by United States' officials on these practices. These statements demonstrate, contrary to the DOS position, that taken as a whole, US justification of its use of RCA's in Vietnam is that these agents are not banned by the Protocol or by international law--not on the narrow ground that a "humanitarian purpose" exception exists. Further, there is no evidence that this distinction proposed by the Department of State--that riot

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control or incapacitants may be used in warfare only for "humanitarian purposes"--has been accepted by all or even a majority of States. The negotiating history of the Protocol does not show that this doctrine of "humanitarian purpose" was even considered by its draftsmen. In the DOD view, use of RCA's or incapacitants is either prohibited by the Protocol or it is not. There is no basis for the argument that their use is permitted for "humanitarian" purposes and prohibited for all others.

The Department of Defense view is that there are no rules of customary international law which prohibit, per se, the use of any chemical agent reasonably employed to secure a military objective, other than the generally accepted principle that weapons shall not be used against non-combatants or to cause unnecessary suffering, and those rules which state that a soldier who is hors de combat is not a lawful target under the laws of war. Whether or not the enemy is hors de combat, however, is a factual and not a legal question. There is no rule which says that gases and conventional weapons cannot be used together. There is, instead, the above-mentioned test to be applied on a case-by-case basis to the facts. This position is in accord with that developed by Thomas and Thomas for ACDA (pp 171-173), referred to above. There is no support for the DOS argument that CW or BW agents--or any other weapon--shall be used "only for humanitarian purposes" i.e., only to save lives or reduce casualties.

With respect to biological agents the Department of Defense takes the view that the term "bacteriological" is vague and ambiguous and was not intended to encompass organisms which are not "bacterial" in nature. Other biological organisms such as rickettsiae, viruses and fungi under this view do not fall under the Protocol's prohibition.

This view is supported by the "draft convention on biological warfare" tabled by the United Kingdom at the ENDC in June 1969, the purpose of which is to

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overcome the ambiguous provision in the Geneva Protocol concerning "bacteriological" warfare. The United Kingdom considers this term "not sufficiently comprehensive to include the whole range of microbiological agents."

Additionally, since the Protocol prohibition of "bacteriological methods of warfare" is only an extension to such agents of the basic Protocol prohibition, the same rationale as set forth above with respect to chemical agents would apply to incapacitating bacteriological agents. Hence, such agents are considered to be beyond the reach of the Protocol.

Finally, it should be noted that if DOS views on the status of the Geneva Protocol as customary international law and on its scope are adopted by the US Government, and if public pronouncement of such adoption is made, the effect would be for our Government to brand itself and its allies as lawbreakers, and to publicly announce that our own actions in Vietnam and those of our allies, were and are contrary to established principles of international law. Further, if the option is taken to ratify the Protocol with an interpretation that RCA's are prohibited per se by the Protocol, as some States contend, we would be in the anomalous position of saying it is a crime to use RCA's against enemy soldiers but legal to use the same agents against our own civilians in peace time.

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