

OFFICE OF THE SECRETARY OF DEFENSE

4 June 1986

MEMO FOR Sven Kraemer

FYI

Doug Feith

*Copy to Mahley
6/1/86
DF*



INTERNATIONAL
SECURITY POLICY

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, DC 20301-2600

0 4 JUN 1986

In reply refer to
I-09522/86

MEMORANDUM FOR ABRAHAM D. SOFAER, LEGAL ADVISER, DEPARTMENT
OF STATE

SUBJECT: 1977 Protocols: Announcement of Decision

As a follow-up to our telephone conversation of 2 June 1986, we have drafted and attach for your review (1) the announcement of the decision, and (2) a background paper outlining the reasons for the decision.

The announcement could be made jointly by State and DoD at State. The timing of the announcement is now up to us, inasmuch as Admiral Poindexter's instructions only delay the moment until we have consulted with the allies. The consultations having occurred, I assume you will want to make the appropriate arrangements with State/PA. A standard format -- a short statement by the spokesman, distribution of a background paper (and perhaps my National Interest article), and a question and answer session with thee and me -- would do the trick.

In the meantime, we should without further delay inform the Depository formally of the decision. In the same letter, we would state our intention to salvage the new-but-good provisions of Protocol I. Jacques Moreillon told me at our meeting last week that the ICRC is debating whether to support the US idea to work to have the "good" provisions of Protocol I accepted as customary international law. We still need to brief NATO at "an appropriate, high level", i.e. the NAC reinforced by legal experts from capitals. Ambassador Abshire told me yesterday that he favors the idea and believes you should give the briefing; he recommended mid-July. What do you think?

I take your point on congressional consultations. We will await word from you that the extradition treaty is safely through before starting talks with the SFRC on the Protocols. I also concur that the best vehicle for getting an SFRC endorsement of the President's decision on Protocol I is the Protocol II ratification package.

I would appreciate seeing any revisions you might want to make in the materials I have enclosed.

A handwritten signature in black ink, appearing to read "D. Feith".

Douglas J. Feith
Deputy Assistant Secretary
of Defense,
Negotiations Policy

Attachments
a/s

BACKGROUND PAPER ON PROTOCOLS' DECISION

The 1977 Protocols Additional to the 1949 Geneva Convention on the Protection of War Victims were negotiated from 1974 to 1977, and were signed by the previous administration. They address the treatment of civilians by combatants in both domestic and international conflicts.

The United States has decided (1) to ratify Protocol II with appropriate understandings and reservations; and (2) not to ratify Protocol I.

In arriving at these decisions, the government has been mindful that the protocols contain certain desirable provisions. In general, Protocol II is consistent with U.S. policy and practice on human rights and national security. But we have concluded that Protocol I suffers from fundamental shortcomings that cannot be remedied through reservations or understandings.

Protocol I is in key respects a pro-terrorist document that would undermine humanitarian law and endanger civilians in war. Certain provisions, such as Article 1(4), which extols "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," would inject subjective, political standards into the issue of the applicability of humanitarian law. Protocol I was designed to elevate the international legal status of self-described "national liberation" groups that make a practice of terrorism. This would undermine the principle that the rights and duties of international law attach principal to entities that have those elements of sovereignty that allow them to be held accountable for their actions.

Protocol I aims to encourage and give legal sanction not only to "national liberation" movements in general but in particular to their most most dubious tactics. Article 44(3), in a single subordinate clause, sweeps away hundreds of years of law and morality by "recognizing" that an armed combatant "cannot" always distinguish himself from non-combatants; it would grant him the status and privileges of a combatant anyway. As the essence of terroristic criminality is the obliteration of the distinction between combatants and non-combatants, it would be hard to square ratification of this protocol with the United States' announced policy of combatting terrorism.

Protocol I does contain specific anti-terrorism language. But that language is hortatory and in any case, is vitiated by other provisions that seek to legitimate terrorist organizations, to legalize terrorist acts and to reduce the protections of civilians in war.

Accordingly, the United States government has decided to seek the advice and consent of the U.S. Senate to ratify Protocol II, but we will not ratify Protocol I. We have notified the Swiss government (as depository) of these decisions.

We note that certain provisions of Protocol I reflect customary international law, and others appear to be positive new developments. We therefore intend to work with our allies and others to develop a common understanding or declaration of principles incorporating these positive aspects, with the intention that they shall, in time, win recognition as customary international law.

Prepared by:
OSD/ISP/NP/LRP
03 JUN 86

ANNOUNCEMENT OF PROTOCOLS' DECISION

Upon review of agency recommendations and after consultations with our allies, the President has decided that the United States will not ratify Protocol I of the 1977 Protocols Additional to the Geneva Conventions of 1949 on Protection of War Victims. The President also has decided that Protocol II, with appropriate understandings and reservations, should be submitted to the Senate for advice and consent on ratification.

The Protocols were negotiated from 1974 to 1977 and were signed by the previous administration in 1977. They address the treatment of civilians by combatants in both domestic and international conflicts. The government has reviewed these documents carefully and fully to determine whether they are compatible with traditional humanitarian law and with US policy and practices.

Protocol I is unacceptable because it would politicize humanitarian law, making its applicability hinge on subjective, non-legal judgments. It would afford legal protection to terrorists and terrorist organizations at the expense of noncombatants; it would grant POW status to irregulars who engage in terrorist practices. It would also abolish traditional distinctions between international and non-international conflicts, and establish an exemption for "national liberation movements" from the principle of non-interference in the internal affairs of other states.

Protocol II applies to non-international armed conflicts. Most of its provisions promote basic human rights in line with US policy and practice.

In addition, certain provisions of Protocol I are positive developments in international law. The United States will work with the international community to win respect for these provisions so that over time they will become recognized as customary international law.

The President's decision is a reaffirmation of traditional humanitarian law and the rights of civilians in war. It is a repudiation of the intense efforts of terrorist organizations and their supporters to promote the legitimacy of their aims and practices.

Prepared by:
OSD/ISP/NP/LRP
03 JUN 86