



DEPARTMENT OF STATE
ACTION MEMORANDUM

S/S

January 15, 1975.

CONFIDENTIAL

TO : D - Mr. Ingersoll

FROM : L - George H. Aldrich, Acting

GHA

Response to Deputy Secretary of Defense
on the Laws of War Conference

Attached (Tab A) is a proposed response to Mr. Clements' memorandum of January 3, 1975 (Tab B). This memorandum forwards the views of the JCS and represents an effort to overturn the position of the United States delegation at the first session of the Conference concerning the right of reprisal against civilians or the civilian population. That issue was the only one out of the hundreds of issues before the Conference on which State and Defense differed. As chief of the delegation, I decided that we would not oppose the draft provision before the Conference which would prohibit such reprisals. The last paragraph of the Clements memorandum is apparently an attempt to prevent me from prevailing on this issue again this year.

The issue is complicated, although I shall naturally be happy to go through it with you if you wish, but the Clements memorandum has been overtaken by consultations this week in Washington in which the British, French, and Canadians have all expressed an interest in finding a solution to it which can be supported by most western countries. It was agreed to try to do so at a meeting of the western delegations in London on January 27-30. The probable outcome will be a carefully restricted right of reprisal for egregious cases, which would be quite acceptable to Defense, even though it will doubtless differ from the JCS formulation. Thus, this should not be a continuing issue between State and Defense.

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I believe it important that your response to Secretary Clements both note the remarkable degree of cooperation that exists between the two Departments in our work on this Conference and preserve the decision-making authority of the chief of delegation.

Recommendation:

That you sign the letter to Deputy Secretary of Defense Clements (Tab A).

Attachments:

1. Tab A - Letter to Mr. Clements
2. Tab B - Memorandum from Mr. Clements

Drafted by:
L:GHaldrich:lr
1/15/75 ext.28460

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WASHINGTON

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RF (CWM)
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January 17, 1975

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Dear Bill:

Thank you for sending me the guidelines prepared by the Joint Chiefs of Staff for the second session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict. Your memorandum and the guidelines have been given to George H. Aldrich, who is our Acting Legal Adviser and chief of the United States delegation to the Conference. Mr. Aldrich informs me that work is nearly complete on position papers for the Conference and that, as was the case at the first session of the Conference last year, there is virtually complete agreement with the representatives of your Department on these papers. I am gratified at the close and effective cooperation between our two Departments which has characterized all of our work on this subject in recent years.

With respect to the question of the prohibition of reprisals against civilians or the civilian population, I understand that recent consultations with the British, French, and Canadians have improved the possibility of developing an agreed western position. This

The Honorable
William P. Clements, Jr.,
Deputy Secretary of Defense.

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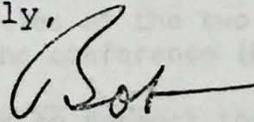
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possibility will be explored during a meeting of western delegations in London beginning on January 27. Representatives of your Department, including a representative of the Joint Staff, will participate in the London meeting, and I hope a fully satisfactory proposal will result. In determining the positions to be taken by the United States in the Conference, the chief of our delegation will naturally give serious and sympathetic consideration to the views expressed in your memorandum of January 3 and its enclosures.

Very best regards.

Sincerely,



Robert S. Ingersoll

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THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

7500246

3 JAN 1975

MEMORANDUM FOR DEPUTY SECRETARY OF STATE

SUBJECT: Preparation for the Second Session of the 1975 Diplomatic Conference on the Reaffirmation and Development of the International Humanitarian Law Applicable in Armed Conflict (LOW) (U)

(U) In preparation for the second session of the 1975 Diplomatic Conference, scheduled for Geneva beginning 3 February 1975, the Joint Chiefs of Staff have reviewed the results of the first session and prepared recommended guidelines. The guidelines address broad issues (Enclosure 1) as well as specific articles of the two draft protocols which will be under consideration at the conference (Enclosure 2).

(C) The Department of Defense continues to support the efforts of the International Committee of the Red Cross to make more explicit and complete the law which protects prisoners of war and other war victims. I believe that it is important to the United States to continue to play a constructive role in the Geneva negotiations. In this regard, I recommend that our delegation adopt the principles in the general guidelines at Enclosure 1. Also, in my opinion, the detailed guidelines at Enclosure 2 provide an excellent basis on which to develop our negotiating instructions pertaining to specific articles of the two draft protocols under consideration.

(C) I understand that there is some difference of view on the issue of reprisals. Nevertheless, I recommend that the delegation adopt the limited JCS position (Enclosure 2, page 9, paragraph d) on this issue at least as initial guidance. Should developments at the conference warrant a deviation, I would appreciate an opportunity to comment on proposed changes.

H. P. Clement

Enclosures 2
a/s

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SUBJECT TO GENERAL DECLASSIFICATION SCHEDULE OF EXECUTIVE ORDER 11652. AUTOMATICALLY DECLASSIFIED ON 31 Dec. 80.

SEC DEF CONTR No. X- 3824

APPENDIX A

GENERAL GUIDELINES FOR DEVELOPING US NEGOTIATING POSITIONS
FOR THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND
DEVELOPMENT OF THE INTERNATIONAL HUMANITARIAN LAW APPLICABLE
IN ARMED CONFLICT SCHEDULED TO CONVENE 3 FEBRUARY 1975 (U)

- 1. (C) Support reaffirmation of the principle that the humanitarian law of armed conflict should be applied equally regardless of the side or cause for which combatants are fighting.
- 2. (C) Continue to support strengthening of the Protecting Power provisions in the International Committee of the Red Cross (ICRC) Protocols.
- 3. (C) Support provisions for protection of civilians and civilian objects, but oppose provisions which would unrealistically limit military operations or fail to recognize military necessity.
- 4. (C) Continue to oppose substantive discussion of limitations on specific weapons in conjunction with the Diplomatic Conference. The US position has been, and should continue to be, that measures involving arms control, disarmament, or the prohibition or restriction of the use of specific weapons are matters to be considered in other forums, such as the Conference of the Committee on Disarmament.
- 5. (C) Recognize that it would not be feasible to attempt to make the provisions of these protocols pertaining to the conduct of hostilities applicable to the protection of civilians in the event of general nuclear war.

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Director, J-5
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SUBJECT TO GENERAL DECLASSIFICATION
SCHEDULE OF EXECUTIVE ORDER 11652
AUTOMATICALLY DECLASSIFIED AT THREE
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1980
DECLASSIFIED ON DECEMBER 31

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6. (C) Oppose draft provisions which would oblige extending 1
prisoner-of-war status to individuals belonging to a nonstate 2
entity who are engaged in disorganized or sporadic violence. 3
Consistent with the guidelines concerning Article 1 as amended, 4
may accept provisions which confer a right of prisoner 5
of war treatment to combatants meeting appropriate legal 6
criteria and belonging to a nonstate entity which has 7
accepted and is capable of applying the Conventions and 8
Protocol I. 9
7. (C) Develop provisions in Protocol I which would reaffirm 10
the underlying principles of the Third Geneva Convention 11
(1949) for the protection of all prisoners of war and there- 12
by attempt to nullify the present reservations to that 13
Convention which erode those principles. 14
8. (C) Support provisions in Protocol II which would make 15
the humanitarian provisions of that Draft Protocol appli- 16
cable in low-intensity (low-threshold) noninternational 17
conflicts and oppose provisions which either grant legal 18
status to insurgent groups or interfere with the ordinary 19
orderly process of national judicial systems. There must 20
be a careful balancing between the threshold of application 21
of the protocol and the substantive provisions therein. 22

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APPENDIX B

DETAILED GUIDELINES FOR DEVELOPING US NEGOTIATING POSITIONS
FOR THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND
DEVELOPMENT OF THE INTERNATIONAL HUMANITARIAN LAW APPLICABLE
IN ARMED CONFLICT SCHEDULED TO CONVENE 3 FEBRUARY 1975 (U)

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Protocol I

1. (C) Part I. GENERAL PROVISIONS

a. Response to Article 1 as amended by Committee I at the
1974 Diplomatic Conference:

The US Delegation may refrain from opposing Article 1
as amended conditional upon acceptance of certain provisions.
The Delegation should establish clearly in the negotiating
history of Article 1 an interpretation that "armed conflict"
within the meaning of paragraph 2 of Article 1 implies sus-
tained hostilities between Parties having organized armed
forces, and that such Parties either are high contracting
parties or are capable of applying the Geneva Conventions
and the Protocol and have declared that they accept the
obligations of the Conventions and the Protocol. The Dele-
gation should also insist on the adoption of a provision
which negates implications that the application of the law of
war is dependent on the nature of the cause for which com-
batants are fighting. The Delegation should clearly indi-
cate in the course of the negotiations that the US views
Article 1 as a broadening of the scope of humanitarian law
and regards the specific references to "racist regimes,
alien occupation and colonial domination" as merely
illustrative of the struggles for self-determination
to which the article applies. Finally, the Delegation

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should clearly indicate that US acceptance of Article 1 1
is premised on the development of reasonable provisions 2
for the remainder of the Protocol. 3

b. The US Delegation should continue to press for a 4
mechanism which will increase the probability for the 5
appointment and acceptance of Protecting Powers and provide 6
for the mandatory acceptance of the International Committee 7
of the Red Cross (ICRC) as a substitute if arrangements 8
cannot be made for the services of a Protecting Power 9
(Article 5). 10

c. In order to improve the probability that a neutral state 11
or an impartial humanitarian organization will agree to 12
serve as a Protecting Power and that Parties to a conflict 13
will accept these services, the Protocol must make clear 14
that the supervisory duties are limited to those concerned 15
with the protection of the wounded and sick, prisoners of 16
war, and protected civilians in the hands of an adversary. 17
The Protocol should specifically exclude supervision of 18
combat operations from the scope of the Protecting Power's 19
duties (Articles 2 and 5). 20

2. (C) Part II. WOUNDED, SICK, AND SHIPWRECKED 21

a. The US Delegation should support the provisions of Part II 22
which extend protection to civilian medical units and 23
establishments, personnel, and transports, comparable to that 24
provided to military medical units, establishments, personnel, 25
and transport under the First and Second Geneva Conventions 26
(1949). It should, however, oppose any provisions which 27
degrade or limit the medical services provided within a 28
nation's armed forces. In this connection, the US Delegation 29
should seek to modify the provisions of Draft Article 16 (2) 30

which may be construed to limit unduly the services which may
be performed by skilled paramedical personnel on ships
and in units where professional medical personnel are
not available.

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b. Restriction of medical experiments, similar to those
proposed, on persons who have fallen into the hands of the
adverse Party or who are detained or deprived of liberty as
a result of hostilities should be supported. Broader
restrictions which would put an end to reasonable medical
research on other freely consenting human subjects should be
opposed (Articles 11 and 65.2(c)).

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c. The US Delegation should continue to support the optional
use of distinctive visual and nonvisual signals for better
identification of medical transport, particularly medical
aircraft. Flashing blue lights for medical aircraft, a
distinctive medical radio call and a secondary
surveillance radar specified or agreed code on MODE 3A
(medical aircraft) should be reserved for the exclusive use
of medical transport. These provisions must be supplemented
by an obligation for the parties to take reasonable measures
for the recognition of the distinctive signals. Optional
designation and publication by the High Contracting
Parties of national radio frequencies to be used by them
to facilitate radio communications should be supported
(Article 18 and Annex).

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d. Efforts to achieve a common set of rules for all types
of medical transport must not infringe upon the special
privileged status and protection of hospital ships described
in Articles 22, 24, and 25 of the Second Geneva Convention
(1949) or that of their medical personnel and crews
(Article 23).

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e. The US Delegation should support measures for the reasonable protection of medical aircraft, including authority to operate without prior agreement over land areas controlled by itself or its allies and over sea areas not controlled by the enemy, its allies, or neutrals. The Delegation should support provisions for prior agreements for medical aircraft operating over land or sea areas controlled by neutrals or the enemy and their allies. These measures should, however, be balanced by adequate provisions for insuring the security of forces against abuse of the protected status of such aircraft (Articles 26-32).

3. (C) Part III. METHODS AND MEANS OF COMBAT AND PRISONER-OF-WAR STATUS

a. If attempts are made to expand paragraph 2, the US Delegation should seek to limit Article 33, paragraph 2, to a reaffirmation of the principle of the conventional (Hague Regulations, Article 23e) and customary law of war which prohibits the use of weapons, projectiles, materials, or methods so as intentionally to cause unnecessary suffering. The text of Article 34 should be related to, and consistent with, paragraph 2 of Article 33. Thus, it should provide that in its study and development of new weapons or methods of warfare, each Party is obliged to determine whether the subject of its R&D falls within the prohibition of paragraph 2 of Article 33.

b. The US Delegation should oppose specific weapons prohibitions or restrictions within the scope of the Protocols and oppose substantive consideration of this subject in any form by the Diplomatic Conference. The US Delegation may, however, support procedural considerations with a view to recommending an appropriate forum to study and consider this issue.

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c. It is noted that Article 37, Emblems of Nationality, 1
 changes the existing law by prohibiting the use of enemy 2
 or neutral flags, distinctive emblems, and military insignia 3
 in such a way as to shield, favor, or impede military 4
 operations. Under existing law, the use of enemy uniforms is 5
 improper only when used in actual combat. The Joint Chiefs 6
 of Staff oppose this extension of the rules of warfare 7
 governing ruses. 8

d. The US Delegation should resist any provisions in the 9
 protocol which could compel their application to the conduct 10
 of hostilities at sea in order to avoid an unintended 11
 codification of many areas of the law of maritime warfare 12
 not presently covered by any treaty or convention. 13

e. The US Delegation should oppose provisions which would 14
 confer prisoner-of-war status on individuals of nonstate 15
 entities engaged in sporadic or disorganized violence. The 16
 United States should also oppose provisions which suggest 17
 unequal application of the humanitarian law of armed conflict 18
 and should seek provisions which reaffirm the requirement of 19
 equal application of the law regardless of cause. Consistent 20
 with these requirements, paragraphs 1 and 2 of ICRC draft 21
 Article 42 may be accepted provided that the article is 22
 amended to establish reasonably concrete and unambiguous 23
 standards on the means of distinguishing irregular combatants 24
 from the civilian population. 25

f. The US Delegation should exploit the opportunities 26
 afforded by provisions for the protection of irregular 27
 combatants in order to reaffirm the protection which the 28
 Third Geneva Convention (1949) provides for all persons 29
 entitled to prisoner-of-war status and to nullify the 30
 reservations of Communist states to Article 85 of the Third 31

Geneva Convention of 1949 which, in practice, have become
reservations incompatible with the objectives and purposes
of the Third Convention (Article 42). 1
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4. (C) Part IV. CIVILIAN POPULATION 4

a. The Delegation should seek to limit the field of
application of Section I (Article 44) to the civilian
population and civilian objects on land insofar as they may
be directly affected by military operations involving land,
sea, or air forces. Application of the Protocol to sea
warfare or its imposition of limitations on Parties to
control their own populations should be opposed (Article 44). 5
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(See subparagraph 3d above for rationale on sea warfare.) 12

b. The US Delegation should support a reaffirmation of the
principle that the civilian population as such, as well
as individual civilians, shall not be made the object of
attack (Article 46). It should, however, oppose any rule
derived from this principle which might create the
illusion that civilian casualties incidental to attacks
against military targets located in populated areas can be
avoided. Prohibition against indiscriminate means of
combat should not extend beyond restrictions against: 13
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(1) Those which are intended to attack indiscriminately
the civilian population and military targets, and 22
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(2) Those for which there is a high probability of
incidental civilian casualties known to be dispropor-
tionate to the military advantage anticipated (Article
46). 24
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c. The rules limiting military operations with a view to
providing reasonable protection of the civilian population
and civilian objects against the effects of hostilities
should be stated more clearly so that they can be easily
and readily understood (Articles 46-50). 28
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d. It is noted that the US Delegation at the first session of the Diplomatic Conference did not oppose the prohibition against reprisals directed against the civilian population under the control of the enemy (Article 46(4)), contrary to the recommendation in paragraph 4d of the Appendix to JCSM-4-74, 8 January 1974. Upon further consideration, the Joint Chiefs of Staff continue to adhere to the view that the threat of reprisal is an essential means for deterring serious violations of the law of war. Recognizing that the risk of escalating counter reprisals should be minimized, it is proposed that the US Delegation should seek to amend draft Article 46(4) so as to permit reprisals against the enemy's civilian population in enemy territory, but only in response to grave unlawful enemy attacks on the other party's civilian population. The US Delegation should also support provisions restating customary international law prerequisites for resort to reprisals not forbidden by international law.

e. The US Delegation should support the concept that objects which are not military objectives should not be made objects of attack (Articles 47, 48, and 49). The prohibition should not, however, preclude attacks and destruction rendered necessary by military operations nor should it prohibit a Party from certain actions on its own territory (e.g.,

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a Party from certain actions on its own territory (e.g., 25

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destruction of specified objects to deny them to an invading
enemy). The prohibition in Article 49 against attacks
upon works and installations containing dangerous forces
should be limited to the prohibition against destruction
intended to cause damage disproportionate to the military
advantage expected. Moreover, the article should be modified
in recognition of the fact that attacks against military
objectives located on such works and objects need not
necessarily destroy them.

f. The rule of proportionality along the lines of Proposal II,
Article 50, is acceptable in principle so long as it is clear
that the term "military advantage" is understood to include
the security of the military force and the principle of
economy of force. In addition, the US Delegation should
resist any reference to "those who launch an attack"
since the broad application of this phrase places upon
lower ranks responsibilities that are unreasonable and
difficult or impossible to discharge. The Delegation
should support a rule which provides for "reasonable
precautions" in choice of weapons and method of attack
so as not to cause unnecessary civilian losses; however,
consideration of military losses when attacking a military
objective remains a most important principle.

g. It is noted that Western European delegations at the
first session strongly urged strengthening of the protec-
tion afforded by Article 63 of the Fourth Convention with
respect to civil defense organizations and personnel.
The Joint Chiefs of Staff have, accordingly, reviewed the
instruction of the US Delegation relative to Articles 54-
59 dealing with civil defense. These instructions remain
suitable insofar as, without interfering with the

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performance of military missions, they support respect and protection of civil defense organizations of a non-military character whose purpose it is to insure the survival of the civilian population by the maintenance of essential services, by the distribution of relief, and by the organization of rescue. The US Delegation should oppose the extension of special protection to nonmedical military units or military personnel performing civil defense tasks.

5. (C) Part V. EXECUTION OF THE CONVENTIONS AND OF THE PRESENT PROTOCOL

a. The provisions dealing with the repression of breaches are deficient in that they do not define grave breaches, nor does Article 2(c) provide a clear definition of the class of victims protected by the penal sanction of grave breaches. As grave breaches of the present Geneva Conventions are universal crimes over which all Parties have jurisdiction, they should be reserved for extremely serious offenses against persons, committed willfully. If there is substantial support for including certain offenses against property among grave breaches, the US Delegation should seek to limit those offenses to those committed voluntarily or willfully against property the destruction or seizure of which is not justified by military necessity and seriously endangers the life or health of persons (Articles 2(c) and 74).

b. Except as now provided in the First and Second Geneva Conventions, crimes by nationals of a Party against their own nationals or the property of such nationals should be reserved for disposition by the Party's own national courts and should not be grave breaches.

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Protocol II

DRAFT PROTOCOL ON NONINTERNATIONAL ARMED CONFLICT

1. (C) The principal issue in establishing a position with regard to Protocol II is to identify the type of noninternational conflict to which this Protocol shall apply. The Joint Chiefs of Staff would accept a Protocol based on a low level of violence and organization which is limited, substantively, to provisions of a strictly humanitarian nature. It is recognized that there are infinite degrees of intensity in noninternational conflicts, and the US Delegation must carefully balance the threshold of application vis-a-vis the substantive proposals. Provisions such as those presently found in Parts IV and V of Draft Protocol II can apply only when both parties have organized armed forces under responsible command and have an administrative and disciplinary system capable of carrying out the obligations of the Protocol. Such a scenario could indicate a high-intensity conflict.
2. (C) Application of Protocol II should be expressly limited to armed conflict not of an international character, occurring within the territory of a Party. The absence of such a limitation would tend to encourage the export of internal armed conflicts and terrorism.
3. (C) The US Delegation should oppose any provision in the Protocol the application of which would imply recognition, legitimacy, or international standing to insurgent groups. Consistent with this, the US Delegation should insure the negotiating record reflects the US understanding that the application of the humanitarian law of armed conflict in no way signifies or implies a partial or complete recognition of the opposing group or movement or change in its legal status.