

Delegation of the Federal Republic
of Germany to the Diplomatic Conference
on the Reaffirmation and Development
of International Humanitarian Law
Applicable in Armed Conflicts

*Fifth -
Human Rights
in Armed
Conflicts*

Talking points on statements to be made upon ratification of
protocol I.

I.

1. The Government of the Federal Republic of Germany understands the statements on the use of nuclear weapons made by the United States and the United Kingdom at the Geneva Conference on International Humanitarian Law applicable in Armed Conflicts and upon signing the protocols thereto on december 12, 1977 to mean that in the view of the two powers nuclear warfare has not been a subject of the conference, and that the provisions of protocol I neither regulate nor prohibit the use of nuclear weapons, so that this protocol is not applicable to any possible use of nuclear weapons.
2. The Federal Government has not yet reached a definitive consensus on this point. There is a strong body of opinion that, though protocol I does not contain a prohibition of specific weapons, its clear and unequivocal wording would, nevertheless, prohibit the use of any weapon if under the specific conditions of its use, its effects would be indiscriminate. This would, therefore, also apply to nuclear weapons and would mean that under the conditions prevailing in Central Europe even tactical nuclear weapons could as a rule no longer be put to use.

It is considered that a mere interpretative statement upon ratification and a reference to conference history would not suffice to preclude this consequence. According to article 32 of the Vienna Convention on the Law of Treaties, recourse may only be had to such supplementary means of interpretation when the wording of the treaty is ambiguous or obscure. This, however, would not be the case here. In fact, the interpretation of the wording makes it unequivocally clear that the use of any weapon shall be prohibited if in a specific case its effects are indiscriminate. In order to ensure in internationally binding form that, in the event of nuclear weapons being used,

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the user would not be bound by the provisions of protocol I on methods and means of warfare, a clear reservation upon ratification would be indispensable.

Should this legal consideration become authoritative for the Federal Government, perhaps by virtue of a supreme court decision, considerable consequences would ensue for it unless it had made a reservation, it would be bound by the protocol also with regard to nuclear warfare and obliged under international law to forbid its nuclear allies to stockpile nuclear warheads in its territory or to make any first use of such warheads in its territory, nor could it ever, with its own units, make first use of such nuclear warheads as might have been placed at its disposal within the framework of NATO planning. This would be a consequence which might most seriously jeopardize NATO strategy.

3. The Federal Government is aware that a reservation by one or more NATO partners regarding nuclear warfare would be contradictory to the argumentation of the two nuclear allies. For indeed, such a reservation would mean that, in the view of the state making it, protocol I does in fact regulate the use of nuclear weapons and that only a reservation could eliminate its application to these weapons.

It should, however, be possible to formulate a statement making it sufficiently clear that the Federal Government does not want to be bound beyond a specific interpretation as stated by it, but which would permit of being legally qualified both as a substantive reservation or only as an understanding. To this end the following wording is proposed for discussion:

"It is the understanding of

that the rules established by this protocol have been designed with a view to conventional weapons and were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons. An acceptable rule of law designed to be applicable to the use of such weapons would have to follow other criteria than the rules established in this protocol which are designed for conventional warfare and would not fit well in the context of the use of weapons of mass destruction. In applying the protocol, the

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

In order to make this statement appear more acceptable, it could be enriched as necessary by additional political arguments such as a reference to the need for agreement on effective measures to end the nuclear arms race and to implement nuclear disarmament under strict and effective international control.

4. Another problem discussed by the Federal Government is the question whether such a reservation would be compatible with the object and purpose of the treaty (article 19 (c) of the Vienna Convention on the Law of Treaties). This question need not, however, be considered and discussed in depth in this context. In any case, in the event of incompatibility, the fact that the readiness to be bound has expressly been limited ("... considers itself bound only in so far...") would be a legal guarantee that no obligation arises under the treaty.

II.

The statement made by the United States (and in similar form by the United Kingdom) upon signing protocol I on December 12, 1977, i.e.

"It is the understanding of the United States that the rules established by this protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons"

has the disadvantage that in the event of nuclear weapons being used it would preclude the application of the protocol altogether and hence also of the provisions covering the protection of medical transport and the treatment of prisoners of war.

It would, therefore, seem useful to search for formulas which, though precluding the application of all provisions that are positively incompatible with the use of nuclear weapons, would nevertheless in binding form and for all parties to the conflict maintain the protection of the other rules.

One way of achieving this would be to make the nuclear statement with direct reference to article 49 of protocol I so as to make it clear that it is meant to relate only to that sphere of application of protocol I which is defined in that article.

relating to the use of weapons

and will not be bound by any inconsistent understandings

In this case the draft statement put forward for discussion under I above would have to be modified as follows:

"It is the understanding of
that the rules contained
in the section mentioned in article 49 (3) of this protocol
have been designed with a view to conventional weapons
and were not intended to have any effect on and do not
regulate or prohibit the use of nuclear weapons.
An acceptable rule of law designed to be applicable to
the use of such weapons would have to follow other criteria
than the rules contained in this section which are designed
for conventional warfare and would not fit well in the
context of the use of weapons of mass destruction.
In applying the relevant provisions of this section,
the
therefore,
considers itself bound only in so far as the use of
conventional weapons is concerned."

III.

Apart from the nuclear statement, the Federal Government considers it necessary to make further statements which could also be briefly discussed during the forthcoming bilateral consultations:

Statement on Art. 44

"It is the understanding of the Federal Republic of Germany that the criteria contained in the second sentence of art. 44 (3) for distinction between combatants and the civilian population can only apply in occupied territories and in the other armed conflicts described in art.1(4). The Federal Republic of Germany interprets the word "deployment" to mean any movement towards a place from which an attack is to be launched".

Statement on Art. 50(1) and Art. 52 (3)

"In the opinion of the Federal Republic of Germany, the presumptions contained in the last sentence of art. 50 (1) and in art. 52(3) do not apply if in consideration of the specific circumstances of the respective military situation there are reasonable grounds for presuming that the attack is directed against combatants or objects used for military purposes."

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Statement on Art. 51(4)

"The Federal Republic of Germany understands art. 51(4) to mean that attacks are not prohibited which are launched with the intention of striking a military objective, which employ a method or means of combat which, with regard to the respective military objective, ensure an adequate degree of accuracy, and the effects of which on civilians and non-military objects can be limited in accordance with the prohibition of excessiveness".

Statement on Art. 51(5) and Art. 57

"In applying the rule of proportionality, the term "military advantage" is understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack."

The judgement whether an attack will bring concrete and direct military advantage lies with the military leader who plans or decides upon the overall attack. Such judgement should be made with due discretion and with regard to the military situation and the intentions of higher command.

Statement on Art. 58

"In endeavouring to take all practicable and practically possible precautions against the effects of attacks. Those circumstances which are relevant to the success of military operations must also be taken into account. Thus the aim should be to choose from the practically possible alternatives the one which makes it possible to distinguish more clearly between civilian and military objects".

Bonn, September 18, 1978

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