



~~CONFIDENTIAL~~ United States Department of State

S/S 8608291

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Washington, D.C. 20520

98817

March 21, 1986

MEMORANDUM FOR VADM JOHN M. POINDEXTER
THE WHITE HOUSE

SUBJECT: 1977 Protocols Additional to the Geneva Conventions
of 1949 on Protection of War Victims

(C) The Joint Chiefs of Staff and the Departments of State, Defense, and Justice have completed their reviews of these two Protocols and have agreed upon a recommendation that (1) the USG not ratify Protocol I, and (2) the Administration submit Protocol II to the Senate for advice and consent on ratification with certain reservations and understandings. (Attached at Tabs 1 and 2 is an exchange of letters between Secretaries Weinberger and Shultz reflecting these conclusions.)

(C) We propose that the USG formally notify the Swiss Government, as depository, of our intention not to ratify and request it to note that fact in its publications listing signatories. We propose also that we work to persuade our allies to follow our lead. (The only allies that have ratified already are Denmark and Norway; France has declared it will not ratify.) We can accomplish these objectives in a low-key, business like manner.

(U) Several provisions of Protocol I represent welcome innovations in the law. We recommend that the USG develop and raise with our allies a possible common declaration of principles incorporating the positive aspects of Protocol I, which will assist in their recognition as customary international law.

(U) Protocol II applies to non-international armed conflicts. Most of its provisions promote basic human rights in line with U.S. policy and practice. We recommend that the Administration support ratification of Protocol II with minor reservations and understandings along the lines of the examples set forth at Tab 3. The exact wording of the required understandings and/or reservations for Protocol II should be worked out among the Departments and then with our allies.

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(C) To accomplish these objectives, we suggest the following immediate steps:

-- By DOD:

- Providing the JCS study on the Protocols on a confidential basis to the allies and other appropriate foreign military authorities. (We suggest, in addition to all NATO countries, Australia, Israel, Japan and Korea.)
- Providing State and Justice with background material on Protocol II that DOD believes might be useful in preparing a transmittal package for the Senate.
- Informally advising the Armed Services Committees, as DOD believes appropriate, of our course of action.

-- By State (In coordination with Justice):

- Advising the ICRC, the NATO Political Committee, and other appropriate foreign political authorities of our decision to ratify Protocol II but not Protocol I, and our intention to develop a possible common declaration of principles incorporating the positive aspects of Protocol I. Work on such a declaration should proceed in a low-key, confidential manner. (We contemplate contacting, in addition to all NATO countries, Australia, Israel, Japan and Korea.)
- Preparing a draft transmittal package for Protocol II, taking into account the materials DOD would provide, as described above.
- Preparing a draft declaration of principles incorporating the positive aspects of Protocol I.
- Informally advising the Congressional foreign affairs committees of our course of action.

(C) RECOMMENDATIONS:

(1) That the USG not ratify Protocol I.

(2) That the Administration submit to the Senate Protocol II with reservations and understandings along the lines of the examples set forth in Tab 3.

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(3) That the program described above, and approved by State, Defense, and Justice, be implemented promptly.

Nicholas Platt

Nicholas Platt
Executive Secretary

cc: The Attorney General
The Secretary of Defense

Attachments:

- Tab 1 - From Weinberger to Shultz,
July 2, 1985
- Tab 2 - From Shultz to Weinberger,
December 10, 1985
- Tab 3 - Draft Understandings and
Reservations to Protocol II

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ACTION (L)

Copies to:

MEMORANDUM FOR THE SECRETARY OF STATE

SUBJECT: 1977 Protocols Additional to the Geneva Conventions of 1949 on War Victims

The Joint Chiefs of Staff have completed their review of the two subject Protocols. They have recommended against ratification of Protocol I and in favor of ratification, with certain reservations and understandings, of Protocol II. Their analysis is well-grounded and I concur with their recommendations.

Protocol I, negotiated under Red Cross auspices from 1974 to 1977 and signed by the Carter Administration in 1977, would politicize international humanitarian law and, inter alia, afford legal protections to terrorists and "national liberation movements" at the expense of non-combatants. In my judgment, the treaty would abet terrorism through (1) use of highly-charged rhetoric (e.g., "[the Protocol covers] conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes...") inappropriate in an humanitarian law treaty and (2) granting of combatant/POW status to irregular fighters who do not wear uniforms and otherwise fail to distinguish themselves from non-combatants.

It would abolish the traditional distinction between international and non-international conflicts, assigning to the former category conflicts involving only one sovereign state. The Soviets in particular would benefit from this creation of a "national liberation war" exception to the rule against interference in other states' internal affairs.

There are numerous operational restrictions in Protocol I that the Chiefs and I deem unacceptable, but even if these were not present, the Protocol would be unacceptable for the aforementioned reasons. We recognize that Protocol I contains some good language urging all fighters to distinguish themselves from non-combatants and refrain from attacking civilians, but that language is essentially hortatory, while the Protocol's key operative provisions would radically change humanitarian law in favor of terrorists and other irregulars at the expense of civilians.

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The unacceptable elements of Protocol I are multifarious and fundamental in nature. Given that reservations must be compatible with the object and purpose of the treaty, the Chiefs and I have concluded that Protocol I's flaws are not remediable through reservations and understandings. We therefore recommend that the United States declare its intention not to ratify Protocol I. The Swiss Government, as depository, should be informed formally of our intention and requested to note the fact in its publications listing signatories. We are confident that a clear exposition of our case against Protocol I will win substantial support on the Hill and with the public.

Protocol II applies to non-international armed conflicts. Most of its provisions promote basic human rights in line with US policy and practice. The Chiefs and I recommend that the Administration support ratification of Protocol II with minor reservations and understandings along the lines of the examples set forth in Attachment A. The exact wording of the required reservations for Protocol II must be worked out, first among OJCS, your office, mine, and other relevant agencies and then with our Allies.

Our NATO Allies, in particular, are eager to learn our conclusions regarding Protocols I and II. I have been told that, in the FRG, the Bundestag has pressed inquiries with the government on the ratification issue, which has been under study since December 1977. It is in our interest to inform our allies and the international community, without delay, of our position on Protocol I, as our opposition can be expected to discourage others from endorsing it. I do not think we should make the public announcement of our position await the precise formulation of the Attachment A items. When we declare our intention not to ratify Protocol I, I recommend we also declare our intention to ratify Protocol II with certain minor reservations and understandings that we shall work out with our Allies.



cc: The Assistant to the President
for National Security Affairs

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DRAFT UNDERSTANDING AND RESERVATIONS

1. Article 10 is reserved to the extent that it would affect the internal administration of the United States Armed Forces, including the administration of military justice.
2. The United States understands that Article 16 establishes a special protection for a limited class of objects that, because of their recognized importance, constitute a part of the cultural or spiritual heritage of peoples, and that such objects will lose their protection if they are used in support of the military effort.
3. It is the understanding of the United States that when assistance is provided to the armed forces of a High Contracting Party by another High Contracting Party, in relation to a situation described in Article 1/1, the Protocol will govern the conduct of both High Contracting Parties only to the same extent, and under the same conditions, that it binds the High Contracting Party in whose territory the conflict takes place.
4. [The United States shall, through a reservation or understanding, make clear that it does not accept the reference in Article 1 to Article 1(4) of Protocol I.]

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THE SECRETARY OF STATE
WASHINGTON

December 10, 1985

Dear Cap,

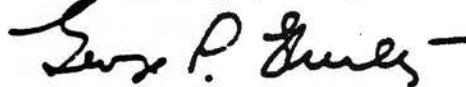
The Department of State has previously expressed its sympathy for the underlying objectives of the 1977 Additional Protocols, and its appreciation especially for the continuing efforts of the ICRC to improve humanitarian aspects of international law. Our prior positions on the Protocols have always been conditional, however, on their military acceptability.

The JCS Review of Protocol I makes clear that it is militarily unacceptable to the U.S., and should not be ratified. I agree with the Joint Chiefs that we should make every effort to see to it that the positive aspects of Protocol I become widely accepted as customary law. I also agree that Protocol II can and should be ratified, with appropriate reservations and understandings.

We will, however, need to carry out these decisions in a manner designed to minimize any potentially adverse international consequences of repudiation of Protocol I, and in particular, we should handle the issue publicly in a low-key way.

In the meantime, I request that you arrange to have the JCS study provided on a confidential basis to the NATO Military Committee and other appropriate foreign military authorities; and we will initiate interagency work on future steps, including documents for the submission of Protocol II to the Senate, and a possible proposal to allies for a common declaration of principles.

Sincerely yours,



George P. Shultz

cc: The Attorney General
The Assistant to the President
for National Security Affairs

The Honorable
Caspar W. Weinberger,
Secretary of Defense.

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DRAFT UNDERSTANDINGS AND RESERVATIONS

1. Article 10 is reserved to the extent that it would affect the internal administration of the United States Armed Forces, including the administration of military justice.
2. The United States understands that Article 16 establishes a special protection for a limited class of objects that, because of their recognized importance, constitute a part of the cultural or spiritual heritage of peoples, and that such objects will lose their protection if they are used in support of the military effort.
3. It is the understanding of the United States that when assistance is provided to the armed forces of a High Contracting Party by another High Contracting Party, in relation to a situation described in Article 1/1, the Protocol will govern the conduct of both High Contracting Parties only to the same extent, and under the same conditions, that it binds the High Contracting Party in whose territory the conflict takes place.
4. The United States shall, through a reservation or understanding, make clear that it does not accept the reference in Article 1 to Article 1(4) of Protocol I, and that the scope of the Protocol will be the same as that of Article 3 common to the Geneva Conventions of 12 August 1949.