Opposition to the Federal Government's assertion that the nuclear sharing practiced by Germany within the framework of NATO does not violate the Non-Proliferation Treaty

The Bundeswehr Fighter-Bomber Wing 33 is stationed in Büchel. It has the task, within the framework of NATO's nuclear cooperation, of practicing with its Tornado aircraft the transport and dropping of the atomic bombs stationed there. In the event of war, Fighter-Bomber Wing 33 would deliver nuclear bombs to their targets following their release by the US President and operational authorization through the U.S. chain of command. In the event of war, the German soldiers thus acquire the “power of disposal” over nuclear weapons under the auspices of NATO. This is so despite the fact that the release of the weapons is only effective for dropping them on targets chosen by the U.S. There are no indications that peacetime nuclear exercises have involved actual nuclear weapons rather than practice bombs.

As a party to the NPT, the Federal Republic of Germany as a non-nuclear weapons state is obliged under Art. 2 NPT not to "accept nuclear weapons or other nuclear explosive devices or the power of disposal thereof from anyone, directly or indirectly". Accordingly, the USA is obliged under Art. 1 NPT to "not transfer nuclear weapons or other nuclear explosive devices or the power of disposal thereof to any person, directly or indirectly". The Federal Government claims that these obligations do not apply without restriction because nuclear sharing already existed before the NPT was signed on 1 July 1968 (by the Federal Republic only in November 1969). In fact, the Federal Republic already had its own delivery systems ready in the 1950s for the nuclear weapons deployed in Germany by the USA and the United Kingdom. It is important to note that nuclear sharing has no basis in international treaties. Nuclear sharing is not regulated by the NATO Treaty. It is only a part of the NATO strategy. The Federal Constitutional Court has ruled that no treaty is required for to amend the NATO strategy .[1] It could be abandoned by a declaration of the Federal Government.

The wording of the NPT is clear. There is no exception for nuclear weapons deployed in the context of nuclear sharing. This raises the question of whether the Federal Republic, when signing and ratifying the NPT, made a formal reservation, by which it reserved the right to dispose of nuclear weapons in the event of war.

On 28 November 1969, on the occasion of the signing of the NPT, the Federal Government declared inter alia

> "The Government of the Federal Republic of Germany
>
> (4) assumes that the security of the Federal Republic of Germany will remain guaranteed by NATO; for its part, it remains fully committed to NATO's collective security rules;"

On the same occasion, the Federal Government declared in a note sent to the then NPT contracting parties, inter alia

> "The Federal Government assumes
>
> that the security of the Federal Republic of Germany and its allies continues to be guaranteed by NATO or an equivalent security system,"

A declaration by the Federal Government on 2 May 1975, on the occasion of the deposit of the instruments of ratification of the NPT, states inter alia

> "The Government of the Federal Republic of Germany

[1] BVerfGE 104, 151-214.

2. assumes that the security of the Federal Republic of Germany remains guaranteed by NATO; the Federal Republic of Germany, for its part, remains bound by the collective security rules of NATO."

None of the declarations designate the weapons with which the protection of the Federal Republic was to be guaranteed under NATO's collective security rules. Although the Federal Republic was particularly interested in the continued existence of nuclear sharing and in securing the European option,[2] nuclear weapons are not explicitly mentioned in the declarations. According to the wording of the declarations, it is not excluded that NATO should defend the Federal Republic exclusively with conventional weapons systems. Nor does it follow from the declarations that the nuclear sharing already practiced at the time necessarily should be continued after the entry into force of the NPT.

Nevertheless, the Federal Government claims that the NPT does not prohibit nuclear sharing. In doing so, it also refers to the declarations made at the time of signature and ratification.

Whether these declarations are reservations that are effective under international law is regulated in a binding manner under international law by the Vienna Convention on the Law of Treaties (VCLT - Federal Law Gazette 1985 II p. 927). If the interpretation shows that the declarations of the Federal Republic of Germany were intended to change (e.g. to restrict) the content of the NPT, a reservation exists under Article 2 (1) (d) of the Vienna Convention on the Law of Treaties. In this context, the determination whether a reservation is involved does not depend on the designation of the declaration, but exclusively on its content.[3]

According to Art. 31 VCLT, the wording is decisive for interpretation, contrary to what the parties subjectively meant by the wording used when they concluded the agreement.[4] The key provision, Art. 31 (1) VCLT, which is also considered to be common law, states: „A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Only reservations which are not incompatible with the object and purpose of the treaty are admissible under Art. 19 lit. c VCLT. The NATO security system referred to by the Federal Government provides for the transfer of nuclear weapons to Bundeswehr soldiers who are acting under the authority of the German government in the event of war within the framework of nuclear sharing. The handing over of nuclear weapons would in practice undermine the NPT, because its intent, expressed in Articles I and II, is to assure that nuclear weapon states may not transfer nuclear weapons to non-nuclear weapon states and the latter may not exercise control over nuclear weapons. Further provisions with possible relevance as to nuclear sharing are not contained in NPT Art 1 and 2. The continued validity of nuclear sharing (i.e. the transfer of power to dispose of nuclear weapons in the event of war) even after the NPT has entered into force would change the wording and purpose of the NPT to its opposite. According to Art. 19 lit. c VCLT, it cannot be the subject of a reservation under international law and is invalid as a reservation.

The declarations of the Federal Government can only be regarded as statements of interpretation. These differ from a reservation in that they do not aim to exclude or amend a provision of the treaty, but only to clarify it.[5] More than a reservation, an interpretation must not contradict the unambiguous wording or the aim and purpose of the entire treaty. This would, however, be the case with the interpretation of the Federal Government, which in the event of war means a transfer of the power to

[2] Matthias Küntzel, Bonn und die Bombe, Deutsche Atomwaffenpolitik von Adenauer bis Brandt, Frankfurt/M. 1992, S. 143
[3] Heintschel von Heinegg in Ipsen, Völkerrecht 6. Auflage, § 15 RdNr. 2
[4] Wolfgang Graf Vitzthum in Wolfgang Graf Vietzthum, Völkerrecht 4. Auflage, 1.Abschnitt RdNr. 123; von Heinegg aaO § 12 RdNr. 12
[5] von Heinegg aaO §15 RdNr. 4

dispose of nuclear weapons. This interpretation is unreasonable under Art. 31 para. 1 WKV and according to Art. 19 lit. c VCLT and thus should be without legal effect. Possibly identical bilateral interpretations of the Federal Government and the USA (Rusk Letter[6]), which would render the core provisions of the NPT meaningless in the event of war, are contrary to the clear language of Articles I and II of the NPT, and hence cannot entitle the two states to violate the Treaty.

Even a longstanding history of nuclear weapons exercises throughout the existence of nuclear sharing does not require a different assessment. It is true that Art. 31 para. 3 lit. b VCLT requires “any subsequent practice in the application of the Treaty" to be taken into account. But this provision applies where such subsequent practice "establishes the agreement of the Parties regarding its interpretation.” The protests of numerous non-nuclear weapon states parties to the NPT against nuclear sharing speak against this.

It should be reiterated that the Federal Republic of Germany did not express a reservation, effective under international law, regarding the continued validity of nuclear sharing either at the time of signature or when depositing the instruments of ratification. Nor can nuclear sharing be justified under international law by an interpretation of the Treaty.

It is true that all NATO states still use the so-called "war reservation". According to it, the NPT is to cease to apply if "a decision to wage war is taken" ("at which point the treaty would no longer be authoritative").[7] If this publicly concealed war reservation were to be effective under international law, it would render the NPT and the prohibition of the proliferation of nuclear weapons to non-nuclear weapon states contained therein practically meaningless in the event of tension and war.

Evidence for the establishment of a formal reservation under international law to Art. II of the NPT has not yet been presented to the public. There are serious objections under international law to the effectiveness of any such reservation, both with regard to procedure (lack of proven information provided to the NPT contracting parties pursuant to Art. 23 VCLT) and in material terms (compatibility within the meaning of Art. 19 VCLT with the objective and purpose of the NPT).

The transfer of unlocked nuclear weapons to soldiers of the Bundeswehr in the event of war violates the NPT. The delivery of operational nuclear weapons by Bundeswehr soldiers violates other provisions of international law as well.

In this context it is important to note that, according to the advisory opinion of the International Court of Justice (ICJ)[8], any use and threat of nuclear weapons is contrary to international law. Admittedly, the ICJ also stated in the tenor of its expert opinion that, in view of the current state of international law and in view of the factual material available to it, it cannot definitively decide the question of whether the threat or use of nuclear weapons in an extreme self-defense situation in which the existence of a state would be at stake is lawful or unlawful. This statement is due to the fact that, according to the ICJ's findings, none of the states advocating the legality of the use of nuclear weapons has elaborated on the exact conditions that would justify such limited use.[9] The ICJ could not rule out with absolute certainty that there could be nuclear weapons in the future that would meet the conditions of international humanitarian law.

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[6] US interpretation of the NPT provided to the German Bundestag prior to Germany’s entering of the NPT. This interpretation considers the Non-Proliferation Treaty as applicable “unless or until a decision were made to go to war, at which time the treaty would no longer be controlling”. See: An end to the atomic age, Annex 1 and page 19, IALANA Germany, 2019: https://www.ialana.info/2020/09/ialana-germany-an-end-to-the-atomic-age-2/

[7] See the Letter reproduced in the annex and the German Parliament memorandum submitted to the Foreign Office: Bundestag/ Drucksache 7/994: http://www.ialana.de/images/pdf/arbeitsfelder/atomwaffen/atomsperrvertrag/Seite_16-20_aus_0700994.pdf.

[8] Advisory Opinion of the International Court of Justice of 8. July 1996 – printed in: IALANA, Atomwaffen vor dem Internationalen Gerichtshof, Münster 1997

[9] IGH aaO subparagraph 94.

Crucially, the ICJ has repeatedly emphasized in the grounds of its expert opinion that self-defense is only allowed with weapons whose use does not contradict the principles and rules of international humanitarian law; the ICJ has stated that the right of self-defense is limited under Article 51 of the UN Charter by international humanitarian law, "whatever means of force are used".[10] This means that self-defense with nuclear weapons is fundamentally prohibited under international law, because according to the current state of weapons technology they do not distinguish between civilians and combatants, cause unnecessary suffering, especially through their radioactive radiation, and affect neutral states across borders.

A deviating self-defense rule for extreme self-defense situations in which the survival of a state is at stake cannot be derived from international law. The conditions of international humanitarian law cannot be met by nuclear weapons stationed in Germany within the framework of nuclear sharing. Accordingly, in the 2006 edition of the pocket card, the Federal Ministry of Defense expressly prohibited the soldiers of the Bundeswehr from using nuclear weapons.[11]

According to the ICJ, the principles and rules of international humanitarian law are part of customary international law.[12] They are international law in force according to Article 38 of the ICJ Statute and, in Germany, as general rules of international law according to Article 25 of the Basic Law, are a primary component of federal law. The NPT itself since ratification has been regarded in the Federal Republic under Article 59 (2) of the Basic Law as international treaty law applicable within the country.

According to Article 20.3 of the Basic Law, the Federal Government and all soldiers of the Bundeswehr are bound by this law without exception. They could not justify their participation in nuclear weapons use. In this case, all those responsible for the use of nuclear weapons would have to be held criminally responsible for crimes under international law.

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English translation with the help of Pressenza Translation Team and Andrew Lichterman (Western States Legal Foundation)

[10] See subparagraphs 40, 41, 42, 78 of the Advisory Opinion, subparagraph 42 states: “The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.”

[11] Druckschrift Einsatz Nr. 03 – Humanitäres Völkerrecht in bewaffneten Konflikten – Grundsätze – August 2006 DSK SF009320187.

[12] Advisory Opinion of the International Court of Justice of 8. July 1996, subparagraph 79.