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*File -
Human Rights
in Armed
Conflicts*

REPLY TO
ATTENTION OF:

DAJA-IA

29 September 1978

MEMORANDUM FOR THE LAW OF WAR WORKING GROUP

SUBJECT: FRG Talking Paper for October Meeting

1. Reference DAJA Memorandum dated 22 September 1978, subject as above. Copies of the FRG Talking Paper for the October 2-3 meeting were distributed for comments.
2. Attached for your information are copies of the comments prepared by Army JAG (Incl 1) and Air Force JAG (Incl 2).

Waldeemar A. Solf

WALDEMAR A. SOLF
Chief, International Law Branch
International Affairs Division

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Comments on FRG Talking Paper on Statements To Be Made Upon Ratification of Protocol II. Nuclear Declaration:

A. The paper suggests that there is a strong body of opinion that the substance of several provisions of Protocol I clearly and unequivocally prohibit certain uses of weapons which would have indiscriminate effects, and that under conditions prevailing in central Europe, these provisions would limit the use of nuclear weapons, including tactical nuclear weapons. The paper also suggests that a mere interpretive statement would not suffice to preclude that consequence. The Vienna Convention on the Law of Treaties is cited as authority for this view. Accordingly, the FRG proposes an unambiguously worded declaration which has the effect of a reservation.

Comments:

1. It should be noted at the outset that the FRG appears to be interpreting the Vienna Convention's rules on treaty interpretation in an improper manner. The FRG appears to be acting on the assumption that the Vienna Convention only permits parties to interpret treaties according to the "plain meaning" of the terms and that recourse to the negotiating record is permitted only if there is ambiguity. This is not an accurate interpretation. The general rule of interpretation (Article 31) states that treaties shall be interpreted in accordance with the plain meaning of terms (a) in their context and (b) in the light of the treaty's object and purpose. Recourse to supplementary materials is permitted either (1) to confirm an interpretation of the treaty or (2) to determine the meaning of the treaty if there is ambiguity or if a literal application of Article 31 to the provision in question leads to an absurd result. The FRG also ignores the possibility of having recourse to the supplementary means of interpretation to confirm an interpretation. In

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the case of the Protocol, the "object and purpose" (Article 31, Vienna Convention) of the treaty was in part to devise rules that would be applicable in situations when conventional weapons are used. The "object and purpose" of the treaty was not to deal with the use of nuclear weapons. Consequently, the U.S. is entitled to insist that its views on nuclear weapons are indeed within the purview of the "plain meaning" rule of Article 31 of the Vienna Convention. Article 32 would permit a recourse to the negotiating record to "confirm" this interpretation regardless of whether there is any ambiguity.

2. As the U.S./UK declaration will be a part of their instruments of ratification, it will not be a mere supplementary source. In view of Article 2(1)(d) of the Vienna Convention, it will have the same effect as a reservation, without running the risk of being construed as an admission that the conference intended the Protocol to regulate the use of nuclear weapons. (Article 2(1)(d) of the Vienna Convention defines a "reservation" as being "a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state.") Nevertheless, the U.S. has no objections to making it clear that states expressing similar understandings "will not be bound by any inconsistent interpretation."

4. There is, however, some concern whether the language proposed in the FRG talking paper is broader than the limitation expressed by the understanding. The FRG proposed declaration is

"In applying the Protocol, the _____ therefore, considers itself bound only in so far as the use of conventional weapons is concerned."

This is susceptible to the interpretation suggested in Part II of the FRG talking paper that the declaring State considers the Protocol to be

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applicable only in armed conflicts in which conventional weapons are used. The U.S. declaration, on the other hand, does not imply that Protocol I is inapplicable in the event of a nuclear armed conflict. It merely declares that the rules established by the Protocol "were not intended to have any effect on, and do not regulate or prohibit, the use of nuclear weapons." The U.S. declaration cannot reasonably be construed as denying the applicability of the provisions of the Protocol dealing with the wounded and sick, prisoners of war, and civilians except to the extent that particular provisions could be construed as affecting the use of nuclear weapons.

II. Effort To Limit Declaration to Section I, Part IV.

The FRG paper construes the U.S. declaration as precluding, in the event of nuclear war, "the application of the Protocol altogether and hence the protection of medical transport and the treatment of prisoners of war". To overcome this possibility, the FRG paper proposes to restrict the effects on the declaration to "the section mentioned in Article 49(3)", i.e. Section I, Part IV. (Articles 48 to 67).

Comments:

1. As pointed out in the preceding section, the U.S. declaration was carefully phrased to avoid the interpretation attributed to it in the FRG paper.
2. Limitation of the effects of the declaration to Articles 48-60 would leave uncovered Article 35, Paragraph 3, which would otherwise severely limit the use of nuclear weapons to the same extent as Article 35.
3. On the other hand it would cast doubt as to the applicability in nuclear war of Articles 59 (Non-defended localities), (Demilitarized zones) and 61-67 (Civil defense). These are consequences not envisioned under the U.S. declaration.

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4. Although not clearly stated, the FRG paper may express a concern that in the event the U.S. declaration is construed as a reservation and rejected by a State, there may be no treaty relationship under the Protocol between the reserving State and the rejecting State. This is suggested in Professor Ipsen's paper. The current law on the effect of reservations and objections to reservation relevant to this matter is reflected and summarized in Articles 20 and 21 of the Vienna Convention on the Law of Treaties. The relevant provisions state that:

a. An objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State (Article 20 (4)(b)).

b. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation is made do not apply as between the two States to the extent of the reservation.

(Article 21(3)). (Emphasis added)

In view of these rules, an objecting State has the option to reject any treaty relations with the reserving State, or to accept the treaty relations except to the extent of the reservation.

Applying these principles, an objection to the U.S. declaration which does not expressly reject treaty relations with the U.S., would have the following effect:

a. Establish treaty relations with the U.S. as to the entire Protocol except as to those provisions which affect the use of nuclear weapons to the extent of reservation. In other words, the Protocol creates no treaty relation respecting the use of nuclear weapons. The parties would be governed by pre-existing law with

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respect to the use of nuclear weapons. Thus a rejection of the U.S. declaration would have the same legal effect as an acceptance.

b. Provide an opportunity for stigmatizing the U.S. thru propaganda.

Professor Ipsen construes the principle reflected in Article 2(3) as mechanically effecting a rejection of Parts, Sections or Articles of the Protocol mentioned in the declaration, or to the entire Protocol if not so particularized.

It is not believed that this is a valid construction. The proper construction is that, in the absence of a contrary expression, a general objection to a reservation is to the severable portion of the substance only.

Nevertheless, the end result would be that in the process of sorting out the treaty relationship between the reserving and objecting States, it would be necessary to identify the specific provisions affected.

In order to remove whatever ambiguity remains in the U.S. declaration, consideration should be given to revising the U.S. declaration to read as follows:

It is the understanding of the United States of America that the [provisions of] [rules established by] this Protocol pertaining to methods and means of warfare were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons. [The United States of America will not be bound by any inconsistent interpretation].

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III. Other Proposed FRG Declarations

1. Article 44(3). This appears to be consistent with the U.S. declarations.
2. Articles 50(1) and 52(3) (Presumptions of civilian character).

The understanding prepared by the FRG in its talking paper (page 4) on Articles 50(1) and 52(3) appears to be based on a misunderstanding. The treaty provisions in question state in essence that if there is doubt as to whether a person or object is "civilian", it shall be presumed to be civilian. The understanding expressed by the FRG in essence deals with a situation in which there is no longer any reasonable "doubt". The FRG understanding deals with a situation in which it can be inferred that the objects or persons are of a combatant character. Consequently, the "presumption" stated in Articles 51(1) and 52(3) is overcome. Thus the declaration adds nothing to the statement of the two provisions.

The thrust of the U.S. statement covering this situation, as well as other situations in which decisions are made by combatants, is to shield honest decisions against condemnation in the light of hindsight:

"The provisions of Part IV, Section I of Protocol I must be applied to commanders, and others responsible for planning, deciding upon or executing attacks, on the basis of information reasonably available to them at the time they take such action and not on the basis of hindsight."

If it is desired to particularize this general statement with reference to the presumptions stated in Articles 50(1) and 52(3), the following may be considered:

"It is the further understanding of the _____ that the presumptions stated in Articles (50) and 52(3) are [rebutted] [overcome] when a commander or other person responsible for planning, deciding upon or executing an attack, honestly concludes on the basis of information reasonably available to him that the persons or objects under consideration are [legitimately the object of attack] [legitimate military objectives].

3. Article 51(4) (Indiscriminate Attacks).

The FRG proposed understanding does not do much to clarify Article 51(4).

If it tends to clarify their thinking, it is not objectionable except as to the implication that the rule of proportionality (excessiveness) is the only limitation on the effects of attacks under Article 51(4)(e).

Analysis indicates that the Protocol requires three limitations on the effects of attacks;

- (a) Proportionality (Excessiveness) (Article 51(5)(b) and 57(2)(a)(iii)).
- (b) Rules relating to the protection of the natural environment (Articles 35(3) and 55).
- (c) Limitations on attacks against military objectives located at or near dams, dikes and nuclear electric stations if such attacks may cause the release of dangerous forces and consequent severe losses among the civilian population (Article 56).

In regard to the natural environment and the installations containing dangerous forces, if the severe consequences are foreseen, the attack may not be launched regardless of the relative importance of the target.

With respect to the rule of proportionality, the commanders concerned must make a determination whether the foreseeable civilian losses are excessive in relation to the concrete and direct military advantage anticipated.

This decision will have to be based on a balancing of

(1) The foreseeable extent of incidental civilian casualties and damage, weighed against

(2) The relative importance of the military objective as a target.

4. Articles 51(5) and 57. (Proportionality/Military Advantage Anticipated).

(1) The U.S. has informed the alliance of its intent to express an understanding substantially similar to the first paragraph of the declaration proposed by FRG.

The substance of the second FRG paragraph is covered by the principles that a decision maker's action should be judged on the basis of information reasonably available to him at the time he makes his decision and not on the basis of hindsight. If the FRG intends to make this declaration, it would probably sound better to omit the reference to "the intentions of higher command." This concept is certainly included within the more general term "military situation."

National manuals should, and probably will, contain a discussion as to the level of command authorized to cancel or suspend an attack for reasons of proportionality (Article 57(2)(b)).

5. Article 58. Precautions Against the Effects of Attacks

The first two sentences of the proposed FRG declarations are encompassed in the UK Declaration definition of "feasible."

The third sentence is a self evident truism as to the thrust of Article 58.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C. 20324



REPLY TO
ATTN OF:

JACI

28 SEP 1978

SUBJECT:

FRG Talking Paper (Your Letter of 22 Sep 78)

TO:

DAJA-IA

1. Part I of the FRG paper assumes that Protocol I applies to nuclear weapons, and that such weapons are forbidden as "indiscriminate" under Article 51. It then argues that this would have severe repercussions under German internal law, and that these would not be avoided by a mere statement of understanding upon ratification because such a statement would be without effect under the rules of interpretation laid out in Article 32 of the Vienna Convention on the Law of Treaties. The conclusion drawn is that the FRG must file a formal reservation to the Protocol, something that the United States has consistently opposed.

2. Leaving aside the rather questionable assertion that tactical nuclear weapons are necessarily "indiscriminate," it should be pointed out that the Vienna Convention is not yet in force, and that the United States has always asserted that the negotiating history of a treaty should be freely consulted during the process of interpreting it. Even within the framework of the Vienna Convention, however, a good argument can be made that it is still permissible to consider the U.S. statement of understanding. Article 31 of the Convention lays down the "general rule" that a treaty should be interpreted in accordance with the "ordinary meaning" of its terms and "in the light of its object and purpose." No limitations are stated on the means to be used to determine "object and purpose." Our understanding on nuclear weapons relates to the "object and purpose" of the Protocol as a whole, rather than to the meaning of specific language therein. It should, therefore, properly be considered even if the Vienna Convention rules of interpretation are strictly followed. It should also be noted that some commentators have argued that Article 32 of the Vienna Convention does not prohibit the consideration of preparatory work unless a treaty is ambiguous, but only authorizes it in those circumstances.

3. The crux of the German argument, however, relates to the effect of the Protocol in FRG internal law. This concern is apparently based on Article 25 of the FRG Constitution, which

reads as follows: "The general rules of public international law are an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the territory." For many years, however, both the Federal Constitutional Court and the majority of commentators have construed the phrase "general rules of public international law" to refer only to rules of customary international law. Treaties are regarded as non-self executing, and require separate legislation in each case to take effect within the FRG. It would therefore appear that the Federal parliament could incorporate a NATO-approved statement of understanding into FRG internal law when it passes the statute executing the Protocol in that law. The previously accepted interpretation of Article 25 of the FRG Constitution may or may not have changed in recent years, but this is certainly an area which ought to be explored with the German representatives.

4. In any event, many of the fears and interpretations expressed in the FRG paper seem to be rather fanciful. Even if nuclear weapons are assumed to be indiscriminate, there is no explicit prohibition on stockpiling such weapons on the soil of a state party to the Protocol. Similarly, while the Protocol might permit the use of an indiscriminate weapon in reprisal in some circumstances, there is nothing in Protocol I to suggest that such weapons are merely subject to a "no first use" rule. The concern for the sick and wounded and PWs expressed in Part II of the FRG paper seems equally fantastic, since the 1949 Geneva Conventions are not subject to any understandings or reservations dealing with nuclear weapons. While the Protocol does expand the protection of guerillas, national liberation movements and medical aircraft, none of these is a likely target for nuclear weapons.

5. Turning, finally, to the miscellaneous suggestions in Part III of the paper, the understandings on Articles 44 and 58, and the first understanding on Articles 51(5) and 57, are consistent with past U.S. and DOD positions. There may be problems with the other statements, however.

a. The suggested understanding on Articles 50(1) and 52(3) would allow persons and objects of doubtful status to be attacked "if there are reasonable grounds for presuming" that they are lawfully subject to attack. This statement is capable of being interpreted as permitting attacks whenever there is some reasonable ground for believing the attack

lawful even if the commander in fact knows it is not lawful. It would be preferable to refer to whether the person deciding on the attack "honestly believes" that the attack is directed against lawful objectives.

b. The statement of understanding on Article 51(4) would require weapons to have an "adequate degree of accuracy," without stating what they should be adequate to do. This whole statement does not seem to clarify the Protocol very much, as it is not at all apparent what the Germans intend the statement to accomplish.

c. The second understanding on Articles 51(5) and 57 might be read to mean that the decision of a field commander could never be subject to later questioning, even in the case of bad faith or manifestly irrational actions (e.g., the Calley case). The reference to "intentions of higher command" might also suggest a revival of the superior orders issue. It would be preferable to use language similar to that used by the U.S. delegation to the Diplomatic Conference: "commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time."

Robert W. Norris
ROBERT W. NORRIS, Colonel, USAF
Chief, International Law Division
Office of The Judge Advocate General