

Hand Carried
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Aide-Memoire

I.

As is known to the Department of State from former consultations, some of the results taking shape at the Geneva diplomatic conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts cause a certain concern within the government of the Federal Republic of Germany. It cannot be ruled out that such results may possibly have farreaching consequences for the Western alliance's defense policy. In view of the fourth, and final, session of the conference in the spring of 1977, the government of the Federal Republic of Germany wishes to set out its concerns once more to the government of the United States of America and submit for discussion solutions which are being considered within the Federal Government. At the same time, it would express its wish for renewed consultations between the two governments. The Federal Government would appreciate it if it were possible to obviate the potential negative effects of the Geneva conference jointly and in a manner taking adequate account of the interests of the alliance and its individual members. The Federal Government considers the problems involved to be so important that it intends to make this question the subject of a talk between Federal Foreign Minister Genscher and Secretary of State Kissinger when next the occasion arises.

II.

The aforementioned concerns relate to some of the new warfare provisions in part III and part IV of additional protocol I, notably its articles 33, 34 and 46 to 51.

1. A particularly critical view is taken of the prohibition of indiscriminate attacks on military objectives, the

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civilian population and civilian objectives such as

- attacks not directed at a specific objective (e.g. widespread area fire),
- attacks using methods and means of combat which cannot be directed at a specific military objective (e.g. the use of landmines),
- attacks the effects of which cannot be limited to the military objective (e.g. the use of nuclear explosive devices involving radioactive fall-out or damage to the environment).

In view of the majority situation at the conference, the Federal Government does not reckon with any decisive alteration of these provisions during the final session.

2. The negative effects on NATO's concept of deterrence and defense including its nuclear component, with which the allies might be faced could be as follows:
 - a ban by treaty which could be interpreted in the sense of largely excluding the use of nuclear weapons, especially in the densely populated region of Central Europe,
 - a drastic reduction of the possibilities of conventional warfare,
 - a corresponding limitation of a military commander's present scope of action under international law.

The ultimate cause of these legal and political consequences are the restrictions of the principle of proportionality resulting partly implicitly and partly explicitly from the New Geneva Rules.

3. An additional problem will arise especially for the Federal Republic of Germany from the fact that its national laws permit the individual soldier to lodge complaints with a court against the service and training regulations of the Federal armed forces. The compatibility of NATO's defense concept with international law may thus become the subject-

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matter of proceedings before a supreme court. Should the court find that the present NATO strategy is not consistent with the new warfare provisions of protocol I, it would become difficult if not impossible for the Federal Government to fulfil its obligations towards the alliance.

III.

1. The effects of the Geneva conference set out above could create a risk of fundamental significance for the alliance and its members, should the allies agree without qualification to protocol I. In this case, the Federal Government would not rule out the possibility of the applicable NATO strategy coming under strong political and legal pressure. It does not seem sure that any doubts as to the legality of NATO's applicable strategy could be offset by reference to the fact that this strategy was conceived to apply solely in a case of self-defense (article 51, UN charter), that it is based on the concept of proportionality, and that it is justified in any event by the principle of self-preservation. This applies above all in regard to the first use of nuclear weapons which is an element contained solely in NATO's concept of deterrence.
2. On the other hand, to end its participation in the conference would not be an option which the Federal Government could justify politically. Withdrawal from a conference whose declared objective it is to improve the humanitarian protection of the victims of armed conflicts, can hardly be justified by any Western government to its own as well as to the international public. The alliance therefore depends on securing its essential interests within the framework of the conference.

Thus, specific joint steps at least on the part of the major NATO-partners will be necessary.

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IV.

The Federal Government wonders whether declarations of understanding to make clear that the additional protocols leave the international rules on the use of nuclear weapons unaffected and that the new provisions therefore relate to conventional warfare only, can be deemed to provide adequate protection against the difficulties foreseen. Above all in view of the problems arising out of its own national legal system, such a solution would hardly afford the Government of the Federal Republic of Germany the required certainty beyond any doubt in legal respects, because

- a declaration of understanding does not have the character of a formal reservation,
- such a declaration would, above all, not cover the problem of the use of specific conventional weapons.

V.

1. The solution being considered within the Federal Government therefore primarily tends in the direction of making reservations regarding individual provisions of protocol I upon ratifying the additional protocols. These reservations should not explicitly refer to nuclear warfare or specific restrictions on conventional warfare, but should quite generally restore the overriding validity of the principle of proportionality.
2. This solution would only be realized if it would be possible at the fourth session of the conference to exempt the warfare provisions from the interdiction of reservations as envisaged in article 85 of the ICRC draft protocol I. To this end, however, it will, in the Federal Government's view, be necessary for the major partners in the Western alliance to prepare appropriate specific steps to be taken at the next session of the Geneva conference. The proposed German-American consultations could, inter alia, also touch upon this subject.

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