



Chayes, Antonia

[Handwritten initials]

955 Massachusetts Avenue, Cambridge, Massachusetts 02139 (617) 868-0200

March 13, 1992

General John Gordon
National Security Council
Washington, DC 20506

Dear John:

Matt Meselson was trying to see you about some definitions in the Chemical Weapons Convention. I think the issues in this paper are extraordinarily important.

I know that this may not be your highest priority, but I think you need to staff it out. I'd like to talk to you about it sometime soon. Give me a call.

With warmest regards,

Toni

Antonia Handler Chayes

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→ Mike?

Any?

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Note

Chicago Office:
Washington, D
New York C

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Lead to John Yodan

**QUESTIONS REGARDING THE US POSITION
SEEKING TO EXEMPT CERTAIN TOXIC CHEMICALS FROM THE
CHEMICAL WEAPONS CONVENTION**

The Chemical Weapons Convention (CWC) being negotiated at the Conference on Disarmament in Geneva would prohibit the development, production, acquisition, stockpiling, transfer and use of chemical weapons. "Chemical weapons" are defined in the draft treaty not in terms of specific chemicals but rather in terms of purpose. Chemicals intended for permitted purposes, as long as the types and quantities involved are consistent with such purposes, are not prohibited. Permitted purposes include industrial, agricultural, research, medical, pharmaceutical and other peaceful purposes and domestic law enforcement and riot control. Thus the Convention will expressly permit the use of chemicals for domestic law enforcement and riot control.

The US has sought to insert an additional provision into the Convention that would exempt entirely from the definition of "chemical weapons", and consequently from all provisions of the Convention, those "chemicals which are not super-toxic lethal or other lethal chemicals and which are used by a Party for domestic law-enforcement and riot control purposes". This language was initially put forward in the US draft treaty of April 1984. By exempting such chemicals from the definition of chemical weapons, the proposed provision would remove them from all prohibitions of the Convention, regardless of types and quantities, thereby seeming to allow even their unrestricted use as a means of warfare. Potent disabling chemicals, if of sufficiently low lethality and if used by a Party for police purposes, would apparently become freely usable, without violating the Convention, to increase the effectiveness of conventional lethal weapons in war.

Presumably, however, the intent of the US stops short of permitting such unrestricted use of disabling chemicals in war but seeks only to protect the limited military uses of "riot control agents" authorized by the national policy, as specified in Executive Order 11850 of 8 April 1975, according to which :

"The United States renounces, as a matter of national policy, ...first use of riot control agents in war except in defensive military modes to save lives such as:

- (a) Use of riot control agents in riot control situations in areas under direct and distinct US military control, to include controlling rioting prisoners of war.
- (b) Use of riot control agents in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.

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(c) Use of riot control agents in rescue missions in remotely isolated areas, ~~of~~ downed aircrews and passengers, and escaping prisoners.

(d) Use of riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations."

In contrast to these very limited uses, many of which are equivalent or closely akin to riot control, the uses allowed by the exemption to the CWC sought by the US go far beyond its own national policy, raising questions of major importance to the world effort to ban chemical warfare and preparations for it:

- 1) Does allowing the use of "riot control agents" for certain highly limited purposes, as exemplified in US Executive Order 11850, require entirely exempting from the prohibitions of the CWC their development, production and unrestricted use in war?
- 2) Does the proposed definition of exempted chemicals, with its dependence on domestic practices of individual States Parties, risk serious disagreement among States Parties as to which chemicals are permitted as a means of warfare and which are not?
- 3) If riot-control and other such disabling chemicals are exempted from the CWC, would there be any other internationally accepted legal restraint on their use as a means of warfare?
- 4) Do the benefits of exempting certain toxic chemicals from the CWC outweigh the international loss of confidence in the CWC that could result from the unrestricted use of those chemicals as a means of warfare?
- 5) Do the benefits of exempting certain toxic chemicals from the CWC outweigh the risk of weakening the international norm that restrains the use of chemical and biological weapons generally?
- 6) Do the benefits of exempting certain toxic chemicals from the CWC outweigh the long-term interest of society in proscribing and preventing hostile uses of future advances in biotechnology?
- 7) Would the proposed exemption create any conflict or ambiguity with definitions or prohibitions embodied in the 1925 Geneva Protocol?
- 8) Could the proposed exemption gain the necessary support of potential States Parties to the Convention?
- 9) Should the US refuse to join the Convention if the proposed exemption is not introduced into the Convention?

10) In view of the legislative history of Senate approval of the Geneva Protocol (summarized below) would US insistence on incorporating into the CWC provisions allowing broader use of "riot-control agents" than the very limited uses allowed in Executive Order 11850 risk delaying or even preventing Senate advice and consent to ratification of the CWC?

BACKGROUND

- A. Relevant provisions of the current (January 1992) draft of the Chemical Weapons Convention.

ARTICLE I

GENERAL PROVISIONS ON SCOPE

1. Each State Party to this Convention undertakes never under any circumstances:

(a) to develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;

(b) to use chemical weapons;

(c) to assist, encourage or induce, in any way, anyone to engage in activities prohibited to Parties under this Convention.

...

ARTICLE II

DEFINITIONS AND CRITERIA

For the purposes of the Convention:

1. The term "Chemical Weapons" shall apply to the following, together or separately:

(a) Toxic chemicals [...], and their precursors [...] except such chemicals intended for purposes not prohibited under the Convention, as long as the types and quantities involved are consistent with such purposes;

(b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals, as referred to above, which would be released as a result of the employment of such munitions and devices;

(c) Any equipment specifically designed for use directly in connection with the employment of such munitions or devices.

[...]

2. "Toxic Chemical" means:

any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans and animals. This includes all such chemicals, regardless of their origin or method of production and, regardless of whether they are produced in facilities, in munitions or elsewhere.

...

5. "Purposes Not Prohibited Under the Convention" means:

(a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes, domestic law enforcement and riot control purposes; and military purposes not connected with the use of chemical weapons;

(b) Protective purposes, namely those purposes directly related to protection against chemical weapons.

...

B. "Riot control agents" and the US Senate.

After President Nixon submitted the Geneva Protocol to the US Senate in August 1970, ratification was held up for nearly five years, owing to Senate opposition to the Administration view that the Protocol does not prohibit the use in war of riot control agents and herbicides. At the League of Nations and then at the United Nations, most governments expressing themselves on the question had stated the opposite view. In December 1974 the Senate was assured by the Administration that the US would renounce as a matter of national policy the first use in war of "riot control agents" and herbicides except in the very limited modes subsequently exemplified in Executive Order 11850. With this assurance and without accepting or rejecting the Administration

view of the scope of the Protocol, the Senate gave its advice and consent to ratification. The resulting favorable Report of the Committee on Foreign Relations of 13 December 1974 states that "the Committee attaches particular importance" to the following Committee question and the written answer provided by the Administration:

"Question: Assuming the Senate were to give its advice and consent to ratification on the grounds proposed by the Administration, what legal impediment would there be to subsequent Presidential decisions broadening the permissible uses of herbicides and riot control agents?
Answer: There would be no formal legal impediment to such a decision. However, the policy which was presented to the Committee will be inextricably linked with the history of Senate consent to ratification of the Protocol with its consent dependent on its observance. If a future administration should change this policy without Senate consent whether in practice or by a formal policy change, it would be inconsistent with the history of the ratification, and could have extremely grave political repercussions and as a result is extremely unlikely to happen."

C. Toxicity and lethality.

The categories "super-toxic lethal" and "other lethal" are defined by laboratory tests on rats described in the Annex on Chemicals of the draft CWC. Toxicity, in the draft, is not limited to lethality. Thus Art II.2 (see above) defines "toxic chemical" to include not only those chemicals that can cause death but also chemicals that can cause temporary incapacitation or permanent harm. A chemical may be relatively non-lethal but nevertheless highly toxic.

An example is the ultra-toxic heroin-like family of chemicals known as opioids -- a category of novel agent being studied by the US military and possibly others for possible use in incapacitating chemical munitions. There has also been interest in their use for domestic law-enforcement purposes. Such compounds can cause catalepsy in test animals at intraperitoneal dosages as low as 0.01 mg/kg, an incapacitating toxicity ten times greater than the lethal toxicity of the most powerful stockpiled nerve agent, VX. An objective of current military research is to develop relatively non-lethal opioids with extreme paralytic toxicity for use in disabling chemical weapons.