



DEPARTMENT OF STATE

ACTION MEMORANDUM

s/s # 7731019

*Emb Aldrich
Chron*

December 9, 1977

TO: The Acting Secretary

FROM: L - Herbert J. Hansell *HJH*
S/AR - George H. Aldrich *GHA*

SUBJECT: Circular 175 Procedure: Request for Authorization to Sign Two Protocols to the Geneva Conventions of 1949 for the Protection of Victims of War

Issue for Decision

In accordance with the Circular 175 Procedure (11 FAM 700), authorization is requested to sign the two recently negotiated Protocols to the Geneva Conventions of 1949 for the protection of victims of war. It is also requested that you sign the Full Power at Tab A to permit Ambassadors Warner and Aldrich to sign the Protocols on behalf of the United States.

History of Negotiations

The Swiss Government, as depositary of the 1949 Geneva Conventions, convened in 1974 a diplomatic conference to consider two draft protocols which had been prepared by the International Committee of the Red Cross. The Conference held four annual sessions and concluded in June 1977, with the adoption of the texts of the two Protocols. The Final Act of the Conference and the texts of the Protocols are at Tab B. The Protocols will be opened for signature on December 12, 1977.

Description of the Protocols

The Protocols make significant advances in the protections accorded by international law to the victims of armed conflicts. Protocol I, dealing with international

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armed conflicts, corrects a number of deficiencies in the 1949 Conventions, for example, by providing a considerable immunity from attack to medical aircraft, by improving the procedures for the appointment of protecting powers to oversee the implementation of the law, and by requiring accounting for persons missing in action and the return of the remains of the dead. Protocol II, dealing with non-international armed conflicts, expands dramatically the law applicable to civil wars, which at present is found largely in one article (Article 3, common to the four Geneva Conventions of 1949). Protocol II is concerned almost exclusively with the protection of basic human rights, both of combatants and non-combatants.

Thus the Protocols make important, positive contributions to the development of the law. Furthermore, they do not contain any provisions that should be unacceptable to the United States. Considering the relatively recent experience of the Vietnam War and the opportunity for propaganda offered by the negotiation of the Protocols, it is a cause for considerable satisfaction that the international conference system was able to produce such a responsible result. Significantly, the only article that seems politically charged, Article 1 of the first Protocol, which defines international armed conflicts to include wars of national liberation, was one of the very few articles adopted at the first session of the Conference in 1974. In subsequent sessions the Conference found itself more absorbed in its humanitarian tasks and less tempted by the prospect of propaganda. Moreover, the extreme language of Article 1, which defines wars of national liberation in terms of "alien occupation", "colonial domination", and "racist regimes", is explicable, not primarily as a propaganda exercise, but rather as an effort by the developing countries to ensure that this provision has no application outside of the present armed conflicts by various liberation movements in Southern Africa and by the PLO in the Middle East. Furthermore, Article 96 of the Protocol makes clear that this provision is non-discriminatory in its application, and that the laws of armed conflict would have to be fully observed by such movements.

Reservations and Understandings

Although the United States does not need to make a final decision concerning any reservations or understandings until the time for ratification, it would be

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appropriate and probably desirable to state formally at the time of signature any reservations or understandings which we are reasonably certain will be required. We have identified only two understandings that we should state at the time of signature with respect to Protocol I and only one with respect to Protocol II. These statements are at Tab C. It may be desirable to add other statements to the United States instrument of ratification, but this does not need to be decided now.

The most important statement of understanding, that excepting nuclear weapons from the new rules established by the Protocol, is arguably unnecessary, as it states a position taken throughout the Conference by the representatives of the United States, the United Kingdom, and France and was contradicted only by the representative of India. In view of the importance of clarity on this question, however, and particularly in the light of Articles 35 and 55 which prohibit means of warfare likely to cause widespread, long-term and severe damage to the natural environment, this understanding should be made for the record at the time of signature.

The understanding concerning the term "deployment" in Article 44 is necessitated by the facts that the term is of critical importance for the protection of the civilian population, and its meaning was disputed at the time the article was adopted. We must insist that a guerilla who takes advantage of his enemy by pretending to be an unarmed civilian while moving toward the position from which he is to attack forfeits his status as a legitimate combatant and prisoner of war and may be tried and punished for any offenses he has committed. Although most representatives who spoke to this question agreed with us, a few interpreted the term "deployment" so as to require the guerilla to distinguish himself from the civilian population only just before he begins his attack. In view of this division of opinion, our understanding should be clearly and formally stated.

The understanding concerning Protocol II (to interpret certain terms as they are defined in Protocol I) is technical and results merely from the deletion of an article on definitions when Protocol II was compressed at the end of the Conference.

The Department of Defense concurs in these understandings but also recommends that consideration be given to one reservation to the first Protocol. It does not believe that it is necessary to make the reservation at the time of signature. This proposed reservation, the text of which is at Tab D, would preserve the right of reprisal against an enemy's civilian population or civilian objects in the event of systematic and massive attacks against our civilian population in violation of Article 51 of the first Protocol. That article prohibits all attacks directed against the civilian population, expressly including attacks by way of reprisal. Article 52 prohibits reprisals against civilian objects. The Department of Defense believes that these prohibitions are unrealistic and will not be respected in practice. They eliminate the ability of the United States to threaten to take these reprisals.

The State Department and the Arms Control and Disarmament Agency agree that this prohibition may prove unworkable in the event of massive and continuing violations of the Conventions and the Protocol, and that such violations could not be absorbed without a response in kind. However, they believe that a reservation by the United States on the point is neither necessary nor desirable. State and ACDA believe that such a reservation would be misconstrued and misunderstood as a statement of intention to attack civilian populations and to justify such attacks as "reprisals". Certainly it is true that those who have in the past violated the laws of war have often tried to justify their actions as legitimate reprisals. The Protocol goes too far in an effort to remove that justification, but that excess does not compel us to make a reservation. In view of our understanding concerning nuclear weapons, it would be particularly difficult to explain why we, of all nations, found this reservation necessary, as such a reservation would not be needed to preserve our right to use these weapons. It would only preserve our right to use conventional weapons or other proportionate means to respond to the enemy's violations. In any event, since we should limit our reservations and understandings at the time of signature to those almost certain to be required, we can consider this question at any time prior to ratification.

Congressional Consultations

Interested members of Congress have participated as advisors to the United States Delegation to the

Geneva Conference and have been kept informed of the progress of negotiations, but there have been no formal hearings or consultations with the Congress. At the appropriate time, we intend to offer briefings to interested Congressional members and staff. We anticipate no significant Congressional objection to the two Protocols.

Allied Consultations

Consultation with our NATO allies has, of course, occurred throughout the negotiations. A NATO Military Committee Study has recently been completed which finds the Protocol acceptable from the military standpoint, but stresses the needs (a) for all of the allies to be bound by the same rules, (b) for the rules not to affect the use of nuclear weapons, and (c) for certain ambiguous articles to be interpreted uniformly by all allies in ways we stated for the record during the closing sessions of the Conference. Further allied consultations will be held as appropriate to ensure a coherent approach to both the timing of ratification and to the substance and texts of any reservations, understandings, and interpretations.

Recommendations

1. That you approve signature of these two Protocols on behalf of the United States with the understandings proposed at Tab C.

Approve _____ Disapprove _____

2. That you sign the Full Powers at Tab A.

Attachments:

- Tab A - Full Powers
- Tab B - Final Act and Protocols
- Tab C - Statements of Understanding
- Tab D - Proposed Reservation
- Tab E - Memorandum of Law

Drafted:

S/AR:GHaldrich:js
12/8/77:x28460

Concurrences:

- L/T - Mr. Rovine *by MDM*
- PM - Mr. Breckon *by MDM*
- H - Mr. Atwood *by MDM*
- DOD - Mr. Anderson *by MDM*
- ACDA - Mr. Graham *by MDM*
- L - Mr. Michel *by MDM*

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PROPOSED UNDERSTANDINGS

A. Protocol I

1. It is the understanding of the United States of America that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.

2. It is the understanding of the United States of America that the phrase "military deployment preceding the launching of an attack" in Article 44, paragraph 3, means any movement towards a place from which an attack is to be launched.

B. Protocol II

It is the understanding of the United States of America that the terms used in Part III of this Protocol which are the same as the terms defined in Article 8 of Protocol I shall so far as relevant be construed in the same sense as those definitions.

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PROPOSED RESERVATION TO PROTOCOL I

Notwithstanding the provisions of Article 51, paragraph 6, and Article 52, paragraph 1, the United States of America reserves the right, in the event of massive and continuing attacks directed against the civilian population, to take reprisals against the civilian population or civilian objects of the State perpetrating these illegal attacks for the sole purpose and only to the extent necessary to bring the illegal attacks to an end. These measures shall not include any of the actions that are otherwise prohibited by the Geneva Conventions of 1949 or this Protocol.

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DEPARTMENT OF STATE

Washington, D.C. 20520

MEMORANDUM OF LAW

Circular 175 Procedure: Request for Authority to Sign Two Protocols to the Geneva Conventions of 1949 for the Protection of Victims of War.

The accompanying Circular 175 memorandum requests authority to sign two Protocols to the Geneva Conventions of 1949 for the Protection of Victims of War. These Protocols will be submitted to the Senate for advice and consent to ratification. Therefore, the treaty power of the Constitution (Article II, section 2, clause 2) provides legal authority for U.S. adherence.

The Protocols obligate parties to accord certain protections to persons engaged in or affected by armed conflicts, particularly civilians, prisoners of war, and the sick and wounded. Observance of these obligations by the United States would be fully compatible with the Constitution, and no implementing legislation will be required.

Neither signature nor ratification of the Protocols by the United States would constitute a "major federal action significantly affecting the quality of the human environment" within the meaning of the National Environmental Protection Act (NEPA). No identifiable effects on the environment from the adoption of the Protocols can be foreseen; any hypothetical effects would be incidental and highly speculative, and, since the Protocols moderate and restrict the use of armed force, would be beneficial and not destructive. Further, the proposed statement of understanding concerning nuclear weapons is not a major federal action, since it merely restates the fact that Protocol I was not intended to create new rules prohibiting or restricting the use of nuclear weapons. Accordingly, no environmental impact statement is required under the NEPA.

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On the basis of the foregoing, there is no legal objection to United States signature of the Protocols.

Michael J. Matheson

Michael John Matheson
Assistant Legal Adviser
for Politico-Military Affairs

Cleared:

L/T - Mr. Rovine *by MDM*
L/OES - RJBettauer (draft) *by MDM*
L - Mr. Michel *by MDM*

Drafted:

L/PM - MJMatheson:jd
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