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Reviewed Chief, RDD, WHS
IAW EO 13526, Section 3.5

Date: AUG 2 1 2013

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THE SECRETARY OF DEFENSE

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MEMORANDUM FOR THE SECRETARY OF DEFENSE

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MEMORANDUM FOR THE SECRETARY OF STATE

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

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

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

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

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

Office of the Secretary of Defense 5 USC 552
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The unacceptable elements of Protocol I are multifarious and fundamental in nature. Given that reservations must be compatible with the object and purpose of the treaty, the Chiefs and I have concluded that Protocol I's flaws are not remediable through reservations and understandings. We therefore recommend that the United States declare its intention not to ratify Protocol I. The Swiss Government, as depositary, should be informed formally of our intention and requested to note the fact in its publications listing signatories. We are confident that a clear exposition of our case against Protocol I will win substantial support on the Hill and with the public.

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

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

cc: The Assistant to the President
for National Security Affairs

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