

Message Text

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C O N F I D E N T I A L SECTION 01 OF 03 BONN 00233

E.O. 11652: GDS
TAGS: ICRC, PARM, PFOR, NATO, GW
SUBJECT: FRG POSITION ON DRAFT PROTOCOL ON INTER-
NATIONAL LAW IN ARMED CONFLICT

REF: STATE 308066; STATE 000066; BONN 00056

BEGIN SUMMARY: A FONOFF OFFICIAL HAS DESCRIBED FRG
CONCERNS ABOUT THE DRAFT PROTOCOL ON INTERNATIONAL LAW
IN ARMED CONFLICT AS CENTERING ON A POSSIBLE WEAKENING
OF NATO DEFENSE STRATEGY AS WELL AS A STRONG DESIRE
OF THE GERMANS TO AVOID ANY POSSIBLE FUTURE WAR
CRIMES CHARGES. THE EMBASSY DOES NOT BELIEVE THE FRG
WISHES TO BLOCK ACCEPTANCE OF THE PROTOCOL, BUT
RECOMMENDS THAT THE US CONSIDER WHETHER A MORE FORTH-
COMING APPROACH TO THE GERMANS MIGHT NOT BE WARRANTED
IN VIEW OF BONN'S HISTORICALLY AND LEGALLY BASED
CONCERNS. END SUMMARY

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1. DR. VON MARSCHALL, FRG FONOFF LEGAL SECTION, BEGAN
MEETING WITH EMBOFFS ON JANUARY 4 BY REVIEWING
PROBLEM OF INTERPRETATION OF CERTAIN PROVISIONS OF
DRAFT PROTOCOL CONCERNING NUCLEAR AND CONVENTIONAL
WARFARE. HE SAID THESE VIEWS WERE MADE KNOWN IN
OCTOBER AIDE-MEMOIRE FROM FRG EMBASSY TO DEPARTMENT
AND HAD BEEN FULLY DISCUSSED AT WASHINGTON AND MOST

RECENTLY AT "INNER CORE" MEETING IN BONN IN EARLY
DECEMBER 1976.

2. PRESSED FOR THE REASONS BEHIND WHAT APPEARED TO
OTHER INNER CORE STATES TO BE EXCESSIVE FRG CONCERNS,
VON MARSCHALL REFERRED TO THE NUREMBERG TRIALS, THE
FRG WISH TO AVOID IN THE FUTURE BEING CHARGED WITH
VIOLATING INTERNATIONAL RULES OF WARFARE, AND CONSEQUENT
UNWILLINGNESS TO DO LESS THAN CONFORM 100 PER CENT
WITH ESTABLISHED RULES. WHILE, ON A PERSONAL BASIS,
ALLOWING THAT THE FMOD WAS TAKING AN EXCESSIVELY
CONCERNED VIEW IN FONOFF'S OPINION, VON MARSCHALL
STATED THAT THE FMOD BELIEVED THAT THE "ANGLO-SAXONS"
(US, UK, CANADA) WERE TAKING THE MATTER TOO LIGHTLY.
HE SAID HE BELIEVED THIS WAS PARTLY BASED ON THEIR
ASSUMPTION THAT CONFORMITY WITH THE RULES WOULD, IN
THE EVENT OF WAR, BE JUDGED BY VICTORS ANYWAY AND THE
PROBLEM WAS THUS NOT SO IMPORTANT.

3. THE FRG, VON MARSCHALL SAID, HAD A PARTICULAR
PROBLEM, STEMMING FROM THE WISH NOT, LIKE NAZI GERMANY,
TO FORCE ITS SOLDIERS TO VIOLATE ESTABLISHED RULES
OF WARFARE AS WELL AS FROM POST-WWII WAR CRIMINAL
TRIALS. FRG SOLDIERS COULD, INITIALLY IN MILITARY AND
ADMINISTRATIVE COURTS, QUESTION THE LEGALITY OF NATO-
AGREED STRATEGY AND TACTICS AND THEIR CONFORMITY WITH
INTERNATIONALLY ESTABLISHED RULES, INCLUDING THE
PROTOCOL SHOULD IT COME INTO FORCE AND SHOULD THE FRG
BECOME A PARTY TO IT. SUCH ACTION COULD RESULT IN
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A FINAL JUDGMENT THAT WOULD DECISIVELY AFFECT FRG
ABILITY TO CONTINUE TO PLAY AN EFFECTIVE ROLE IN NATO
DEFENSE PLANNING. EVEN A LOWER COURT JUDGMENT COULD
CREATE GREAT UNCERTAINTY AND A SUBSTANTIVE POLITICAL/
MILITARY PROBLEM. VON MARSCHALL EMPHASIZED THAT THE
FONOFF FULLY SHARED THE FMOD VIEW THAT THE FRG HAD
AN UNIQUE PROBLEM BY REASON OF THIS OPPORTUNITY OPEN TO
FRG SOLDIERS. VON MARSCHALL SAID THAT THERE WERE,
OF COURSE, CLASSICAL DIFFERENCES IN THE APPROACH OF
THE FONOFF AND THE FMOD (DIPLOMATS VS. SOLDIERS) TO
THE PROTOCOL ITSELF AND THE POLITICAL CONTEXT OF ITS
NEGOTIATION.

4. VON MARSCHALL RETURNED SEVERAL TIMES TO THE THEME
THAT NATO DEFENSE STRATEGY MIGHT BE WEAKENED BY
CERTAIN INTERPRETATIONS OF THE PROTOCOL. AS THE
PRINCIPAL FRONT-LINE STATE IN CENTRAL EUROPE, THE
GERMANS WANT TO BE ABLE TO DEFEND THEMSELVES TO THE
BEST OF THEIR ABILITY. AS A NON-NUCLEAR WEAPON STATE,

HOWEVER, THEY FELT THAT SOME MIGHT INTERPRET THE
PROTOCOL AS PROHIBITING CERTAIN CONVENTIONAL WEAPON

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SYSTEMS OR THEIR EFFECTIVE EMPLOYMENT. THE GERMAN
DEFENSIVE PROBLEM IS MADE MORE INTRACTABLE BY THE FACT
THAT SO MANY VILLAGES AND CITIES ARE PACKED INTO A
RELATIVELY LIMITED GEOGRAPHIC AREA, MAKING IT DIFFICULT
IF NOT IMPOSSIBLE TO DEFEND AGAINST AN AGGRESSOR'S
INVASION WITHOUT INVOLVING AREAS WHERE CIVILIANS ARE
CONCENTRATED.

5. THE FONOFF DIFFERED WITH THE FMOD ON THE NEED AND
ADVISABILITY OF USING A WORST CASE ANALYSIS AS THE
BASIS FOR FRG VIEWS, AND AGREED WITH OTHER INNER CORE
STATES THAT FMOD WAS OVERDOING IT. VON MARSCHALL SAID
THAT HARD FMOD RELIANCE ON THE WORST CASE ANALYSIS
WAS IN PART, PERHAPS, ATTRIBUTABLE TO THE FMOD VIEW
THAT INADEQUATE UNDERSTANDING WAS BEING SHOWN TO ITS
CONCERN BY OTHER NATO STATES. ON THE OTHER HAND,
THE FONOFF AGREED WITH THE FMOD THAT RELIANCE ON A
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BEST CASE ANALYSIS USED BY THE ANGLO-SAXONS WAS ALSO NOT ADVISABLE. EMPHASIZING ONCE MORE THAT THE VIEWS HE WAS EXPRESSING WERE PERSONAL AND NOT GOVERNMENTAL, AND SHOULD BE HELD IN CONFIDENCE, VON MARSCHALL SAID HE HAD THE STRONG IMPRESSION THAT THE FMOD WAS NOT SUFFICIENTLY TAKING INTO ACCOUNT THE IMPRESSION MADE BY FRG VIEWS VOICED SO FAR ON OTHER NATO STATES AND THE TARNISHING EFFECT OF THOSE VIEWS ON THE FRG'S IMAGE AS A HUMANITARIAN STATE.

6. VON MARSCHALL SAID THE FONOFF WOULD BE WORKING CLOSELY WITH FMOD TO SEE WHAT COULD BE DONE TO ALLEVIATE THE PROBLEM AND TO COPE WITH THE NON-INCLUSION OF THE RULE OF PROPORTIONALITY IN THE PROTOCOL BY MEANS OF A DECLARATION, A DRAFT OF WHICH (DATED DECEMBER 2, 1976) WAS DISCUSSED WITH OTHER INNER CORE STATES IN BONN MEETINGS. THE FONOFF HOPED TO BRING THE FMOD AROUND MORE NEARLY TO VIEWS OF OTHER INNER CORE STATES (EXCLUDING FRANCE), BUT THE FONOFF'S BEST HOPE WAS FOR SOMETHING MORE THAN WHAT APPEARED ACCEPTABLE TO INNER CORE STATES USING ONLY A BEST CASE ANALYSIS.

7. VON MARSCHALL ASKED EMBOFFS TO MAKE CLEAR THAT THE VIEWS EXPRESSED BY FMOD BASED ON THE FMOD STUDY DISCUSSED AT THE BONN MEETING WERE NOT REPEAT NOT THE VIEWS OF FRG.

8. SUMMING UP THE ATTITUDE OF THE FRG TO CONCLUSION OF THE PROTOCOL AND EXPRESSING GRATITUDE FOR THE CHANCE TO EXPLAIN THE FRG POSITION AND ITS BACKGROUND, VON MARSCHALL SAID THAT WHILE THE FRG WOULD WELCOME IT IF CONCLUSION OF THE PROTOCOL WERE POSTPONED FOR FIVE YEARS, THIS DID NOT SEEM A REALISTIC HOPE. SUCH POSTPONEMENT WOULD PUT THE VIETNAM WAR INTO BETTER PERSPECTIVE; MOREOVER, MORE AND MORE ELEMENTS FORMERLY

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FAVORING TROUBLESOME FORMULATIONS HAD BECOME GOVERNMENTS AND WERE BEGINNING TO HAVE SECOND THOUGHTS ABOUT THE WISDOM OF LANGUAGE SUPPORTING NON-ESTABLISHMENT INTERESTS. A PAUSE FOR THOUGHT MIGHT PERMIT THESE HISTORICAL CHANGES TO RESULT IN A BETTER ATTITUDE TOWARD THE GENUINE HUMANITARIAN PURPOSE OF PROTOCOL.

9. VON MARSCHALL CLEARLY SUGGESTED THAT, FOR HISTORICAL REASONS, THE FRG COULD NOT AFFORD TO OBSTRUCT CONCLUSION OF PROTOCOL, AND STATED THIS WAS NOT THE PURPOSE OF FRG EFFORTS, ALTHOUGH THERE WERE ADMITTEDLY PERSONS INVOLVED IN THIS MATTER ON THE GERMAN SIDE WHO WOULD PREFER NOT MERELY A DELAY IN CONCLUSION, BUT RATHER NON-CONCLUSION, OF THE PROTOCOL. IT WAS CLEAR, HOWEVER, FROM HIS DISCUSSION THAT THOSE DID NOT REPRESENT THE MAIN OBSTACLE. HE EXPRESSED CONFIDENCE THAT WITH BETTER UNDERSTANDING FOR, AND PATIENCE WITH, FRG CONCERNS, AN ACCEPTABLE AND WORKABLE SOLUTION COULD BE ACHIEVED, AND HE HOPED THAT THE US AND OTHER INNER CORE STATES SHARED THAT CONFIDENCE.

10. COMMENT: THE GERMAN HISTORICAL EXPERIENCE HAS CONTRIBUTED DIRECTLY TO FRG THINKING ON THE RELATION OF INTERNATIONAL HUMANITARIAN LAW TO THE CONDUCT OF WAR. ONLY GERMANS WERE TRIED AS WAR CRIMINALS AT NUREMBERG. THE FEAR IS STILL PRESENT, DOCUMENTED BY THE HISTORICAL RECORD, THAT GERMANS COULD AGAIN, AT SOME POINT IN THE FUTURE, BE CHARGED WITH WAR CRIMES. THE NUREMBERG EXPERIENCE IS ONE WHICH THE GERMANS DO NOT WANT REPEATED, EVEN AT THE RISK OF

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NOW APPEARING LEGALISTIC AND PERFECTIONISTIC IN EXPRESSING CONCERN AT WHAT MAY APPEAR TO BE SOME OF THE MORE REMOTE POSSIBLE CONSEQUENCES OF THE LANGUAGE OF THE PROTOCOL.

THE USG SHOULD BEAR IN MIND THAT, BECAUSE GERMAN COURTS DURING THE HITLER PERIOD BECAME MERELY AN ARM OF THE EXECUTIVE, FRG COURTS NOW GENERALLY GIVE LESS WEIGHT TO THE VIEWS OF THE FEDERAL GOVERNMENT IN ACTIONS PENDING BEFORE THEM, EVEN WHEN THE INTERPRETATION OF AN INTERNATIONAL TREATY IS INVOLVED, THAN DO COURTS IN THE UNITED STATES. MOREOVER, AT LEAST SOME FRG OFFICIALS MAY HARBOR MISGIVINGS ABOUT THE WILLINGNESS OF A JUDGE OR EVEN A COURT THAT MIGHT BE CALLED ON TO RULE ON INTERPRETATION OF THE PROTOCOL ADEQUATELY TO TAKE THE NATIONAL SECURITY INTERESTS OF THE FRG INTO ACCOUNT. THERE IS A GENUINE CONCERN,
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AND THIS WAS CONFIRMED BY VON MARSCHALL, THAT A GERMAN COURT WITH PACIFISTIC OR HUMANISTIC ORIENTATION COULD RULE AGAINST THE GOVERNMENT IN SUCH AN ACTION, AND THAT SUBSTANTIAL UNCERTAINTY AND POLITICAL/MILITARY CONSEQUENCES COULD RESULT (EVEN IF THAT RULING WERE LATER OVERTURNED).

THERE ARE ALSO STRONG FEELINGS AND DIFFERING OPINIONS IN THE FRG ABOUT THE EMPLOYMENT OF POLITICAL RADICALS IN PUBLIC SERVICE. THAT SERVICE INCLUDES SERVICE AS JUDGES OF FRG COURTS. WHETHER THEY ARE JUSTIFIED OR NOT, MISGIVINGS AS DESCRIBED IN THE PRECEDING PARAGRAPH MAY AFFECT THE DEGREE TO WHICH SOME QUARTERS IN THE FEDERAL GOVERNMENT ARE PREPARED TO TRUST THE COURTS WITH PRODUCING A REASONABLE INTERPRETATION OF THE PROTOCOL THAT WOULD TAKE ACCOUNT OF THE RULE OF PROPORTIONALITY UNLESS THAT RULE IS EXPRESSLY PROVIDED FOR EITHER IN THE PROTOCOL ITSELF OR BY AN APPROPRIATE FRG RESERVATION OR DECLARATION.

THE DILEMMA IS A PARTICULARLY CRUEL ONE FOR THE GERMANS, SINCE THEY KNOW THAT AGGRESSION FROM THE EAST IN CENTRAL EUROPE MUST BE MET AND STOPPED IN THE FRG. THE QUESTION WHICH THIS NEED RAISES IS WHETHER THE GERMANS CAN EFFECTIVELY PLAN WITH NATO TO DEFEND THEMSELVES AND WHETHER THEY CAN IN FACT DEFEND THEMSELVES WITHOUT FEAR THAT THEIR DEFENSIVE ACTIONS

MIGHT LATER BE HELD AGAINST THEM, AS INDIVIDUAL
MILITARY MEN AND AS A NATION.

IT IS NOT SURPRISING THAT SOME IN THE DEFENSE
MINISTRY WOULD PREFER THAT THE PROTOCOL NEVER BE
ACCEPTED. ON THE OTHER HAND, THE FRG HAS BUILT A
HUMANITARIAN, FUNCTIONING DEMOCRACY SINCE THE
SECOND WORLD WAR AND MUST BE CONCERNED ABOUT CONTINUING
TO PROJECT A CORRESPONDING IMAGE. AS A RESULT, WE
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BELIEVE THAT THE FRG WILL EVENTUALLY OPT FOR THE
PROTOCOL FOR DIPLOMATIC AND POLITICAL REASONS. TO
HELP SPEED THE PROCESS ALONG, THE EMBASSY RECOMMENDS
THAT THE COMPETENT US AGENCIES CONSIDER WHETHER A
MORE FORTHCOMI OR AT LEAST A MORE UNDERSTANDING,
US ATTITUDE TO BONN IS NOT WARRANTED. WE ARE UNABLE
TO MAKE SPECIFIC RECOMMENDATIONS BECAUSE WE ARE
INSUFFICIENTLY FAMILIAR WITH THE DETAILS OF THE
DISCUSSION, BUT WE BELIEVE THAT THE FUNDAMENTAL
GERMAN ATTITUDE WOULD NOT PRECLUDE REACHING
AGREEMENT PROVIDED SOME OF THEIR GENUINE CONCERNS CAN
BE MET.
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