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JCS 2497/24-6
13 September 1982
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Date: SEP 30 2013

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REPORT BY THE J-5
to the
JOINT CHIEFS OF STAFF
on

JCS REVIEW OF THE 1977 PROTOCOLS ADDITIONAL
TO THE 1949 GENEVA CONVENTIONS (U)
Reference: JCS 2497/24-4

DECISION

1. On 28 September 1982, by telephone vote, the Joint Chiefs of Staff, after making amendments, approved the recommendations in paragraph 9 of this report.
2. The Enclosure was sent as JCSM 219-82, 1 October 1982, to the Secretary of Defense.
3. This decision replaces the paper. Holders are requested to destroy the superseded paper in accordance with security regulations.

JS 5 U.S.C. 552(b)(6)

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INTERNAL STAFF PAPER

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JCS 2497/24-6

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13M-3010

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JCS REVIEW OF THE 1977 PROTOCOLS ADDITIONAL TO THE 1949 GENEVA CONVENTIONS (U) 1

THE PROBLEM 2
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1. (U) To respond to a request* by the Under Secretary of Defense for Policy (USD(P)) for a preliminary analysis of the major areas of likely JCS concern with the 1977 Protocols Additional to the 1949 Geneva Conventions (the "Additional Protocols"). 4
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FACTS BEARING ON THE PROBLEM 9

2. (U) On 20 April 1982, OJCS initiated** a formal military review of the protocols. To meet the first milestone in the plan for the review, three Services have provided*** their initial military assessment of the protocols. Those assessments address issues that may require a declaration,**** several reservations,† and numerous statements of understanding.‡ Many of the proposed statements repeat or revise statements provided by the Joint Chiefs of Staff (JCSM-448-77)‡‡‡ concerning US signature. 10
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3. (U) On 30 July 1982, the USD(P) requested an informal preliminary but substantive analysis of the major areas of likely JCS concern with the protocols. In addition to his 19
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* JCS 2497/24-4 22
** JCS 201720Z Apr 82, as revised by JCS 031924Z Aug 82 23
*** (1) Army memorandum, DAMO-SSM, 9 August 1982, "Army Views on Ratification of the Additional Protocols to the Geneva Conventions of 1949 (U)"; 5N file in Joint Secretariat 24
25
(2) Air Force memorandum, 13 August 1982, "Military Review of 1977 Additional Protocols"; 6N file in Joint Secretariat 26
27
(3) Marine Corps memorandum; JCS 2497/24-5 28
**** Annex D to Appendix A 29
† Annex A to Appendix A 30
‡ Annexes B and C to Appendix A 31
‡‡‡ Enclosure to JCS 2497/18-2 31

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request for preliminary analysis, he requested final JCS 1
recommendations on the protocols on or before 1 December 1982. 2
This requested completion date is the second USD(P) initiative* 3
to accelerate the JCS review. While acknowledging that every 4
effort would be made to accelerate the military review,** the 5
Services and the Joint Staff have indicated that the Joint 6
Chiefs of Staff would provide their views on ratification in 7
December 1982.*** 8

DISCUSSION 9

4. (✓) Providing the Secretary of Defense with the draft 10
proposed reservations (Annex A to Appendix A) would limit the 11
broader range of issues raised during the current military 12
review and possibly mislead the OSD staff about the range and 13
depth of military concerns. Accordingly, the Director for 14
Multilateral Negotiations Policy, OSD, agreed to the informal 15
Joint Staff suggestion that the draft proposed statements and 16
supporting analysis include as many issues as the Services and 17
Joint Staff had under study at this time and to the extension 18
of the requested response date to 24 September 1982. Further, 19
the supporting analysis would address principally those new and 20
revised (from those provided in JCSM-448-77) proposed 21
statements under consideration rather than provide a 22
comprehensive statement encompassing material previously 23
provided to the OSD staff.**** 24

5. (✓) Providing such statements, even on an informal, 25
preliminary basis, may imply that the Joint Chiefs of Staff may 26
not object to ratification of one or both of the protocols. If 27
the Joint Chiefs of Staff do object to ratification, the 28
statements will not be required. Providing a lengthy 29

* Attachment to JCS 2497/24-2 30
** Attachment to JCS 2497/24-3 31
*** Attachment to JCS 2497/24-1
**** See Appendix B

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collection of statements also may imply that issues addressed 1
reflect a complete survey of the issues under study for the 2
military review; that the issues addressed may be resolved only 3
by such statements and not by changes to military doctrine and 4
procedure or to State's practices with the passage of time; and 5
that a complete survey has been completed to determine which 6
protocols' provisions are new treaty laws versus restatements 7
of treaty or customary law accepted by the United States. A 8
separate action is being prepared on the issue of the 9
nonapplicability of the protocols to nuclear weapons; that 10
action includes analysis of various options for statements on 11
this issue. 12

6. (U) In 1977, the Joint Chiefs of Staff noted (Appendix D to 13
JCSM-448-77) the need to develop common statements for reserva- 14
tions and understandings with other States, should the United 15
States decide to accept the protocols. 16

CONCLUSIONS 17

7. (U) The draft proposed statements and accompanying analysis 18
in Appendix A and its annexes should be submitted to the 19
Secretary of Defense with the express understanding that the 20
response does not prejudice the JCS recommendations regarding 21
the decision to ratify the protocols and that the statements do 22
not reflect a comprehensive survey of all issues under study in 23
the military review. 24

8. (U) The Secretary of Defense should be reminded of the pos- 25
sible need for consultations with other States, especially US 26
allies; he should be informed, however, that the need for such 27
consultations will not affect completion of the JCS review. 28

* See Appendix B, subparagraph e
** See Annex D to Appendix A

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RECOMMENDATIONS

- 9. (U) It is recommended that: 1
- a. The memorandum in the Enclosure, with Appendix A and 2
Annexes A, B, C and D, and Appendix B, reflecting the above 3
conclusions, be sent to the Secretary of Defense. 4
5
- b. Copies of the memorandum in the Enclosure NOT be 6
furnished to other agencies except as authorized under JCS 7
MOP 39. 8
- c. Copies of this paper be sent to commanders of unified and 9
specified commands as authorized under JCS MOP 39. 10
- d. Copies of this paper be sent to the USNMR to SHAPE 11
and the UBLO to SACLANTR. 12
- Action Officer: Maj [REDACTED] USAF 13
Maritime/Law of Armed Conflict Branch, J-5 14
Bxt 77454 15

B S U.S. (C. 5526)(6)

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ENCLOSURE

THE JOINT CHIEFS OF STAFF
WASHINGTON D.C. 20301

JCSM-219-82
1 October 1982

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Chief, Records & Declass Div, WHS
Date: SEP 30 2013

MEMORANDUM FOR THE SECRETARY OF DEFENSE

Subject: JCS Review of the 1977 Protocols Additional to the
1949 Geneva Conventions (D)

1. Reference a memorandum* that requested an analysis of the major areas of likely JCS concern with the 1977 Protocols Additional to the 1949 Geneva Conventions. The request was limited to those issues that may require US reservations, if the President should decide to submit the protocols to the Senate for its advice and consent to ratification.
2. The request for proposed reservations presumes that the Joint Chiefs of Staff may not object to ratification. As the Joint Chiefs of Staff stated** in 1977, their final position with regard to ratification was subject to more detailed military study. That study is currently underway with a view toward providing JCS recommendations to the Secretary of Defense in December.*** The statements provided in Appendix A are offered without prejudice to the JCS recommendations on the decision to ratify.
3. The military review of the protocols has progressed to the point where providing you with reservations, and accompanying analysis, would reflect inadequately the range and depth of the concerns under study. Accordingly, Appendix A includes draft proposals for statements of understanding as well as reservations for Protocols I and II. It must be noted that this compilation of statements does not address all the issues under study at this time. One of the fundamental issues involves a survey to determine which provisions of the protocols contain new treaty law versus restatements of treaty law or codifications of customary law that the United States has accepted previously. Appendix A contains several statements concerning the articles on methods and means of warfare;**** those articles are the subject of continued review, and more statements may be needed to address issues.

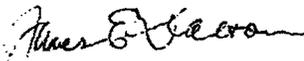
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4. (U) This paper does not contain a statement addressing the increasingly important issue of the nonapplicability of the protocols to nuclear weapons. While a variety of legal options exist to reaffirm the US position that the protocols do not apply to the legality and use of such weapons, an assessment is needed as to whether those options will effectively protect US political and military interests. This issue will be addressed in a separate memorandum in the near future.

5. (U) Appendix A does not include an assessment of the military interests supported by the protocols, nor an analysis of the issues that statements apparently cannot resolve. As the military review continues, many issues addressed by proposed statements might be resolved by changes in military doctrine and procedure and by changes in States' practices with the passage of time. As implied by Appendix B, your staff will continue to be kept informed about progress of the military review. Every effort continues to be made to complete the review in December 1982.

For the Joint Chiefs of Staff:


JAMES R. DALTON
Lieutenant General, USMC
Director, Joint Staff

Attachments

References:

- * Memorandum by the Under Secretary of Defense for Policy, 30 July 1982, "JCS Review of the 1977 Additional Protocols to the 1949 Geneva Conventions (U)"
- ** JCSM-448-77, 7 December 1977, "Protocols I and II-- Humanitarian Law During Armed Conflict"
- *** MJCS 19-82, 12 February 1982, "Progress Report on the JCS Review of the 1977 Protocols Additional to the 1949 Geneva Convention (U)"
- **** Articles 48-58 of Protocol I

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APPENDICES A AND B

(37 pages)

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JCS 2497/24-6

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Appendices A and B

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| | |
|---|---|
| APPENDIX A | <u>1</u> |
| PRELIMINARY ANALYSIS OF THE 1977 PROTOCOLS (U) | <u>2</u> |
| 1. (U) In 1977, the Joint Chiefs of Staff provided* general comments, a proposed reservation for use at ratification, and proposed statements of understanding for use at signature and at ratification. Those proposed statements were based largely on DOD Law of War Working Group review and analysis.** | <u>3</u> <u>4</u> <u>5</u> <u>6</u> <u>7</u> |
| 2. (U) This appendix represents many of the 1977 proposed statements still under consideration as well as draft alternative texts to some of them. New draft statements also are presented, some of which have been shared in the informal interagency working group during 1981. Annex D provides preliminary and informal analysis supplementing that of the DOD Law of War Working Group** and principally provided to support the new texts in Annexes A, B, and C. None of the analysis in Annex D comprehensively addresses the issues. Some of the issues, such as applicability to nuclear weapons and changes in the law affecting the methods of warfare, remain under study and are introduced in the memorandum to assist the OSD staff in substantive analysis of those areas. | <u>8</u> <u>9</u> <u>10</u> <u>11</u> <u>12</u> <u>13</u> <u>14</u> <u>15</u> <u>16</u> <u>17</u> <u>18</u> <u>19</u> <u>20</u> |
| 3. (U) As noted in an earlier memorandum,*** the 1977 Additional Protocols are the most complex agreements ever negotiated affecting the law of armed conflict on and over land | <u>21</u> <u>22</u> <u>23</u> <u>24</u> |
| * JCSM-448-77, 7 December 1977, "Protocols I and II-- Humanitarian Law During Armed Conflict" | <u>25</u> |
| ** See memorandum by the Deputy Assistant Secretary of Defense, I-12817/77, 7 November 1977, "Protocols I and II--Humanitarian Law During Armed Conflict" | <u>26</u> |
| *** MJCS 19-82, 12 February 1982, "Progress Report on the JCS Review of the 1977 Protocols Additional to the 1949 Geneva Convention (U)" | <u>27</u> <u>28</u> <u>29</u> |
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(and for some other sea and air operations). The focus of the 1
military review to date has been on the impact of the protocols 2
upon unilateral US military operations. The Services and the 3
Joint Staff are also concerned about the impact of the 4
protocols upon combined force operations. The assessments by 5
the commanders of unified and specified commands will address 6
that impact, but a complete assessment may not be possible 7
without consultations with allied military counterparts at the 8
national level. 9

4. (U) Some nations (France and Israel) have indicated that 10
they will not accept the protocols; others have indicated that 11
they may accept them with reservations and statements of under- 12
standing that vary from those of their allies* (including those 13
under consideration by the Joint Staff and the Services at this 14
time, as well as those presented by the Joint Chiefs of Staff 15
in 1977). For example, Norway has accepted them without any 16
reservations and statements of understanding. Among most US 17
allies, the protocols remain under review within their govern- 18
ments. Consultations with representatives of those allies 19
indicate that a variety of responses to the protocols probably 20
will occur should each government decide to accept them. 21

5. (U) The phenomenon of different nations accepting an 22
international agreement with various reservations and state- 23
ments of understanding is not unique to the process of multi- 24
national acceptance of the 1977 Additional Protocols. The 1949 25
Geneva Conventions, for example, have been accepted by 151 26
nations and with varying reservations and understandings. The 27
protocols, however, are more than merely "additional to" the 28
protection for the victims of war under the provisions of the 29
four Geneva Conventions. The protocols also revise the rules 30
of combat for the first time in 75 years. Thus, they regulate 31

* NATO memorandum to the Political Committee (POLADS (80)36),
27 November 1980, "Draft Texts of Possible Declarations/
Reservations to be made by Allied Countries on Ratification
of the Additional Protocols to the 1949 Geneva Conventions"

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the means and methods for the exercise of force. As a result of differing operational procedures to satisfy varying legal standards adopted by component national governments, combined force military planners and commanders would face potentially unresolvable constraints upon the exercise of force. This danger also threatens to dissolve the international legal consensus among those nations that now adhere to and train by the commonly understood standards expressed in that body of law known as the law of armed conflict or the law of war. Thus, the Joint Chiefs of Staff may not object to ratification of the protocols, subject to the adoption of certain declarations and statements of understanding based on a unilateral US military review, but they may object based on the impact upon combined force operations.

6. (S) Consultations with allied military counterparts are not a prerequisite to the completion of the military review. Consultations may be needed regardless of the JCS recommendations concerning ratification if more allies accept the protocols. Should the Joint Chiefs of Staff not object to ratification, such consultations appear imperative prior to completion of the US interagency preparations of final texts for US statements to minimize the danger from "many protocols." The Joint Chiefs of Staff noted the need for consultations in Appendix D to JCSM-448-77.

7. (U) This appendix and its annexes constitute an informal, preliminary analysis without prejudice to the final assessment of the current military review and the recommendations by the Joint Chiefs of Staff to the Secretary of Defense.

Attachments

- Annex A - Draft Proposed Reservations at Ratification
- Annex B - Draft Proposed Statements of Understanding for Protocol I
- Annex C - Draft Proposed Statements of Understanding for Protocol II
- Annex D - Informal Preliminary Military Analysis of the 1977 Protocols

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| ANNEX A TO APPENDIX A | <u>1</u> |
| DRAFT PROPOSED RESERVATIONS AT RATIFICATION (U) | <u>2</u> |
| Article 39 - Emblems of nationality: | <u>3</u> |
| The United States of America reserves Article 39(2) and | <u>4</u> |
| retains the right to make use of flags, military emblems, | <u>5</u> |
| insignia, or uniforms of adverse parties when its combatants | <u>6</u> |
| are not engaged actively in an attack. | <u>7</u> |
| Article 41 - Safeguard of an enemy hors de combat: | <u>8</u> |
| The United States of America reserves that portion of | <u>9</u> |
| Article 41(3) of Protocol I calling for the release of | <u>10</u> |
| prisoners of war when unusual conditions prevent their | <u>11</u> |
| evacuation with the understanding that prisoners of war | <u>12</u> |
| detained will not be exposed to hazardous conditions in | <u>13</u> |
| excess of that experienced by the detaining personnel, nor | <u>14</u> |
| will those released, if any, deliberately be exposed to | <u>15</u> |
| hazardous conditions. | <u>16</u> |
| Alternatively, this may be expressed as an understanding: | <u>17</u> |
| It is the understanding of the United States of America | <u>18</u> |
| that the portion of Article 41(3) of Protocol I calling for | <u>19</u> |
| the release of prisoners of war when unusual conditions | <u>20</u> |
| prevent their evacuation does not preclude detaining some | <u>21</u> |
| prisoners of war under hazardous conditions not in excess of | <u>22</u> |
| that experienced by the detaining personnel, until such time | <u>23</u> |
| as the prisoners of war can be evacuated. | <u>24</u> |
| Article 47 - Mercenaries: | <u>25</u> |
| The United States of America reserves Article 47 of | <u>26</u> |
| Protocol I, believing that an individual should not be | <u>27</u> |
| denied combatant or prisoner of war rights because of status | <u>28</u> |
| since the subjective criteria are not an adequate basis to | <u>29</u> |
| define that status. | <u>30</u> |

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(A) Articles 48-58 - General protection against effects of 1
hostilities: 2

The United States of America reserves Articles 48 through 3
58 concerning the general protection against the effects of 4
hostilities to the extent that no member of the United 5
States armed forces may be punished or subjected to any 6
discriminatory treatment by another High Contracting Party 7
or party to the conflict for any act or omission in alleged 8
violations of these articles, except for the grave breaches 9
defined or referred to in Article 85 of Protocol I. 10

(U) Articles 51 and 52 - Protection of the civilian population 11
and civilian objects: 12

Notwithstanding the provisions of Article 51, 13
paragraph 6, and Article 52, paragraph 1, the United States 14
of America reserves the right, in the event of massive and 15
continuing attacks directed against the civilian population, 16
to take reprisals against the civilian population or 17
civilian objects of the State perpetrating these illegal 18
attacks for the sole purpose and only to the extent 19
necessary to bring the illegal attacks to an end. These 20
measures shall not include any of the actions that are 21
otherwise prohibited by the Geneva Conventions of 1949 or 22
this Protocol. 23

Source: JCSM-448-77. 24

ALTERNATIVE 25

Notwithstanding the provisions of Articles 50 through 56 26
of Protocol I, the United States of America reserves the 27
right to take measures otherwise prohibited by those 28
Articles against persons and civilian objects of any Party 29
protected by those Articles, if the United States decides 30
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that massive and continuing attacks by that Party in 1
violation of those Articles have been directed against its 2
civilian population or objects or the civilian population or 3
objects of any of its allies, or that systematic and 4
continuing violations of the Third Geneva Convention of 5
12 August 1949 are being taken against its personnel in the 6
hands of that Party, for the sole purpose and only to the 7
extent necessary to bring to an end those illegal attacks or 8
violations, and only after formal warning to that Party 9
requiring cessation of the attacks has been disregarded, and 10
then only after a decision taken at the highest level of 11
government. These measures shall not include any of the 12
actions prohibited by the Geneva Conventions of 12 August 13
1949 for the protection of war victims. 14

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| ANNEX B TO APPENDIX A | 1 |
| DRAFT PROPOSED STATEMENTS OF UNDERSTANDING FOR PROTOCOL I (U) | 2 |
| | 3 |
| (U) <u>Article 11</u> - Protection of persons: If other States | 4 |
| express understandings that Article 11 as a whole does not | 5 |
| apply to their own nationals who are deprived of liberty as a | 6 |
| result of armed conflict, the United States should repeat the | 7 |
| following understanding that its delegation made during the | 8 |
| Plenary of the Conference: | 9 |
| Paragraphs 1 and 2 apply to: | 10 |
| (1) "Persons who are in the power of an adverse Party." | 11 |
| This includes all prisoners of war and all civilians pro- | 12 |
| tected by the Fourth Convention, whether in the territory | 13 |
| of the detaining power or in occupied territory. It | 14 |
| includes those who are relatively free to pursue their | 15 |
| normal pursuits, as well as those who are interned or | 16 |
| otherwise deprived of liberty. It applies also to | 17 |
| (2) Other persons, including the Party's own nationals, who | 18 |
| are interned, detained, or otherwise deprived of liberty as | 19 |
| a result of hostilities or occupation. | 20 |
| It is the further understanding of the United States of | 21 |
| America that the evils against which this article is | 22 |
| directed are unjustified acts or omissions, by or on behalf | 23 |
| of the occupying or detaining power or by any detaining | 24 |
| authorities that endanger the physical or mental health or | 25 |
| integrity of the persons described in paragraph 1. | 26 |
| Source: JCSM-448-77. | 27 |
| (U) <u>Articles 13, 65, and 67</u> - Discontinuance of protection of | 28 |
| civilian medical units; Cessation of protection; Members of the | 29 |
| armed forces and military units assigned to civil defense | 30 |

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organizations: These articles deal with the arming of medical 1
and civil defense personnel and the use of force by them. 2

It is the understanding of the United States of America 3
that the term "light individual weapons," as used in 4
Article 13, paragraph 2, Article 65, paragraph 3, and 5
Article 67, paragraph 1, excludes fragmentation grenades and 6
similar devices as well as weapons that cannot be handled or 7
fired by a single individual, and those that are primarily 8
intended for material targets such as armored vehicles or 9
aircraft. 10

It is the further understanding of the United States of 11
America that medical personnel and civil defense personnel 12
may be armed only for the purposes specified in Articles 13 13
and 65. The term "defense" as used in these provisions 14
refers to defense against marauders and other criminal 15
individuals or groups. They may not engage in combat 16
against the adverse Party and they may not use force to 17
resist capture. 18

If, however, they are unlawfully attacked by individuals 19
of the adverse Party's forces, they may use their weapons in 20
self-defense and the defense of the wounded and sick in 21
their charge after having made a reasonable effort to 22
identify themselves. 23

Source: JCSM-448-77. 24

(U) Article 16 - General protection of medical duties: If 25
other States make understandings or reservations on this 26
provision, it will be necessary to make an interpretive 27
statement along the following lines: 28

Although the law of most countries recognizes a medical 29
privilege of nondisclosure, national law almost universally 30
requires certain disclosures from doctors. These include 31

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compulsory reports of communicable diseases as specifically 1
recognized in the last sentence of paragraph 3, as well as 2
other matters. Members of the medical profession recognize 3
that their ethical obligation is not to make disclosures 4
concerning their patients except as required by law. This 5
rule, which is applicable in peacetime, must remain equally 6
applicable in time of armed conflict in respect to the 7
relation of persons engaged in medical activities and the 8
authorities of their own Party to the conflict. Inter- 9
national law properly may require these authorities to 10
respect the medical privilege except as specifically limited 11
by national law. 12

On the other hand it is reasonable to prohibit the 13
adverse Party from requiring doctors to act as collab- 14
orators. Thus, paragraph 3 prohibits anyone belonging to a 15
party adverse to that of the doctors to compel any 16
disclosure which would be harmful to a patient. Never- 17
theless, it provides that regulations for the compulsory 18
disclosure of communicable diseases be respected. This 19
effects a sound and reasonable balance between medical 20
ethics and the protection of patients on the one hand and 21
the requirements of public health on the other. When 22
confronted with the choice between concealing the identity 23
of a resistance fighter in occupied territory and preventing 24
a cholera or smallpox epidemic, the decision must be in 25
favor of public health. 26

Source: JCSM-448-77. 27

28 Article 28 - Restrictions on operations of medical 28
aircraft: 29

It is the understanding of the United States of America 30
that the provision in Article 28(2) prohibiting medical 31

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| aircraft from carrying equipment used to collect or transmit | <u>1</u> |
| intelligence data does not preclude the presence and use of | <u>2</u> |
| communications equipment and encryption materials needed to | <u>3</u> |
| facilitate navigation, identification, and communication in | <u>4</u> |
| support of medical operations. | <u>5</u> |
| <u>Article 39</u> - Emblems of nationality: | <u>6</u> |
| It is the understanding of the United States of America | <u>7</u> |
| that the obligations of Articles 86 and 87 of Protocol I do | <u>8</u> |
| not apply to violations of Article 39(2) of that Protocol. | <u>9</u> |
| (U) <u>Articles 41, 56, 57, 58, 78, and 86</u> - Definition of | <u>10</u> |
| "feasible": | <u>11</u> |
| In relation to Articles 41, 56, 57, 58, 78, and 86 of | <u>12</u> |
| Protocol I, it is the understanding of the United States of | <u>13</u> |
| America that the word "feasible" means that which is | <u>14</u> |
| practicable or practically possible, taking into account all | <u>15</u> |
| circumstances at the time, including those relevant to the | <u>16</u> |
| success of military operations. | <u>17</u> |
| (U) <u>Article 42</u> - Occupants of aircraft: Some countries may | <u>18</u> |
| make either reservations or understandings to this article. If | <u>19</u> |
| this is done, it may be necessary to have a US understanding | <u>20</u> |
| reflecting the view that the requirements of Article 42 codify | <u>21</u> |
| existing international law and thus cannot be the subject of | <u>22</u> |
| reservations. | <u>23</u> |
| Source: JCSM-448-77. | <u>24</u> |
| (U) <u>Article 44</u> - Combatants and prisoners of war: | <u>25</u> |
| It is the understanding of the United States of America | <u>26</u> |
| that: | <u>27</u> |
| (1) The situations described in the second sentence of | <u>28</u> |
| paragraph 3 are very exceptional and can exist only in | <u>29</u> |
| occupied territory or in armed conflicts described in | <u>30</u> |
| Article 1, paragraph 4, of this Protocol. | <u>31</u> |

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(2) The phrase in paragraph 3(b) "military deployment
preceding the launching of an attack" means any movement
toward a place from which an attack is to be launched,
and
(3) Failure to meet the requirements of the first
sentence of paragraph 3 is a breach of Protocol I, which
tends to endanger the civilian population. Any combatant
who is guilty of such a breach may be tried and punished
for the offense of failing to distinguish himself from
the civilian population.
(4) Combatants who fail to meet the minimum requirements
of the second sentence of paragraph 3 forfeit their
combatant status and may be tried and punished
accordingly.
Source: JCSM-448-77.

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ALTERNATIVE

It is the understanding of the United States of America
that:

a. Failure to meet the requirements of the first
sentence of paragraph 3 of Article 44 of Protocol I is a
breach of the Protocol which tends to endanger the
civilian population, and combatants who are guilty of a
breach of that sentence may be tried and punished for the
offense of failing to distinguish themselves from the
civilian population but do not lose, therefore, combatant
or prisoner of war status unless they also violate the
second sentence or paragraph 3 of Article 44 of
Protocol I.

b. Combatants who fail to meet the minimum requirements
of the second sentence of paragraph 3 of Article 44 of
Protocol I forfeit their combatant status and may be
tried and punished for acts which would otherwise be
considered lawful acts of combat, but will otherwise
receive equivalent protections as if they were prisoners
of war.

c. The situations described in the second sentence of
paragraph 3 of Article 44 of Protocol I are very
exceptional and can exist only in occupied territory or
in armed conflicts described in paragraph 4 of Article 1
of Protocol I.

d. The phrase "during such time as he is visible to the
adversary" as used in subparagraph 3(b) of Article 44 of
Protocol I establishes an objective standard which
includes visibility through the use of such aids as
binoculars and infrared devices.

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e. The phrase "military deployment preceding the
launching of an attack" in subparagraph 3(b) of
Article 44 of Protocol I means any movement toward a
place from which an attack is to be launched.

f. With regard to paragraph 7 of Article 44, where
members of the regular armed forces are assigned as
advisors to irregular resistance groups, they will not be
required to wear a uniform, but must instead distinguish
themselves from the civilian population in the same
manner as the irregulars under the second sentence of
paragraph 3 of Article 44 of Protocol I.

(U) Article 45 - Protection of persons who have taken part in
hostilities;

It is the understanding of the United States of America
that Article 45, paragraph 3, cannot be construed to
restrict fair trial guarantees under the Third Convention
and this Protocol which are secured to certain persons under
Article 44, paragraph 4.

Source: JCSM-448-77.

ALTERNATIVE

It is the understanding of the United States of America
that paragraph 3, Article 45, of Protocol I cannot be
construed to restrict fair trial guarantees under the Third
Convention and Protocol I which are secured to certain
persons under paragraph Article 44 of Protocol I.

(U) Article 46 - Spies:

It is the understanding of the United States of America
that the elements of espionage, as that term is used in
Article 46, are the same as those listed in Article 29 of
the Hague Regulations Annexed to Hague Convention Number IV
of 1907.

Source: JCSM-448-77.

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(U) Articles 48-67 - Commanders' Assessments: 2
It is the understanding of the United States of America 3
that commanders and others responsible for planning, 4
deciding upon, or executing attacks necessarily have to 5
reach decisions on the basis of their assessment of the 6
information from all sources which is available to them at 7
the relevant time. This is applicable to Part IV, 8
Section I, of Protocol I, including Articles 50, 52, and 57. 9
Source: JCSM-448-77. 10

ALTERNATIVE 11

It is the understanding of the United States of America 12
that the provisions of Part IV, Section I of Protocol I, 13
including Articles 51, 52, and 57, must be applied to the 14
actions of commanders and others responsible for planning, 15
deciding upon, or executing attacks, on the basis of their 16
assessment of the information reasonably available to them 17
at the time they take their actions and not on the basis of 18
hindsight. 19

(U) Articles 51, 52, and 57 - Protection of civilian population 20
and precautions in attack: 21

It is the understanding of the United States of America 22
that the references in Articles 51, 52, and 57 to military 23
advantage anticipated from an attack are intended to refer 24
to the advantage anticipated from the attack considered as a 25
whole and not only from isolated or particular parts of that 26
attack. The term "military advantage" involves a variety of 27
considerations, including the security of attacking forces. 28
It is further the understanding of the United States of 29
America that the term "concrete and direct military 30
advantage anticipated" used in Articles 51 and 57 means an 31

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honest expectation that the attack will make a relevant and 2
proportionate contribution to the purpose of the attack. 3
Source: JCSM-448-77. 4
Articles 51-5(b), 52-2, and 57-2(a)(iii) - Protection of 5
the civilian population and civilian objects; precautions in 6
attack: 7
It is the understanding of the United States of America 8
that collateral civilian losses are measured against the 9
military advantage anticipated from an overall campaign or 10
war considered as a whole and not from its isolated or 11
particular parts; and that collateral civilian losses are 12
excessive only when they are tantamount to the intentional 13
attack of the civilian population, or to the total disregard 14
for the safety of the civilian population. 15
With respect to Article 51(8), it is the understanding of 16
the United States of America that civilian casualties 17
resulting from actions in violation of Article 51(7) are the 18
responsibility of the party violating that provision, and 19
that violation of Article 51(7) may not render an otherwise 20
legitimate target immune from attack. 21
(U) Article 52 - General protection of civilian objects: 22
Article 52 is a significant and important development in 23
the humanitarian law applicable in armed conflict. The 24
distinction between civilian objects and military objectives 25
will be made easier to identify and recognize. In that 26
regard, it is the understanding of the United States that a 27
specific area of land may be a military objective if, 28
because of its location or other reasons specified in 29
Article 52, its total or partial destruction, capture, or 30
neutralisation, in the circumstances ruling at the time, 31
offers a definite military advantage.

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The first sentence of Article 52, paragraph 2, prohibits
only such attacks as may be directed against nonmilitary
objectives. It does not deal with the question of
collateral damage caused by attacks directed against
military objectives.
Source: JCSM-448-77.

ALTERNATIVE

It is the understanding of the United States of America
that:

a. In relation to Article 52 of Protocol I, a specific
area of land may be a military objective if, because of
its location or other reasons specified in the Article,
its total or partial destruction, capture, or
neutralization in the circumstances ruling at the time
offers a definite military advantage.

b. It is the further understanding of the United States
of America that the first sentence of Article 52 of
Protocol I, paragraph 2, prohibits only such attacks as
may be directed against nonmilitary objectives and it
does not deal with the question of collateral damage
caused by attacks directed against military objectives.

(U) Article 53 - Protection of cultural objects and of places
of worship:

It is the understanding of the United States of America
that:

(1) Article 53 does not replace existing customary law
prohibitions expressed in Article 27 of the 1907 Hague
Regulations. Rather, the Article establishes a special
protection for a limited class of objects, which, because
of their recognized importance, constitute a part of the
special heritage of mankind.

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| | <u>1</u> |
| (2) Use of objects listed in support of the military effort is a violation of the Article. | <u>2</u> <u>3</u> |
| (3) Such a violation causes the objects to lose the special protection of this Article. | <u>4</u> <u>5</u> |
| Source: JCSM-448-77. | <u>6</u> |
| ALTERNATIVE | <u>7</u> |
| It is the understanding of the United States of America that: | <u>8</u> <u>9</u> |
| a. Article 53 of Protocol I establishes a special protection for a limited class of objects which, 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. | <u>10</u> <u>11</u> <u>12</u> <u>13</u> <u>14</u> <u>15</u> |
| b. The prohibitions contained in subparagraphs (a) and (b) of Article 53 of Protocol I will not apply in cases imperatively required by military necessity. | <u>16</u> <u>17</u> <u>18</u> |
| (U) <u>Article 54</u> - Protection of objects indispensable to the civilian population: | <u>19</u> <u>20</u> |
| It is the understanding of the United States of America that the phrase "within such territory under its own control" in paragraph 5 of Article 54(1) applies only to the national territory of the defender and not to areas which he may then occupy. | <u>21</u> <u>22</u> <u>23</u> <u>24</u> <u>25</u> |
| (U) <u>Article 63</u> - Civil defense in occupied territories: | <u>26</u> |
| It is the understanding of the United States of America that Article 62 applies to both occupied and nonoccupied territory. Article 63 is thus supplementary to Article 62 as far as occupied territory is concerned. Article 63 of the Fourth Convention is also applicable. | <u>27</u> <u>28</u> <u>29</u> <u>30</u> <u>31</u> |
| Source: JCSM-448-77. | |

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ALTERNATIVE

It is the understanding of the United States of America
that the activities of civil defense organizations referred
to in Article 63 of Protocol I are subject to the
limitations of the second sentence of paragraph 1 of
Article 62 of Protocol I, as well as Article 63 of the
Fourth Convention.

(U) Article 66 - Identification:

It is the understanding of the United States of America
that any signals which Parties to a conflict shall agree to
use for civil defense identification purposes, as
contemplated in paragraph 5 of Article 66, shall differ from
distinctive signals specified for the identification
exclusively of medical units or transports in Chapter III of
Annex I to Protocol I.

Source: JCSM-448-77.

(U) Article 75 - Fundamental guarantees:

It is the understanding of the United States of America
that this Article protects all persons not otherwise
specifically protected under the Conventions and Protocol I
by more specific and elaborate guarantees. The United
States of America further understands that all Parties must
meet these standards of humane treatment at all times and in
all circumstances. The United States of America rejects any
reservation or understanding which attempts to limit the
class of persons to which this Article applies other than
those who are expressly excluded by the language of the
Article.

Source: JCSM-448-77.

ALTERNATIVE

It is the understanding of the United States of America
that Article 75 of Protocol I applies to all persons in the

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power of a Party to a conflict, including accused, suspected, and convicted war criminals, and unprivileged combatants. The United States of America rejects all interpretations which would limit the scope of Article 75 of Protocol I.

(U) Article 90 - International Fact-Finding Commission:

The United States of America recognizes the competency of the International Fact-Finding Commission provided for in Article 90 of the Protocol ipso facto and without special agreement with respect to any other High Contracting Party accepting the same obligation.

Source: JCSM-448-77.

(U) Article 96 - Treaty relations upon entry into force:

It is the understanding of the United States of America in relation to Article 96(3) that only a declaration made by a body which is genuinely an authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in paragraph 4 of Article 1 can have the effects stated in paragraph 3 of Article 96 and that it is also a necessary condition that the body concerned be recognized by the High Contracting Party as representing the people in question.

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ANNEX C TO APPENDIX A 1
DRAFT PROPOSED STATEMENTS OF UNDERSTANDING 2
FOR PROTOCOL II (U) 3

(U) Protocol II - Definitions: 4

It is the understanding of the United States of America 5
that the terms used in Part III of this Protocol, which are 6
the same as the terms defined in Article 8 of Protocol I, 7
shall be construed in the same sense as those definitions. 8
Source: JCSM-448-77. 9

ALTERNATIVE 10

(S) It is the understanding of the United States of America 11
that the terms used in Protocol II, which are the same as 12
the terms used in Protocol I, shall, so far as relevant, be 13
construed in the same sense as those definitions. 14

(U) Article 11 - Protection of medical units and transports: 15

In accepting Article 11, Protocol II, the United States 16
of America wishes to make it clear that humanitarian 17
functions of medical units and transports cannot, under any 18
circumstances, include hostile acts. 19

With regard to Article 11 of Protocol II, it is the 20
understanding of the United States of America that the acts 21
described in Article 13 of Protocol I, as well as those 22
facts and conditions listed in Article 22, First Convention, 23
Article 35, Second Convention, and Article 19, Fourth 24
Convention, do not justify cessation of protection of 25
medical units or transports. 26

Source: JCSM-448-77. 27

(U) Article 16 - Protection of cultural objects and of places 28
of worship: 29

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It is the understanding of the United States of America 1
that this Article establishes protection for a limited class 2
of objects, which, because of their recognized importance, 3
constitute a part of the heritage of mankind. We note that 4
use of these objects in support of the military effort is a 5
violation of this Article. Should they be so used, it is 6
our clear understanding that these objects will lose the 7
special protection of the Article. 8

Source: JCSM-448-77. 9

ALTERNATIVE 10

(~~U~~) It is the understanding of the United States of America 11
that Article 16 of Protocol II establishes a special 12
protection for a limited class of objects, which, because of 13
their recognized importance, constitute a part of the 14
cultural or spiritual heritage of peoples, and that such 15
objects will lose their protection if they are used in 16
support of the military effort. 17

(~~U~~) It is the further understanding of the United States of 18
America that the prohibitions contained in Article 16 of 19
Protocol II will not apply in cases imperatively required by 20
military necessity. 21

(U) Article 18 - Relief societies and relief actions: 22

With respect to paragraph 1 of Article 18, it is the 23
understanding of the United States of America that civilians 24
who have, spontaneously or in response to an appeal from the 25
authorities, collected and cared for the wounded, sick, and 26
shipwrecked, and members of relief societies who have 27
performed their traditional functions in relation to the 28
victims of the armed conflict, shall not be harmed, 29
prosecuted, convicted, or punished for such humanitarian 30
acts. 31

Source: JCSM-448-77.

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ANNEX D TO APPENDIX A

1
INFORMAL PRELIMINARY MILITARY ANALYSIS OF THE 1977 PROTOCOLS (U) 2
1. (U) The following preliminary and informal military analysis 3
supplements the 1977 JCS memorandum* and the analysis provided 4
at that time by the DOD Law of War Working Group review and 5
analysis.** 6

RESERVATIONS 7

2. ~~(U)~~ Reservation on Article 39 - Emblems of nationality: 8
a. The present law permits the use of flags, military 9
emblems, insignia, or uniforms as a ruse as long as the ruse 10
is discarded prior to actual combat. US Army publications 11
have recognized this principle of international law up to 12
and including the most recent version of FM 27-10, "Law of 13
Land Warfare," which states "In practice it has been 14
authorized to make use of national flags, insignia, and 15
uniforms as a ruse" but notes "It is certainly forbidden to 16
employ them during combat." 17
b. In 1947 Nazi General Skorzeny was tried for, and 18
acquitted of, using this ruse (US uniforms, vehicles, 19
weapons) during the Battle of the Bulge. During the trial, 20
the defense established that both sides had employed such 21
tactics on numerous occasions. 22
c. The Soviets made wide use of enemy uniforms during World 23
War II. Open-source documents clearly indicate the Soviets 24
continue to follow this practice in their operations. 25
d. Acceptance of Article 39(2) has no humanitarian benefit. 26
e. Acceptance of Article 39(2) would vastly complicate 27
hostage release and counterterrorist operations as well as 28
certain unconventional warfare operations. 29

* JCSM-448-77, 7 December 1977, "Protocols I and II--
Humanitarian Law During Armed Conflict" 30

** See memorandum by the Principal Deputy Assistant Secretary
of Defense (International Security Affairs), I-12817/77,
7 November 1977, "Protocols I and II - Humanitarian Law
during Armed Conflict" 31

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| 3. (b) Reservation on Article 41 - Safeguard of an enemy hors de combat: | <u>1</u> <u>2</u> |
| a. Article 19 of the Third Convention requires that prisoners of war (PWs) be evacuated as soon as possible and that they not be "unnecessarily exposed to danger while awaiting evacuation." Article 41 requires that when these conditions cannot be met "they shall be released and all feasible precautions taken to insure their safety." | <u>3</u> <u>4</u> <u>5</u> <u>6</u> <u>7</u> <u>8</u> |
| b. Under current Army doctrine, evacuation of PWs will be difficult. The air-land battle doctrine and other tactical innovations increasingly call for independent small-unit operations. Current law is based on previous conflicts which had well-established lines of communication that permitted evacuation of PWs as a matter of routine. | <u>9</u> <u>10</u> <u>11</u> <u>12</u> <u>13</u> <u>14</u> |
| c. A small unit, operating independently, is faced with a dilemma. While circumstances will arise when PWs will be released because of the capturing unit's inability either to control or to evacuate them, it should not be made law that release is mandatory. An isolated unit capturing a high- ranking individual, or an individual with special knowledge, may choose to detain this individual until such time as evacuation is possible. The practical limitation is the ability of the detaining unit to secure the individuals captured. | <u>15</u> <u>16</u> <u>17</u> <u>18</u> <u>19</u> <u>20</u> <u>21</u> <u>22</u> <u>23</u> <u>24</u> |
| 4. (b) Reservation on Article 47 - Mercenaries: | <u>25</u> |
| a. Article 47 denies combatant and PW status to certain persons. An innovation in international law, the Article would expose mercenaries to punishment under local law for their combatant acts. | <u>26</u> <u>27</u> <u>28</u> <u>29</u> |
| b. The definition of a mercenary incorporated in this article is heavily subjective and capable of political- ization. The Soviets have indicated that only those | <u>30</u> <u>31</u> <u>32</u> |

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| opposing struggles of the people for national liberation | <u>1</u> |
| from imperialist, racist, or colonial regimes can be | <u>2</u> |
| considered mercenaries. Under this subjective, politicized | <u>3</u> |
| usage, US advisers, Military Assistance Training Teams, | <u>4</u> |
| etc., could be tried as mercenaries for lawful acts. | <u>5</u> |
| c. The US Army has a long history of mercenary use beginning | <u>6</u> |
| with Indian Scouts and continuing through the Vietnam era. | <u>7</u> |
| These people would be denied PW status, if captured, and | <u>8</u> |
| their use for clandestine or intelligence gathering | <u>9</u> |
| operations is often necessary: | <u>10</u> |
| (1) To overcome language/dialect deficiencies. | <u>11</u> |
| (2) To exploit geographic knowledge of indigenous | <u>12</u> |
| personnel. | <u>13</u> |
| (3) To comply with US domestic law and policies | <u>14</u> |
| restricting the presence of US personnel in certain | <u>15</u> |
| areas. | <u>16</u> |
| d. Adoption of this article would be a step backward in | <u>17</u> |
| humanitarian law. By denying a "mercenary" PW status, | <u>18</u> |
| regardless of his conduct, the article in effect encourages | <u>19</u> |
| the mercenary to act without regard to the norms of warfare | <u>20</u> |
| and the law of war. For him, the penalty is the same no | <u>21</u> |
| matter what his conduct. | <u>22</u> |
| 5. (f) Reservation on Articles 48-58: | <u>23</u> |
| a. International agreements usually create rights and duties | <u>24</u> |
| only for the nations party to them. As an exception to this | <u>25</u> |
| rule, however, the United States Government has taken the | <u>26</u> |
| position that "every violation of the law of war is a war | <u>27</u> |
| crime," for which individuals can be punished (DA FM 27-10, | <u>28</u> |
| July 1956, para. 499). This standard appears appropriate | <u>29</u> |
| for willful, deliberate acts in violation of the law of war, | <u>30</u> |
| such as the murder of interned civilians or the torture of | <u>31</u> |

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PWs. It is not, however, appropriate to attach the label 1
"war crime" to deviations from the law that may occur 2
through an error in judgment or minor carelessness in the 3
heat of combat. This is especially true of air operations, 4
where collateral damage to civilians is nevertheless often 5
characterized as a war crime for propaganda purposes. 6
b. Articles 48 to 58 of Protocol I contain general rules and 7
principles for the conduct of combat operations against 8
targets on land. These rules are phrased in broad, flexible 9
terms, as is proper in a treaty establishing principles of 10
behavior for sovereign governments. Many of them are, 11
however, too general to be fully acceptable as standards for 12
individual criminal responsibility; e.g., Article 57, 13
paragraph 2(a) (ii), which requires those who decide upon an 14
attack to do everything "feasible" with a view to "avoiding, 15
and in any event minimizing, incidental loss of civilian 16
life" and property. On the basis of experience in recent 17
conflicts, it is quite likely that an unscrupulous adversary 18
could take the general language of Articles 48-58, combine 19
it with the position that "every violation of the law of war 20
is a war crime," and turn both against US forces. The 21
effort might thus be made to categorize captured aircrew 22
members as "war criminals" because they had not taken some 23
supposedly "feasible" precaution during an attack. 24
c. The effect of the proposed reservation would be that 25
other nations could enter into treaty relations with the 26
United States, on these Articles, only by agreeing that they 27
would not form the basis for criminal liability for US 28
personnel. If any party to the protocols rejected the US 29
reservation, the effect would simply be that Articles 48 to 30
58 would not be in force as between the United States and 31
that party.

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6. ~~(S)~~ Reservation on Articles 51-56 - Reprisals: 1
- a. The purpose of this reservation is to maintain a credible 2
deterrent against attacks on friendly populations and 3
provide an inducement to all nations to carry out their 4
combat operations in accordance with the law of war. This 5
reservation is also taken to guard against enemy abuse of US 6
PWs. This reservation would preserve the right of reprisal 7
against an enemy's civilian population in the event of 8
systematic and massive attacks against the civilian 9
population, or those of allies, in violation of Articles 51 10
and 52 of the first Protocol, or in the event of the torture 11
or execution of US prisoners of war in violation of the 12
Third Geneva Convention of 1949. Articles 51 and 52 of 13
Protocol I now prohibit all attacks directed against the 14
civilian population and civilian objects, expressly 15
including attacks by way of reprisal. 16
- b. Attempts to prohibit reprisals are unrealistic, since 17
their use, or threatened use, represents the only real 18
sanction, or deterrent, to violations of the law of war by 19
the other side. As it is likely that the prohibition 20
against certain reprisals will be disregarded under the 21
pressures of serious attacks against a Party's population, 22
the United States should shield future decisionmakers 23
against sanctions for responding in a foreseeable manner to 24
this contingency. 25
- c. The essence of reprisal attacks against the civilian 26
population and civilian objects is a suspension of the 27
prohibitions against such attacks contained in Articles 51 28
through 56 of Protocol I. Article 60, paragraph 5, of the 29
Vienna Convention on the Law of Treaties prohibits such 30
suspensions in humanitarian law treaties (such as 31

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Protocol I) in the absence of a reservation avoiding the effects of the prohibition against reprisals. The prohibitions on reprisals contained in Articles 51 through 56 are new and do not reflect customary international law. d. The negotiating record of the Vienna Convention indicates that paragraph 5 of Article 60 was proposed by the Swiss Delegation for the specific purpose of precluding any termination or suspension of the provisions of the 1949 Geneva Conventions prohibiting reprisals in connection with material breaches of other significant human rights treaties (Official Record, Second Session, UN Conference on the Law of Treaties, pp. 112 ff). Thus, only a reservation that avoids the obligation of the provision can legally preserve a nation's right to use the sanction when the illegal attacks can no longer be absorbed without a response in kind.

STATEMENTS OF UNDERSTANDING

7. ~~(C)~~ Article 28 - Restrictions on operations of medical aircraft: Article 28(2) is unacceptable if its practical effect is to require US medical aircraft to transmit in the clear. Communication in the clear by medical aircraft would identify units, their location, and extent of engagement. The requirement to transmit in the clear becomes even less acceptable when applied to operations by units in enemy-controlled territory.

8. ~~(C)~~ Article 39 - Emblems of nationality: Articles 86 and 87 obligate a Party to Protocol I to actively seek out and discipline its personnel who have violated Article 39. While the United States should reserve a portion of Article 39, this requirement will have an undesirable impact on the legality, within US internal law, of special operations requiring the use

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of deceptions prohibited by those portions of Article 39 not reserved. This could be especially important in hostage-rescue situations where it may not be possible for the attacking force to identify itself prior to the start of fighting. The United States should not accept the requirement to discipline its forces for all violations. Reversal of the Skorzeny rule serves no humanitarian purpose. 1

9. (U) Articles 41, 56, 57, 58, 78, and 86 - Definition of "feasible": This understanding is necessary to clarify the meaning of the word "feasible" in the above articles. 2

10. (U) Article 44 - Combatants and prisoners of war: 3

a. Breaches of the Basic Obligation To Distinguish (first sentence of paragraph 3). By stating that "combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack," the first sentence of paragraph 3 of Article 44 establishes a norm, the breach of which is an offense under Protocol I. The second sentence provides an exception, which is intended to relieve the individual from the loss of entitlement to be a combatant and to have PW status, but not from his criminal responsibility for breach of the basic norm. The second sentence, however, is capable of the interpretation that those who qualify under the exception are also excused from liability for a breach of the basic norm. Clarification can be found in the negotiating record where the Report of Committee III notes: 4

"With one narrow exception, the article makes the sanction for failure by a guerrilla to distinguish himself when required to do so to be merely trial and punishment for violation of the laws of war, not loss of 5

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combatant or prisoner of war status." (CDDH/III/407/Rev 1
1, para 19) (Emphasis added.) 2

b. Forfeiture of Combatant Status. Paragraph 3 states 3
explicitly that retention of combatant status is contingent 4
upon compliance with the minimum standard for distin- 5
guishing combatants from civilians. Several allied 6
countries contemplate expressing this understanding in 7
their instrument of ratification. However, paragraph 4 8
provides that, while a combatant loses his right to PW 9
status, he still is entitled to protection equivalent to 10
that given PWs. Therefore, paragraph 3 could be read to 11
preserve the immunity from trial and punishment for other- 12
wise lawful acts of a combatant. Thus, a statement of 13
understanding is important to insure no loss of combatant 14
or PW status for those guerrillas who failed to carry their 15
arms openly when required to do so. 16

c. Exceptional Circumstances. The exception to the 17
requirement that combatants distinguish themselves during 18
military operations preparatory to an attack is limited to 19
situations in armed conflict where, owing to the nature of 20
the hostilities, an armed combatant cannot so distinguish 21
himself. This limitation does not exclude situations in 22
which "fifth column" irregulars infiltrate a target country 23
in peacetime with a view to conducting guerrilla attacks at 24
some future time. In order to show unambiguously that they 25
do not intend to be bound by so literal an interpretation, 26
many Western delegates expressed understandings. The UK 27
understandings incorporate the same concept. In view of 28
the ambiguity in the second sentence of paragraph 3, reaf- 29
firmation of this understanding is considered important. 30
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- d. Visibility. Egypt and the Palestine Liberation Organization have indicated their understanding that visibility as used in paragraph 3 pertains only to visibility to the naked eye. The United States disagrees with this narrow construction and believes, along with the UK, Canada, and Australia, that combatants must realize that the minimum standard for distinguishing combatants from civilians also applies under conditions of darkness and fog when visibility is possible by means of aids such as infrared equipment. It is also applicable within distances capable of detailed observation by means of binoculars. 1
- e. Deployment. Considering the ambiguity inherent in the phrase "military deployment preceding the launching" of an attack and the conflicting understandings expressed both in Committee III and in the Plenary regarding the phrase, formal reaffirmation of the US understanding in the instrument of ratification is considered to be indispensable. 2
- f. Advisers to Guerrillas. A statement of understanding is needed to preserve the legal rights of special forces, special operations personnel, and other members of the regular armed forces serving in the capacity of advisers. 3
11. Article 45 - Protection of persons who have taken part in hostilities: The proposed understanding precludes an apparent inconsistency with paragraph 4 of Article 44, thereby insuring that certain combatants (unprivileged combatants not otherwise entitled to PW status) are entitled to "protections" equivalent in all respects to those accorded to PWs by the Third Convention and by Protocol I, including Article 44(4). 4
12. ~~(C)~~ Articles 48-67 - Commanders' Assessments: Commanders must make their decisions on the basis of the information available to them at the time and cannot be held responsible for what was unknown to them or for unforeseen consequences. 5

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a. Article 48, for example, requires that the commander "at
all times distinguish between the civilian population and
combatants. . . ." Combatants are frequently indistin-
guishable from civilians, as proven in Vietnam. Similarly,
to distinguish between military objectives and civilian
objects is often impossible, as military objectives often
appear to be civilian objects and civilian objects often
are used for military purposes. Even so, if these
principles represented mere goals which Parties were
obligated to strive toward, they would not be objec-
tionable. When they are prohibitory, however, and their
violation constitutes a war crime, they should be more
explicit in stating that good faith effort is all that is
called for.

b. Paragraph 1 of Article 50, for example, provides, among
other things, that when one is in doubt as to whether a
person is a civilian, that person shall be considered to be
a civilian. This is not unreasonable when there is time
for interrogation and deliberation. A different standard
must be applied in the heat of combat, when an individual
combatant has reason to believe, but no absolute convic-
tion, that a "civilian" is in fact a combatant. In that
event, he must act upon his belief, just as a civilian
policeman must act in his own self-protection when he
reasonably believes that his life is imminently threatened.
To the extent that the Protocols do not recognize this
fact, they would place an unrealistic burden upon
combatants.

13. Articles 51(5)(b), 52(2), and 57(2)(a)(iii) - Protec-
tion of the civilian population and civilian objects; pre-
cautions in attack: The proposed statement of understanding is

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intended to eliminate the possibility of an interpretation that
the effects of an attack must be strictly confined to the
military objectives attacked, thereby undermining the estab-
lished and accepted rule of proportionality pertaining to
collateral damage, and properly permits consideration of the
anticipated tactical or strategic ends of the military
operation.

14. Paragraphs 4 and 5 of Article 51, for example, prohibit
indiscriminate attacks, and are vague and ambiguous. They can
be interpreted as excluding use of tactical nuclear weapons.
They make no allowance for time constraints, weapon avail-
ability and cost, and projected loss of US troops using various
weapons or means of attack. Further, how far apart must
separated military targets be in order for the restrictions in
paragraph 5 to apply? How large a concentration of civilians
constitutes "a similar concentration" referred to in paragraph
5(a)? Does "direct military advantage" include surprise gained
through feints and deception? Must the "direct military
advantage" accrue to the military unit inflicting the damage,
or is it sufficient that a direct military advantage accrue to
the force as a whole? It is recognized that these matters
cannot be calibrated and defined with great specificity in
these Protocols, but the language used should at least point
the way for the commander.

15. Article 52 - General protection of civilian objects:
The proposed statement is necessary to clarify the term
"military objective" in view of the fact that the traditional
definition of the word "objective" excludes the concept of
land. It also precludes the possibility that Article 52 could
be interpreted as prohibiting collateral damage of any kind.

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16. (C) Attacks must be limited to "military objectives." A military objective (a) must make an effective contribution to enemy military action, and (b) its destruction, capture, or neutralization must offer a definite military advantage. Strategy aimed at destruction of the enemy's political infrastructure or economic or industrial establishment might result in targeting objects that make only a remote contribution to military action but significantly curtail the enemy's will to continue hostilities. To the extent that this article prohibits strategic bombing, it could severely impede US war efforts. Further, it is unclear whether this article will permit harassing and interdiction fire. An additional statement may be offered on this point.
17. (C) Article 53 - Protection of cultural objects and of places of worship: Article 53 does not specifically state that protection is lost when the objects are used in support of the war effort. Without the understanding, the article may encourage the use of such objects for military purposes. The exception in paragraph b is available to parties to the 1954 Hague Convention for the Protection of Cultural Property, to which the United States is not a party, by virtue of the reference to that convention in Article 53 of Protocol I. However, there is no provision for waiver of the protections contained in Article 53 of Protocol I. Therefore, prudence would dictate insuring that the United States, as a non-party to the 1954 Hague Convention, not be placed in a less favorable position than parties to that convention, such as the Warsaw Pact, who might be opponents.
18. (C) Article 54 - Protection of objects indispensable to the civilian population: An aggressor forced to withdraw should not have the legal right to institute a "scorched earth" policy on

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territory that he has occupied. The phrase "within such
territory under its control" negates the meaning of the
remainder of the article and defeats its humanitarian purpose.
If the defender can lay waste legally to areas under his
control, the article is meaningless: it is not expected that
an advancing force would employ a scorched earth policy in its
own area. An understanding is needed to address these
problems.

19. (U) Article 54 relates to the starvation of civilians.
This change in the law of armed conflict will diminish the
impact of siege warfare and may prolong armed conflicts.
Additionally, it is unclear whether paragraph 2b prohibits the
destruction of enemy food and water supplies where adequate
supplies exist for civilians, but it can be anticipated that
enemy combatants, once deprived of their own food and water,
will take those supplies from the civilian population and
thereby cause civilian starvation. Since this article is not
merely a statement of principle but would establish new war
crimes, it is important that such questions be answered. A
statement may be offered on this issue.

20. (U) Article 53 - Civil defence in occupied territories:
This understanding is necessary to assert that protection may
be denied subject to the requirements of imperative military
necessity and the urgent security requirements of the occupying
power.

21. (U) Article 75 - Fundamental guarantees: An understanding
is necessary to preclude interpretation that some categories of
personnel may be excluded from basic protections. In ratifying
the 1949 Geneva Convention on Prisoners of War, the Soviet bloc
rejected its application to those persons who have been con-
victed under the law of the detaining power for war crimes and

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crimes against humanity. Moreover, during the war in Southeast Asia, the North Vietnamese used the same argument to deny legal rights to US prisoners of war. During the plenary vote on Article 75 to Protocol I, the Soviet Union stated it understood that Article 75 does not extend to war criminals and spies and that national legislation should apply to this category of persons. Since the Soviet statement is contrary to the express language of Article 75(7), it must be rejected.

22. ~~(U)~~ Article 96 - Treaty relations upon entry into force: This statement is of prime concern to the UK because of its desire not to legitimize the combatant status of the groups in Northern Ireland. While there is no current parallel problem for the United States, this article could, at some future date, provide similar difficulties for the United States. The United States would not care to give recognition as legal belligerents, and grant PW status, to domestic terrorist groups.

23. (U) Protocol II in its entirety. Draft Articles 11 and 25 of Protocol II, which defined the terms used, were deleted during negotiations. The US understanding makes it clear that the terms used have the same meaning as those of Protocol I.

24. (U) Article 11 - Protection of medical units and transports: This understanding clarifies that the protected status of medical transports, including aircraft, is the same as that of Protocol I.

25. ~~(U)~~ Article 16 - Protection of cultural objects and of places of worship: This article does not specifically state that protection is lost when the objects are used in support of the war effort. Without the understanding, the article may encourage the use of such objects for military purposes. This exception is available to parties to the 1954 Hague Convention

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for the Protection of Cultural Property, to which the United States is not a party, by virtue of the reference to that convention in Article 16 of Protocol II. However, there is no provision for waiver of the protections contained in this article of the Protocol. Prudence therefore would dictate insuring that the United States, as a non-party to the 1954 Hague Convention, not be placed in a less favorable position than parties to that Convention who might be opponents (e.g., the Warsaw Pact).

26. (U) Article 18 - Relief societies and relief actions: An understanding is needed to clarify that personnel providing relief services are immune from prosecution and are entitled to protection consistent with paragraph 1, Article 10 of Protocol II.

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APPENDIX B

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| | <u>1</u> |
| LIST OF PAPERS PROVIDED TO THE OSD STAFF | <u>2</u> |
| The following papers concerning the military review of the 1977 | <u>3</u> |
| Protocols have been provided on an informal basis to the | <u>4</u> |
| Offices of the General Counsel and for Multilateral | <u>5</u> |
| Negotiations Policy: | <u>6</u> |
| a. Paper, undated, "(Draft) Proposed Legal Commentaries on | <u>7</u> |
| 1977 Additional Protocols" | <u>8</u> |
| b. Paper, undated, "Reprisals under Additional Protocol I" | <u>9</u> |
| c. Memorandum by the Judge Advocate General, Department of | <u>10</u> |
| the Army, DAJA-IA, 1981/9104, 19 January 1982, "Review of | <u>11</u> |
| 1977 Protocols to the 1949 Geneva Conventions; Application | <u>12</u> |
| to Medical Aircraft (Including Helicopters)" | <u>13</u> |
| d. Memorandum by the Judge Advocate General, Department of | <u>14</u> |
| the Army, DAJA-IA 1981/0042, 19 July 1981, "1977 Protocols | <u>15</u> |
| to the 1949 Geneva Conventions; Application to Unconven- | <u>16</u> |
| tional Warfare" | <u>17</u> |
| e. Memorandum by the Chief, Maritime/UN Negotiations Divi- | <u>18</u> |
| sion, Joint Staff, 9 August 1982, "East German Legal Article | <u>19</u> |
| on 1977 Protocols" (with translation of "The Scope of the | <u>20</u> |
| Supplementary Protocols to the Geneva Conventions of | <u>21</u> |
| August 12, 1949" by Bernhard Graefrath) | <u>22</u> |
| f. Memorandum by the Office of the Judge Advocate General, | <u>23</u> |
| Department of the Navy, Serial 10/462, 13 August 1982, | <u>24</u> |
| "Military Review of the Additional Protocols (Hospital | <u>25</u> |
| Ships)" | <u>26</u> |
| | <u>27</u> |
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