
FEDERAL REPUBLIC OF GERMANY

Considerations on including a ban on the use of
chemical weapons and the right of withdrawal in
a future chemical weapons convention

I.

1. The 1925 Geneva Protocol prohibits the use of chemical weapons in war. The international community today regards this ban as customary international law. It is therefore applicable worldwide. This ban could only cease to be binding in relations with another State if the latter violated it. Above and beyond this, no State party to the Geneva Protocol can detach itself from this ban.

2. In its concluding report for 1983 (CD/416) the Ad hoc Working Group on Chemical Weapons nonetheless agreed in principle that a future chemical weapons convention should include a ban on the use of chemical weapons. Agreement on the form in which such a ban should be included has, however, not been reached in the deliberations thus far. It is merely certain that the ban, expressed by means of suitable formulations in the preamble and operative paragraphs, is to be made to relate to the 1925 Geneva Protocol without affecting its validity. Both the 1983 concluding report (CD/416, Annex I, IA 2b) and the report of contact group C (CD/416, Annex II, page 22) contain alternative formulations.

The remarks below are intended to enlarge on the suggestions and develop them further.

II.

1. The Federal Republic of Germany welcomes the basic consensus recorded in the Ad hoc Working Group's concluding report for 1983 that a ban on the use of chemical weapons should be incorporated in a future chemical weapons convention. The fact that the use of such weapons in war is already prohibited by the 1925 Geneva Protocol and by customary international law does not preclude the inclusion of such a ban in a convention.

Repeated codification of prohibitions or obligations is quite customary in humanitarian international law. It does not have a harmful effect even if the new norm is more extensive than the old one. Acceptance of a new identical obligation certainly does not curtail the old one, deriving in this case from the 1925 Geneva Protocol and from customary international law. On the contrary, not including a ban on the use of chemical weapons in a comprehensive convention could be construed as an indication that such a ban does not exist in

customary international law. There are also other general reasons for not drafting a chemical weapons convention in such a manner that the main practical case, namely the use of chemical weapons, is excluded.

2. It is evidently desirable to include a ban on the use of chemical weapons in a future convention. It must be ensured, however, that both the 1925 Geneva Protocol and the relevant rules of customary international law are merely reaffirmed when incorporating a ban on the use of chemical weapons in a convention and that a verification mechanism is provided for ensuring compliance with the ban.

The first formulation proposed by the Ad hoc Working Group in CD/416, Annex I, IA 2b, takes account of these considerations. However, a reference to the relevant rules of customary international law would be desirable in conformity with paragraph 4 of the United Nations General Assembly resolution 37/98 d.

The three additional alternatives provided in CD/416, Annex I, IA 2b, should not be taken into account since the first two of them ignore other legal bases for a prohibition, whilst the third detracts from the ban on use under customary international law. There are no objections to the proposals by contact group C for the wording of the preamble and operative paragraphs I to III, as contained in CD/416, Annex II, Appendix I, page 24. However, in the preamble, reference should also be made to the ban existing under customary international law.

III.

1. As regards the legal content of prohibitions in a chemical weapons convention and their effects in terms of disarmament, considerable importance attaches to the manner in which the right of withdrawal is formulated in such a convention. In particular, it must be ensured that the binding effect of the convention is no less durable than that of the 1925 Geneva Protocol, which cannot be denounced. In its 1983 concluding report the Ad hoc Working Group suggested a formulation for the inclusion of the right of withdrawal in a convention (CD/416, Annex I, VI B). This formulation needs to be improved.

2. The legal implications of incorporating in a convention a ban on the use of chemical weapons and a right of withdrawal should be examined in more detail. The existing formulation proposed by the Ad hoc Working Group in CD/416, Annex I, VI B, gives cause for misgivings because it is very extensive and does not include any criteria admitting of objective assessment in case of withdrawal. Admittedly, it corresponds to similar provisions contained in numerous existing international agreements. It is acknowledged that this formulation is intended to enable countries to accede to the convention without reservations.

3. The formulation of the withdrawal clause proposed by the Ad hoc Working Group has, however, consequences going much further than any reservations with regard to the 1925 Geneva Protocol. The scope of the ban on the use of chemical weapons contained in the Protocol is limited by the fact that numerous states declared, when assuming the obligations under the Protocol, that these would cease to be binding towards any adversary whose armed forces violated the ban. However, the formulation suggested by the Ad hoc Working Group permits withdrawal not only if the ban is violated by an adversary, but also generally speaking whenever a country believes that unspecified extraordinary events related to the subject matter of the convention have jeopardized its supreme interests.

This virtually means that the binding effect of the convention is subject to the discretion of the contracting States. The exercise of such discretion can - apart from the continuing binding effect of the 1925 Geneva Protocol and of the relevant rules of customary international law - in the final analysis only be countered with the argument that it should not be abused, but here it is hard to draw the dividing line.

With the formulation proposed by the Ad hoc Working Group there is thus the danger of countries claiming that, by withdrawing from the chemical weapons convention, they are also released from their obligations under the 1925 Geneva Protocol and customary international law. This is legally incorrect, but could nonetheless result in practice in the validity of the relevant norms that prohibit the use of chemical weapons being impaired.

On the basis of the provisions of the Geneva Protocol, it would only be possible for a contracting party to withdraw from its obligations if an adversary violated the ban on the use of chemical weapons.

As far as such a ban is concerned, a future convention should therefore not provide for the possibility of withdrawal in this respect, but should merely refer to the existing legal situation. Formulations to this effect require further consideration by the Ad hoc Working Group.

4. Apart from a ban on the use of chemical weapons, a comprehensive convention will include numerous other prohibitions and obligations of key importance as well as obligations of less significance and scope. The possibility of withdrawal in the event of their being violated should therefore be differentiated accordingly:

- Violations of the ban on the use, production or transfer of chemical weapons or of the obligations stipulating the destruction of existing chemical weapons stockpiles or chemical weapons production facilities should be regarded as grave violations permitting withdrawal from the prohibitions on production and transfer as well as from the aforementioned obligations.
- Violations of other prohibitions or obligations of the convention should, on the other hand, only permit withdrawal on a reciprocal basis from the prohibition or rule violated. In such cases, the contracting party would therefore, cease to be bound by the prohibition or obligation involved, whilst remaining bound by the other prohibitions and rules of the convention.

Furthermore, in the event of suspected violation, the right of withdrawal should not be available forthright. The means of verification and complaint afforded by the convention should first be exhausted. Only if they do not dispel the suspicion and if a contracting State regards its supreme interests jeopardized should withdrawal be possible. Withdrawal should be the final legal means that can be resorted to in the event of a violation of the convention.