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File -

DAJA-IA

23 February 1978

SUBJECT: Report of U.S. Expert to NATO POLADS/Experts Meeting on  
Protocols Additional to the 1949 Geneva Conventions

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George -  
I've been holding this  
for your return, but forgot  
to pass it along. Sorry.

-Mike M.

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DEPARTMENT OF THE ARMY  
OFFICE OF THE JUDGE ADVOCATE GENERAL  
WASHINGTON, D.C. 20310

REPLY TO  
ATTENTION OF:

DAJA-IA

23 February 1978

MEMORANDUM FOR: LAW OF WAR WORKING GROUP (See Distribution)

SUBJECT: Report of U.S. Expert to NATO POLADS/Experts Meeting on  
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1. REFERENCES.

a. Report of Military Committee, MCM-76-77, dated 31 Oct 1977, which found that Articles 35-60 of Protocol I are militarily acceptable, provided all members take measures to give legal effect to certain interpretations expressed by some nations during the Diplomatic Conference.

b. CONF USNATO 01401, DTG 101903Z Feb 78, which transmitted a UK note of 8 Feb 1978 proposing NATO coordination as to timing of ratification and substance of understandings/reservations which will accompany ratification (Incl 3).

c. CONF US NATO 01738, DTG 201645Z Feb 78, telegraphic report on NATO POLADS/Experts Meeting (Incl 4).

d. CONF US NATO 01739, DTG 201707 Feb 78, statement of FRG delegation (Incl 5).

2. PURPOSE. The purpose of the POLADS/Experts meeting was to provide for an exchange of views on (a) the concerns of the FRG for the need to formulate uniform combat rules giving effect to Protocol I and the recommendations of the NATO Military Committee as to both conventional and nuclear warfare, and (b) the UK concern that there be coordination as to timing and substance in the instruments of ratification.

3. AGENDA. See Incl 1.

4. PARTICIPANTS. The meeting was chaired by Mr. Heichler (US), International Secretariat. In addition to the representatives of the POLADS, experts from capitals were present. A list of experts is at Incl 2.

USMISSION US NATO.



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5. HIGHLIGHTS.

a. Uniformity of interpretation and application of the Protocol.

(1) Both the UK and the FRG stressed that it is essential to the conduct of NATO military operations that all armed forces allocated to NATO commands have the same understanding of the rules of warfare and apply them uniformly.

(2) The UK wished to limit the common understanding to the interpretation of Articles 35-60 of Protocol I and the development of studies as to the legal effect of understandings with a view that all NATO members express similar understandings or reservations in their instruments of ratification. In order to preclude an unacceptable hiatus in the application of the Protocols, the UK urged that ratifications be deposited at about the same time. Canada strongly supported the UK view and expressed disappointment that the Protocols do not have a general participation clause (as in Article 2, Hague Convention No. IV of 1907). Recognizing that such precise coordination is not attainable, most delegations agreed that there should be consultation within NATO prior to submitting the Protocols to each Parliament.

(3) The FRG, which is strongly influenced by Mr. R. Schneider, Head of the International Law Section, MOD, wishes to go considerably farther. The FRG proposes the development of uniform, detailed combat rules as to both the use of weapons and methods of warfare. These rules should be integrated into National Law of War Manuals as well as in NATO documents (Incl 4). Baron von Marshall made frequent reference to the fact that nine Allied Powers have forces in the FRG. The combat rules that the FRG will develop are those demanded by international law and German law. It is essential that all nine Powers apply the same rules insofar as it involves the protection of the civilian population and civilian property.

b. FRG experts expressed doubt as to the previously expressed understandings that Protocol I does not affect or restrict the use of nuclear weapons. This doubt is generated in part by the ICRC introduction of the 1973 Commentary (at page 2) which, unlike the ICRC introduction to the Draft Protocols, states:

"It should be recalled that, apart from some provisions of a general nature, the ICRC has not included in its drafts any rules governing atomic, bacteriological and chemical weapons . . . ."

The FRG considers it arguable that the provisions of Articles 35, 51, 55, and 57 apply to the use of nuclear weapons. In order to ensure legal effect



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to understandings expressed by the US and the UK and those reflected in the Military Committee Report, it may be necessary to express reservations rather than understandings.

Both the US and the UK disagreed. They pointed out that reservations would amount to an admission that the articles dealing with methods and means of combat govern the use of nuclear weapons. The US and UK also stated that our statements made at the Diplomatic Conference clearly reflect an understanding without which we would not have been able to participate in the conference. While recognizing that the use of nuclear weapons is subject to the present principles of international law, there is nothing in the Protocols as such which has any effect on the use of nuclear weapons. In other words, the Protocols leave the law governing nuclear weapons as it was before the Diplomatic Conference.

Referring to a Canadian proposal, the UK objected to any study on the rules to be applied by NATO concerning the use of nuclear weapons as being beyond the scope of the consideration of the Protocols.

c. With regard to conventional warfare, the FRG experts expressed the view that the Protocols demand detailed rules as to the employment of weapons to avoid indiscriminate effects. Detailed rules must also be developed as to methods of warfare to avoid violations of the rules against indiscriminate attacks and the rule of proportionality (Incl 6). The subjects which require such regulation are listed in Incl 7 (which was delivered privately). They include incendiary weapons, high velocity bullets, fragmentation ammunition, operational principles for long range patrols, use of mines, operational principles for artillery, including harrassing fires, unobserved fires, reconnaissance by fire, and a consideration of the stay-put policy. Conversations with Mr. Schneider indicate that he has in mind highly restrictive regulations based on a rigid and literal interpretation of Articles 35-60.

d. The U.S. expert suggested in a private US-UK-FRG meeting that whereas coordination as to timing and substance were desirable ideals, it is not likely to be politically feasible. The problem of coordinating the basic rules for the conduct of military operations cannot feasibly be effected by common provisions in national manuals. It may, however, be feasible to develop NATO or subordinate NATO command rules of engagement or operating procedures which could be fitted to the requirements presented by the countries in which NATO forces might operate. These might differ among the various NATO commands based on conditions of the terrain, population density, and enemy capabilities.



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e. Norway indicated that it would be ready to ratify the Protocols this summer, and its representative indicated doubt that Norway would be willing to wait until all others are ready to ratify. Although agreeing with the U.S. nuclear understanding, it might not be politically feasible to express it. In response to a question from Norway, the US expert expressed the hope that as many non-nuclear states as possible express the nuclear understanding. If any believe that it is not politically feasible, their silence on the subject would be appreciated and construed as an acquiescence in the US-UK understanding.

f. Two working groups were proposed:

(1) A legal group to consider matters relevant to ratification;  
and

(2) A legal-military group to develop uniform combat rules. FRG proposals for the mandate of such a working group and model drafts on rules relevant to mine warfare are anticipated in mid-March 1978. The Representative of the Military Committee suggested that the proposal be referred to the Military Agency for Standardization.

#### 6. CONCLUSIONS.

a. The developments outlined above require close attention by OSD, JCS, the Services, and the State Department.

b. The matters raised by the FRG may substantially delay the process of ratification in several NATO countries.

c. In order to avoid unacceptable restrictions on the conduct of successful military operation within NATO, the US must participate in the working groups, if they are established.

d. Uniformity of application of the law of war in regional NATO operations can partially be effected through the development of Rules of Engagement/Operating Procedures, within each NATO command.

7 Incl  
as

WALDEMAR A. SOLF  
U.S. Representative to  
NATO POLADS/Experts Meeting