

Nuclear sharing

By Bernd Hahnfeld, Board member IALANA Germany
December 2021



Contents

1.What does nuclear sharing mean?	1
2.History of Germany's nuclear sharing	2
3.How is nuclear sharing currently practiced in Germany?	3
4.What is the legal basis for German nuclear sharing?	4
5.Illegality of nuclear sharing	6
6.Criticism and ways out of nuclear sharing.....	10
Summary:.....	13

1. What does nuclear sharing mean?

Nuclear sharing was agreed upon by the participating countries within the framework of the NATO Strategic Concept. In this context, U.S. nuclear weapons are stored, guarded, maintained and released in the event of deployment in the countries concerned. The currently participating countries Belgium, Germany, Italy, the Netherlands and Turkey¹ provide the delivery systems and conduct the deployment. The Bundeswehr has committed to NATO the provision of 46 nuclear-capable carrier aircrafts. It has stationed 44 Tornados from Jagdfliegergeschwader 33 in Büchel (Eifel). There German soldiers are trained in the use of nuclear weapons.²

The nuclear weapons in Europe are primarily intended for NATO tasks, which also issues the order of use. They may and can only be used if the U.S. president has cleared them and the clearance code has been received through a special channel of the U.S. command. The U.S. also reserves the right to deploy nuclear weapons stored in Europe in support of CENTCOM, the regional high command responsible for the Middle East.³

If the US bombs stored in Germany and other NATO countries are to be used, the respective stationing country would have to agree to their use by its own aircraft. The general expectation seems to be that such a decision of deployment would be made after consultation with all NATO members, with the North Atlantic Council having a central role. However, consultation with all allies is not a necessary precondition.⁴

In the event of a NATO use, Bundeswehr soldiers in Büchel⁵ take over the deployed B16 nuclear bombs from the U.S. Army after clearance by the U.S. President, fly them to the target sites, and drop them there.

¹ In the case of Turkey, it is unclear whether the U.S. has since removed for security reasons the nuclear weapons previously stationed at Incirlik from the country. Turkish aircrafts have reportedly not been certified for the use of nuclear weapons since the mid-1990s.

² BVerfG, Order of the Federal Constitutional Court of 15 March 2018 (2BvR 1371/13)

³ Federal Agency for Civic Education, BICC 01/2013

⁴ Peter Rudolf, Deutschland, die Nato und die nukleare Abschreckung, Stiftung Wissenschaft und Politik, Studie 11, May 2020

⁵ In response to a question, the parliamentary group DIE LINKE in the Bundestag has received confirmation from the German government that flight operations at Büchel Air Base will be largely suspended from June 2022 to February 2026

2. History of Germany's nuclear sharing

The U.S. placed tactical nuclear weapons under NATO's control beginning in July 1953 as a key element of Forward Strategy. The first nuclear weapons arrived in Europe (Great Britain) in September 1954. Transfers followed to Germany between March and May 1955, Italy (1957), Turkey (1959), the Netherlands (1960), Greece (1960), and finally Belgium (1963).⁶ By 1971, NATO had 7,300 nuclear weapons in Europe, about half of which were stationed in West Germany.

German Chancellor Konrad Adenauer explicitly approved the stationing of U.S. nuclear weapons in the FRG.⁷ The German public did not learn of the existence of nuclear weapons on German state territory until two years later on March 15, 1957, by U.S. forces. Just five days later, NATO Supreme Allied Commander General Norstadt made the surprising announcement that in the event of war U.S. nuclear weapons would also be handed over to allies, such as the Bundeswehr. Shortly thereafter, Chancellor Adenauer expressed his interest in providing the Bundeswehr with nuclear delivery systems.⁸ Within ten years, Bundeswehr already had a large number of such systems. Nuclear weapons dominated military thinking. When purchasing the Starfighter fighter-bomber, the German government even refrained from providing for conventional armament.⁹

NATO's initial strategy of "massive retaliation" was replaced in 1968 by the strategy of "flexible response." However, NATO explicitly kept open the option of being the first to use nuclear weapons.¹⁰

The end of the East-West confrontation with the fall of the Berlin Wall and the disintegration of the Warsaw Treaty Organization dramatically changed the security environment in Europe. Thousands of tactical nuclear weapons were withdrawn under the mutually unilateral disarmament commitments of Presidents Bush, Gorbachev, and Yeltsin in 1991-92. The number of U.S. nuclear weapons stockpiled in Europe dropped to about 700 by July 1992 and to about 480 by the mid-1990s, and planned modernization projects for tactical nuclear weapon types in Europe were gradually halted.¹¹

NATO's new strategic concept, adopted in 1991/92, continued to consider as the "supreme guarantee of the Alliance's security" the strategic nuclear weapons on submarines that the United States and Great Britain would assign to NATO in the event of conflict. The sub-strategic nuclear weapons stationed in Europe are intended as a link to ensure that Europeans participate broadly in the risks, roles, missions and responsibilities of NATO's nuclear strategy. "Adequate forces" are to remain in Europe.¹²

The new Strategic Concept, adopted by NATO Allies on 19/20 November 2010, commits for the first time to the goal of a nuclear-weapon-free world, while reaffirming the principle of nuclear deterrence until the complete destruction of all nuclear weapons in the world.¹³

due to extensive construction work and will be relocated to Nörvenich Air Base in North Rhine-Westphalia. BT-Drucksache 19/12524.

⁶ Wissenschaftlicher Dienst des Bundestages - WD 2 - 3000 - 102/20

⁷ Karl Brandstetter, *Allianz des Mißtrauens*, Köln 1989, S. 129

⁸ Ottfried Nassauer „50 Jahre Nuklearwaffen in Deutschland“ – AUS POLITIK UND ZEITGESCHICHTE (APUZ 21/2005)

⁹ Nassauer *ibid.*

¹⁰ Nassauer *ibid.*

¹¹ Nassauer *ibid.*

¹² Nassauer *ibid.*

¹³ Strategic Concept for the Defense and Security of North Atlantic Treaty Organization Members, 2010. This strategic concept has been reaffirmed in 2020: "As long as nuclear weapons exist, NATO should maintain safe and reliable nuclear forces ...".

In 2018, NATO justified the concept of nuclear sharing as follows: "NATO's nuclear deterrence posture also relies on United States' nuclear weapons forward-deployed in Europe and the capabilities and infrastructure provided by Allies concerned. National contributions of dual-capable aircraft to NATO's nuclear deterrence mission remain central to this effort."¹⁴

In July 2007, Der Spiegel reported that the U.S. Army had withdrawn the 130 nuclear weapons stationed at Ramstein Airbase and that Ramstein had been removed from the list of stationing sites.¹⁵ Since then, Germany has contributed to nuclear sharing only through the Bundeswehr's Jagdgeschwader 33 stationed in Büchel. There, 10 to 20 B61 nuclear bombs are to be stationed under U.S. Army guard. The plan is to temporarily relocate the nuclear weapons and the aircraft to Nörvenich (NRW) from June 2022 to February 2026 due to extensive construction work in Büchel.¹⁶

The U.S. armed forces want to keep the B61 bombs operational until 2025 at the latest. To this end, \$10 billion are being allocated in the U.S. government budget to modernize the B61 bombs. These will receive variable warheads (0.3/ 1.5/ 10/ 50 kilotons) and guidance systems with satellite navigation that will make them much more accurate.¹⁷

3. How is nuclear sharing currently practiced in Germany?

Although, according to a representative Forsa poll conducted in 2021, 62% of German citizens would like to see closer cooperation between the European Union (EU) and Russia and are in favor of more intensive EU-Russia relations,¹⁸ international relations between NATO member states and Russia are increasingly deteriorating. Public statements by German politicians and reporting by Germany's leading media make a decisive contribution to this. Due to Russia's war of aggression against Ukraine and the reactions of Western states, relations have been frozen since February 2022.

During NATO's annual "Steadfast Noon" fall maneuvers, Bundeswehr pilots practice dropping nuclear bombs over Russian targets with Bundeswehr Tornados stationed in Büchel. Bundeswehr is also practicing how to defend Büchel Air Base against attacks. The Patriot defensive missiles of the Bundeswehr's Air Defense Missile Squadron 1 are intended for this purpose.¹⁹ German Defense Minister Annegret Kamp-Karrenbauer publicly declared in October 2021 that Germany must be prepared to use nuclear weapons against Russia.²⁰ NATO plans to deploy Bundeswehr Tornados armed with nuclear bombs to the Eastern flank (of NATO) at a certain conflict threshold.²¹

At present, there is every indication that the German government assumes the long-term use of the nuclear weapons site: the German government plans to acquire new aircraft carriers to replace the 30 to 40-year-old Tornados.²² The B61 nuclear bombs stationed in Germany and the Büchel nuclear weapons

¹⁴ Meeting of the North Atlantic Council at the level of Heads of State and Government in Brussels, July 11-12, 2018, Summit Declaration, para. 35, accessed April 28, 2020, at https://www.nato.int/cps/en/natohq/official_texts_156624.htm.

¹⁵ Spiegel.de accessed on 9.7.2007.

¹⁶ See footnote 3.

¹⁷ Nassauer ibid.

¹⁸ Ostausschuss der deutschen Wirtschaft, www.ost-ausschuss.de accessed on 2.6.2021.

¹⁹ FAZ.net accessed on 17.10.2020.

²⁰ Deutschlandfunk.de accessed on 21.10.2021, World Socialist Website accessed on 28.10.2021, ntv on 24.10.2021.

²¹ FAZ.net accessed on 18.10.2021.

²² BT-Drucksache 19/19884, Handelsblatt.de accessed on 4.11.2020, DGAP.org accessed on 3.2.2020.

site are being modernized, the latter among other things by refurbishing the flight operation areas and flight operation facilities.²³

4. What is the legal basis for German nuclear sharing?

The German government has expressly consented to nuclear sharing and the stationing of nuclear weapons at Büchel and maintains this consent. There is no legal basis for this.

The Federal Government has never introduced a bill in Bundestag to legally justify nuclear sharing. This was not done, in particular, by the motion of the then governing parties CDU/CSU and DP in the Bundestag. This motion, adopted by the Bundestag with the government majority on March 25, 1958, reads as follows:

"1. the Bundestag requests the Federal Government to continue to advocate, true to its fundamental view, at all international negotiations and conferences in which it participates or over which it has influence,

a) to advocate general controlled disarmament of both nuclear and conventional weapons,
(b) to reaffirm its readiness that the Federal Republic will accept any such disarmament agreement, thereby contributing to détente and to the solution of international problems, including the German question.

2. as long as Communism continues to pursue its world-revolutionary aims, which it reaffirmed as late as November 1957 at the meeting of the Communist and Workers' Parties of the socialist countries in Moscow, peace and freedom can be secured only by a joint defense effort of the free world. The Bundestag notes that the Bundeswehr serves only to maintain peace and defense. Therefore, it calls upon the Federal Government to continue the buildup of German national defense within the framework of the North Atlantic defense community until a general disarmament agreement is reached. In accordance with the requirements of this defense system and in view of the armament of the potential adversary, the armed forces of the Federal Republic must be equipped with the most modern weapons in such a way that they are able to meet the obligations assumed by the Federal Republic within the framework of NATO and can effectively make the necessary contribution to the safeguarding of peace.

The entire German people on both sides of the zonal border expect that the German question will be discussed and brought closer to a solution at the coming summit conference. The Bundestag requests the Federal Government to do its utmost to bring this about.

The Bundestag reiterates its conviction that free elections must form the basis of German reunification. It resolutely rejects

a) the conclusion of a peace treaty for two German states,
b) negotiations with the representatives of the present zonal regime,
c) the conclusion of a confederation with this regime.

5 The Bundestag reaffirms its conviction that the reunification of Germany in conjunction with a European security order is the most urgent task of German politics."²⁴

Numerous other motions by the parliamentary groups on renouncing the nuclear armament of Bundeswehr, on the general outlawing of nuclear weapons, and on the establishment of nuclear-weapon-free zones were either rejected or referred to Bundestag committees, except for one insignificant point. The wording of the resolution is open to interpretation. The decisive passage speaks of "equipping the Bundeswehr with most modern weapons." Nuclear weapons are not mentioned, nor are nuclear delivery

²³ BT-Drucksache 19/27108, BT-Drucksache 19/26133

²⁴ Anlage 10, Umdruck 41 zum Bundestagsprotokoll 25. März 1958.

systems. The term "nuclear weapons" appears only once and in connection with disarmament efforts. The fact that nuclear weapons are not named in the intended equipment of the Bundeswehr leads to the conclusion that they were not meant by "most modern weapons". The minutes of the Bundestag debate do not provide any clarification, although own nuclear weapons for Bundeswehr were recognizably desired by Chancellor Adenauer and by the governing parties. In the Bundestag debate, Kiesinger (CDU/CSU) clarified on behalf of the government: "Mr. President, ladies and gentlemen! Mr. Bucher's statement compels us to declare that state-of-the-art weapons do not mean hydrogen bombs."²⁵ However, this does not yet indicate that the resolution meant tactical nuclear weapons.²⁶ The acquisition of only nuclear weapon carriers cannot be inferred from the wording of the resolution. None of the motions debated in Bundestag on March 25, 1958, dealt with the acquisition of nuclear weapon carriers for the Bundeswehr. The heated four-day debate in Bundestag was primarily about equipping Bundeswehr with its own nuclear weapons.

For the question of the legal basis of nuclear sharing, the interpretation of the Bundestag resolution of March 25, 1958, is ultimately irrelevant because it never became binding formal law. Because in the resolution of March 25, 1958, Bundestag only calls for specific government action. Bundestag does not oblige the Federal Government to act in a certain way. So, the resolution of March 25, 1958 is comparable to the resolution of Bundestag of March 26, 2010, in which Bundestag adopted the motion of the CDU/CSU, SPD, FDP and Bündnis90/Die Grünen parliamentary groups on the resolution entitled "Germany must send clear signals for a world free of nuclear weapons" with a broad majority against the votes of the Die Linke parliamentary group. With this resolution, Bundestag called on the German government, among other things, to "also strongly advocate the withdrawal of U.S. nuclear weapons from Germany in the development of a new NATO strategic concept within the alliance as well as vis-à-vis U.S. allies."²⁷

The German government has consented to nuclear sharing in the exercise of its discretionary powers in defense policy and has maintained this consent without giving it a legal basis. However, the doctrine of materiality of the Federal Constitutional Court²⁸ has made a formal legislative procedure mandatory. This doctrine was developed by the Federal Constitutional Court and states that the legislature must legitimize state action in fundamental areas through a formal law. Basis of this theory is the doctrine of the reservation of the law, rooted in the principle of the rule of law, and the parliamentary reservation, rooted in the principle of democracy, according to which the administration may only act if it has been authorized to do so by a formal law. Everything essential for the exercise of fundamental rights is subject to the reservation of the law.²⁹

These legal and factual requirements for the necessary legislative process should have been met when the Federal Government approved nuclear sharing because the stationing and possible Bundeswehr deployment of nuclear weapons in Büchel were and are of existential importance for the entire region and the fundamental right to life and health of the population living there.³⁰

²⁵ Bundestagsprotokoll *ibid.* p. 1160.

²⁶ The B61 aerial bomb stationed in Büchel is a hydrogen bomb!

²⁷ Deutscher Bundestag – Plenarprotokoll 17/35, Drucksache 17/1159.

²⁸ BVerfGE 40, 237 (249); 49, 89 (126); 83, 130 (142, 151 f.); 95, 267 (307).

²⁹ BVerfGE 47,46 ff Ziffern III, 3,5

³⁰ Due to the operational deployment of nuclear weapons, the remaining deployment site at Büchel is a target for enemy nuclear first strikes or nuclear counterattacks. During the annual NATO maneuvers "Steadfast Noon", the Bundeswehr exercises the defense against expected nuclear attacks with Patriot anti-aircraft missiles.

The German government has also not concluded a treaty under international law on participation in NATO's nuclear defense.³¹ The nuclear strategy does not necessarily result from accession to the North Atlantic Treaty. This is because the latter does not provide for specific defense weapons or strategies. It does not use the terms "nuclear weapons" or "nuclear arms."

Nuclear sharing is merely part of NATO's Strategic Concept, which has been agreed among the alliance states. According to the Federal Constitutional Court ruling of 22.11.2001, it is neither a formal nor an implied treaty.³²

5. Illegality of nuclear sharing

5.1. In Büchel (Eifel), nuclear bombs are stationed ready for use, the use of which is prohibited under international humanitarian law.

The Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977³³ states unequivocally in Article 35: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited." They may defend themselves only with weapons not prohibited by international humanitarian law. The use of nuclear weapons and the threat thereof are prohibited by the Geneva Conventions, according to the opinion of the International Court of Justice (ICJ)³⁴ because

- their effects do not distinguish between combatants and civilians,
- their radioactive radiation causes unnecessary agony,
- they cause damage to the environment and people's livelihoods for future generations, and
- they affect neutral states through cross-border fall-out.

Once nuclear weapons stationed in Büchel are used, these effects cannot be avoided. These weapons indiscriminately affect all living beings in the target area, radiate survivors and the environment radioactively, and send fall-out to neighboring countries through winds.

The prohibition of use under international law binds not only the state parties to the treaty, but all states of the world under customary law.³⁵ It applies to all cases of self-defense invoked by the nuclear weapon states and their allies, i.e., also in the case claimed by them of "an extreme self-defense situation in which the very survival of a state would be at stake," which the ICJ could not decide. In the advisory opinion proceeding, the nuclear-weapon states had claimed that they were developing new, small, supposedly clean nuclear weapons. However, this did not happen, nor is it conceivable, because if such weapons do not release radioactive radiation, they are not nuclear weapons.

The ICJ judges stated only with regard to the allegedly "clean" small tactical nuclear weapons, which could not be technically ruled out at the time, "not having sufficient elements to enable it [the court] to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance."³⁶

³¹ BVerfG Urteil vom 22.11.2001 – 2 BvE 6/99.

³² BVerfG Urteil vom 22.11.2001 - 2 BvE 6/99 -RdNR 131.

³³ BGBl. 1990 II S. 1551.

³⁴ ICJ Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons (8 July 1996). In German and English in IALANA „Atomwaffen vor dem Internationalen Gerichtshof“, Münster 1997. The ICJ Advisory Opinion may be downloaded here: <https://www.icj-cij.org/en/case/95>.

³⁵ ICJ *ibid.* No 78.

³⁶ ICJ *ibid.* No 95.

In its Advisory Opinion, however, the ICJ clarifies that even in the case of an extreme self-defense situation in which the survival of a state is at stake, any use of nuclear weapons could at most be in accordance with international law if it complies with the stated principles and rules of international humanitarian law. The ICJ has stated that the right of self-defense under Article 51 of the UN Charter is limited by international humanitarian law, "whatever means of force are employed."³⁷ A different rule for situations of extreme self-defense in which the survival of a state is at stake cannot be inferred from international law and has not been set forth by the ICJ.

ICJ President M. Bedjaoui, in his statement appended to the opinion, stated: "I cannot sufficiently emphasize that the Court's inability to go beyond this statement of the situation can in no way be interpreted to mean that it is leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons."³⁸

This legal opinion from the ICJ had been requested by the UN General Assembly on the basis of Article 96 of the UN Charter. In doing so, the UN General Assembly had adopted - against the bitter resistance of the nuclear weapon states and their allies - the arguments of the worldwide initiatives of civil movements and non-governmental organizations, including IPPNW, IALANA and the International Peace Bureau (IPB), which had initiated the "World Court Project".

Following the ICJ's lead, the German Federal Ministry of Defense explicitly prohibited servicemen and servicewomen from using nuclear weapons in armed conflicts in its pamphlet "International Humanitarian Law in Armed Conflicts," 2006 and 2008 editions.³⁹

According to the ICJ, the principles and rules of international humanitarian law are part of customary international law.⁴⁰ Under Article 38 of the ICJ Statute, they are applicable international law and, in Germany, as general rules of international law under Article 25 of the Constitution, they are a primary component of federal law.

5.2. The use of nuclear weapons and the threat thereof violate the human right to life under Article 6 of the International Covenant on Civil and Political Rights.⁴¹ This came into force in 1976 and is also applicable in armed conflicts. Art. 6 literally states, "Everyone has an inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Germany has acceded to this pact. The unjustifiable killing with weapons of war prohibited under international law would disregard this human right.

In October 2018, the UN Human Rights Committee stated in its Commentary 65 on Article 6 of the UN Covenant on Civil and Political Rights that States Parties involved in the deployment, use, sale or purchase of existing weapons and in the research, development, acquisition or introduction of weapons and means or methods of warfare must always take into account their impact on the right to life. It specifically states in Commentary 66: "The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human

³⁷ No 40, 41, 42, 78 of ICJ Advisory Opinion. No 42: "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."

³⁸ IALANA „Atomwaffen vor dem Internationalen Gerichtshof“, Münster 1997 p. 115. The declarations of the ICJ Judges may be downloaded here: <https://www.icj-cij.org/en/case/95/advisory-opinions>.

³⁹ Bundesministerium der Verteidigung R II 3 - Druckschrift Einsatz Nr. 03 - DSK SF009320187.

⁴⁰ ICJ *ibid.* No 79.

⁴¹ BGBl. 1973 II S. 1534, UNTS vol. 999, p.171

life on a catastrophic scale is incompatible with respect for the right to life and may amount to a crime under international law."⁴²

5.3 In NATO operations, after clearance by the U.S. President, Bundeswehr soldiers in Büchel receive the B61 nuclear bombs stationed there from U.S. Army soldiers, hang them under the Tornado aircraft of Jagdgeschwader 33, fly them to the deployment sites, and drop the nuclear bombs there. In doing so, both the U.S. and Germany are in violation of the Treaty on the Non-Proliferation of Nuclear Weapons of July 1, 1968 (NPT).⁴³

As a party to the NPT, Germany, a non-nuclear-weapon state, is obligated under Article 2 of the NPT "not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly." Similarly, under Art. 1 NPT, the U.S. is obligated "not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly." The NPT does not provide an exception for nuclear sharing. The German government nevertheless invokes the fact that it declared a formal reservation at the time of signature and at the time of ratification of the NPT, by which it reserved the right to dispose of nuclear weapons in the event of war.

The German government's stated reservations do not confirm this. They merely emphasize that Germany remains committed to NATO's system of collective security. The declarations do not designate the weapons with which, according to NATO's collective security rules, the protection of the Federal Republic of Germany should be ensured. Although the special interest of the Federal Republic of Germany was the continued existence of nuclear sharing and the safeguarding of the European option,⁴⁴ nuclear weapons are not explicitly mentioned in the declarations. The wording of the declarations⁴⁵ does not preclude NATO from defending the Federal Republic of Germany exclusively with conventional weapons systems. Nor does it follow from the declarations that the nuclear sharing already practiced at that time was to be continued after the entry into force of the NPT.

In interpreting reservations under Article 31 of the Vienna Convention on the Law of Treaties (VCLT)⁴⁶, the wording is decisive, irrespective of what the parties subjectively meant by the formulations used when they concluded the treaty.⁴⁷ Moreover, under Article 19 lit c of the VCLT, only reservations that are not incompatible with the object and purpose of the treaty are permissible. With the transfer of nuclear weapons, the NPT would be practically undermined, because its purpose is that nuclear weapon states may not transfer nuclear weapons to non-nuclear weapon states and that the latter may not exercise any power of disposal over nuclear weapons. Further provisions are not contained in Art 1 and 2 NPT. The continued application of nuclear sharing (i.e. the transfer of the power to dispose of nuclear weapons in the event of war) even after the entry into force of the NPT would reverse the wording and the purpose of the NPT. Pursuant to Article 19 lit c of the VCLT, it cannot be the content of a reservation under international law and is ineffective as a reservation.⁴⁸

⁴² Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life - 30 October 2018 - CCPR/C/GC/36. It may be downloaded here: <https://digitallibrary.un.org/record/3884724>.

⁴³ BGBl. 1974 II S. 786.

⁴⁴ Matthias Küntzel, Bonn und die Bombe, Deutsche Atomwaffenpolitik von Adenauer bis Brandt, Frankfurt/M. 1992, p. 143.

⁴⁵ Bernd Hahnfeld, Nukleare Teilhabe ist völkerrechtswidrig, W&F 2/2020 p. 46 ff.

⁴⁶ BGBl 1985 II p. 927.

⁴⁷ Wolfgang Graf Vitzthum in Wolfgang Graf Vitzthum, Völkerrecht 4. Auflage, 1.Abschnitt RdNr. 123; von Heinegg *ibid.* § 12 RdNr. 12.

⁴⁸ Bernd Hahnfeld *ibid.*

The declarations of the German government can only be regarded as interpretative declarations. These differ from a reservation in that they are not intended to exclude or amend a treaty provision, but merely to clarify it.⁴⁹ Even more than a reservation, an interpretation must not contradict the unambiguous wording or the object and purpose of the treaty as a whole. This would be the case, however, with the "clarification" of the Federal Government, which means a transfer of the power to dispose of nuclear weapons in the event of war. It is inadmissible under Article 31(1) of the VCLT and, correspondingly, Article 19(c) of the VCLT and thus has no legal effect. Possible concurring bilateral interpretations by the German and U.S. government (Rusk letter), which would render the core provisions of the NPT invalid in the event of war, do not call into question the effectiveness of the NPT and do not entitle the two states to breach the treaty.⁵⁰

Nor does the practice of dropping nuclear bombs, which has been practiced since the existence of nuclear sharing, require a different assessment. It is true that according to Article 31 (3) (b) of VCLT "any subsequent practice [shall be taken into account] in the application of the Treaty". However, only if it "establishes the agreement of the parties regarding its interpretation." The protests of numerous non-nuclear-weapon states against nuclear sharing argue against this.

NATO states continue to invoke the so-called "reservation of war." According to this, the NPT is supposed to cease to apply when "a decision to go to war is made" ("at which point the treaty would no longer be authoritative").⁵¹ If this publicly concealed reservation of war were effective under international law, it would render the NPT and its prohibition on the transfer of nuclear weapons to non-nuclear-weapon states in the event of tension and war practically invalid.

Evidence that a formal reservation to Article 2 of the NPT would be effective under international law has not yet been presented to the public. There are weighty objections under international law to its effectiveness, both in terms of procedure (lack of proven notification to the NPT parties in accordance with Art. 23 of the VCLT) and in terms of substance (compatibility within the meaning of Art. 19 of the VCLT with the object and purpose of the NPT).

The transfer of nuclear weapons to soldiers of the Bundeswehr violates the NPT. If the transport to the targets and the dropping of the nuclear weapons are illegal under international law, the deployment of the weapons and the operational exercises with nuclear weapons by the Bundeswehr cannot be justified under international law.

In its report of May 23, 2017⁵², the Bundestag's Scientific Service claimed that the NPT does not stand in the way of nuclear sharing because, under the "two-key" agreement between Germany and the United States, both states would decide jointly on use.⁵³

⁴⁹ von Heinegg *ibid.* §15 RdNr. 4

⁵⁰ Bernd Hahnfeld *ibid.*

⁵¹ Cf. the memorandum of the Federal Foreign Office submitted to the German Bundestag by the Federal Government for the deliberation of the Consent Act prior to ratification of the NPT. In this memorandum, the corresponding U.S. "interpretative statement" ("Rusk letter") is reproduced and also published in Bundestagsdrucksache 7/994, p. 17. However, it was and is hardly taken note of publicly. Bundestagsdrucksache 7/994 can be viewed here: http://www.ialana.de/images/pdf/arbeitsfelder/atomwaffen/atomsperrvertrag/Seite_16-20_aus_0700994.pdf.

⁵² Document Number WD2-3000-013/17.

⁵³ In the expert opinion of the Scientific Service of German Bundestag the year 2008 - WD 2 - 3000 - 089/08 - the compliance of nuclear sharing with the NPT was justified in a different way.

This line of argument is incorrect. Only the U.S. president decides on the use of U.S. nuclear weapons.⁵⁴ The German government does not have the right to order their use. Like the other NATO allies, it is merely being consulted by the U.S. - if there is still time to do so in the event of war. At most, the German government could prohibit the Bundeswehr soldiers, who remain German sovereigns even in NATO missions, from using, withdraw the carrier aircraft from NATO air readiness and prohibit landing and takeoff for the landing location and issue prohibitions for overflight. Unthinkable between allies. Also not considered is the fact that, beyond nuclear sharing, the U.S. has reserved the use of nuclear weapons for its own warfare without NATO participation.⁵⁵

The decisive factor for Germany is the prohibition under international law of any power to dispose of nuclear weapons. Under Article 2 of the NPT, Germany has made a binding commitment not to accept nuclear weapons directly or indirectly from anyone. Nuclear sharing is inconceivable without the power of disposal of nuclear weapons in the event of war.⁵⁶ At the latest after take-off, Bundeswehr soldiers are given sole power of disposal over the nuclear weapons on board. They can decide where to fly and whether to drop nuclear weapons in accordance with their NATO orders or to use them for other purposes. The programming of the nuclear weapons to specific targets is irrelevant to the question of the actual use of force.

In its 2017 report, the Bundestag's Scientific Service did not sufficiently address the relationship of nuclear sharing to the NPT and did not justify its position in terms of international law. The neologism "two-key" agreement obfuscates but does not explain. What is suppressed is that agreements that violate the clear wording of the NPT are ineffective under international law. Also suppressed is that it does not matter whether Germany gets "sole power of disposal." According to the NPT, co-disposition, which is unavoidable in a mission, is sufficient.

Upon ratification, the NPT became international treaty law to be applied domestically pursuant to Article 59 (2) of the Constitution and, pursuant to Article 20 (3) of the Constitution, also obligates the Federal Government and the soldiers of Bundeswehr.

5.4 Criminal proceedings for crimes under international law must be instituted against all persons participating in the use of nuclear bombs. They must justify themselves, among other things, for crimes against humanity according to § 7 and war crimes according to § 8 of the German Völkerstrafgesetzbuch (VStGB). Under Section 7 of the VStGB, the killing of human beings in the course of an extended or systematic attack against the civilian population is punishable, and under Section 8 of the VStGB, the killing of persons protected by international humanitarian law in an armed conflict is punishable.⁵⁷ "Acting under orders" does not excuse a soldier because the ICJ opinion considers any use of nuclear weapons to be a violation of international humanitarian law. All soldiers have also been prohibited from using nuclear weapons on legal grounds by the Federal Ministry of Defense's "Pocket Card on International Humanitarian Law to be Observed in Armed Conflict" (2006 and 2008 editions).

⁵⁴ About the US President's right to deploy "The Washington Post" of 13.1.21: "... in such an emergency, there is no time for a Cabinet meeting or consultation with Congress. The whole system is designed to be streamlined and the process short." Where does that leave time for consultations with allies?

⁵⁵ See footnote number 3.

⁵⁶ Scientific Service of German Bundestag document WD 2 - 3000 - 111/20 of 19.1.2021: "To accept, directly or indirectly, nuclear weapons or the power to dispose of them." Both commitments describe essential elements of nuclear sharing.

⁵⁷ Bernd Hahnfeld, Die Nuklear-Strategie der NATO - Das Völkerrecht und strafrechtliche Konsequenzen, Wissenschaft und Frieden 2/2005 S. 39 – With the International Criminal Code of June 26, 2002, Germany incorporated the elements of crime regulated in the Rome Statute of the International Criminal Court into German substantive criminal law.

5.5 The fact that the Russian government is threatening to use nuclear weapons as part of its war of aggression against Ukraine, which is illegal under international law, does not entitle NATO countries to threaten to use nuclear weapons as well. Both would be illegal, because one wrong does not justify the commission of another wrong. Defense with nuclear weapons would be illegal under international law (see above).

6. Criticism and ways out of nuclear sharing

After the end of the Cold War, U.S. nuclear weapons in Europe have primarily served a political-psychological function from NATO's perspective. They sent a signal that nuclear deterrence also applied to its new members, that NATO countries could not be divided, and that responsibility for nuclear policy was shared. By contrast, these weapons had largely lost their specific military function.⁵⁸ They have become militarily redundant.

The current development of small, pinpoint warheads for the small-warhead Trident missiles deployed on 14 U.S. Navy Ohio-class nuclear-powered submarines have enabled the U.S. Navy to carry out limited nuclear strikes at any location.⁵⁹ The risky transport of tactical nuclear weapons by means of flights into enemy territory, with the high risk of being shot down⁶⁰, is thus rendered superfluous. In addition, the use of Trident missiles eliminates the need for the U.S. to consult with its allies as provided for in NATO.

In recent years, an increasing deterioration of the political climate between the U.S./NATO/EU and Russia can be observed. NATO and Russia are building a mutual military threat scenario in which nuclear weapons play a crucial role. For example, in July 2021, in view of Russian cyberattacks, U.S. President Biden threatened to defend the United States with nuclear weapons if another major power were to damage U.S. infrastructure through a major cyberattack.⁶¹ On October 21, 2021, German Defense Minister Kamp-Karrenbauer threatened Russia with the use of nuclear weapons as part of NATO's deterrence strategy.⁶² According to a report in the FAZ, German soldiers practiced using nuclear bombs against Russia during NATO's "Steadfast Noon" exercise in Büchel in the fall of 2020.⁶³

Germany's military role in this context is contradictory. On the one hand, nuclear bomb missions with Tornados stationed in Büchel make little military sense. On the other hand, German politicians again feel actively involved in NATO's nuclear deterrence strategy. The maintenance of nuclear sharing can only lead to the conclusion that it serves - without military benefit - to bind the allies more closely to NATO's leading power, the USA, and to involve them in its conflicts. This should give Germany cause to reflect on the meaningfulness of participation in nuclear deterrence.

All concepts and strategies of nuclear deterrence assume that a potential adversary can be effectively deterred from a nuclear attack by threatening it with a military counterattack that will lead to unacceptable consequences and damage, if not to complete annihilation in a nuclear inferno.

A constitutive element for the "functioning" of this strategy of deterrence, however, is always that one has to deal with a rationally calculating opponent who makes exclusively rational decisions on the basis of sufficient and also ad hoc available information. According to its own "logic", the concept of deterrence cannot work if it is about deterring an "irrational" opponent. This can be the case, for example, if the

⁵⁸ Bundeszentrale für politische Bildung, BICC 01/2013.

⁵⁹ Ottfried Nassauer „Nukleare Teilhabe – überholtes Konzept ohne Funktion“, Bits.de accessed on 18.4.2020.

⁶⁰ Wissenschaftlicher Dienst des Bundestages - WD 2 - 3000 - 035/20.

⁶¹ DeutscheWelle on 28.7.2021.

⁶² WSWS.ORG accessed on 28.10.2021, FR-online.de accessed on 24.10.2021, Spiegel.de accessed on 25.10.2021.

⁶³ FAZ.de accessed on 17.10.20.

opponent is not amenable to "rational" arguments, i.e., if he is - for whatever reason - unable or unwilling to use rational reasoning. Historical examples of such "deterrence-resistant" opponents are not exactly rare, at any rate, in the 20th century, the bloody "age of extremes"; imagine if they had had nuclear weapons.⁶⁴ Current world politics shows similar dangers.

But even if one is dealing with a principally "rational adversary," the functionality of nuclear deterrence depends on this adversary having sufficient temporal and informational capacities available according to the concrete circumstances to be able to assess and judge critical decision-making situations to the necessary degree and to draw responsible conclusions from them in the scarce time available. It is highly questionable and uncertain that this is the case - when it matters for the survival of mankind.⁶⁵

"Logic" of deterrence also fails to work and reaches dangerous limits if human errors of judgment or "technical failure" take effect. This is the case, for example, if electronic misinformation creeps into communications systems or other defects take effect that make it very difficult or even impossible for the other side, given very short warning times, to diagnose with certainty whether or not the data available from the computer systems, for example, indicate an enemy attack in the specific decision-making situation.⁶⁶

In the past 70 years, there have been at least twenty extremely critical situations in the SU/Russia and the U.S. in which the world was on the brink of nuclear inferno. In these instances, the world escaped nuclear catastrophe solely due to very fortunate circumstances. In the past decades of the nuclear age, the survival of mankind - as former U.S. Secretary of Defense Robert McNamara aptly put it - was ultimately due to lucky coincidences.⁶⁷

The risk to Germany's participation in NATO's strategy of nuclear deterrence is significantly higher than its benefits. A war waged with nuclear weapons and involving Germany would likely destroy substantial parts of our country, destroy all life in it, and render the target area uninhabitable for a long time. It would be a return to the days of the Cold War, when the FRG was the battleground of a nuclear confrontation in all planning. Responsible politics looks different.

The so-called Palme Commission, in which nineteen important politicians and experts from East and West, North and South, including the former German Federal Minister and disarmament expert Egon Bahr participated, analyzed in detail the life-threatening consequences of the doctrine of deterrence at the height of the Cold War in the early 1980s and drew remarkable conclusions from it, which it summarized in an alternative concept of "common security."

"In today's world, security cannot be achieved unilaterally. We live in a world whose political, economic, cultural and above all military structures are increasingly interdependent. The security of one's own nation cannot be bought at the expense of other nations."⁶⁸ In the nuclear age of mutually assured destruction, security can therefore no longer be achieved *from* the potential adversary, but only *with* him.

Germany should end nuclear sharing not only for reasons of international law, but also for political reasons. The U.S. nuclear-capable aircraft bombs stationed in Germany are ill-suited for the new targets that have been incorporated into NATO's more flexible "adaptive" target planning since the end of the

⁶⁴ IALANA Atomzeitalter beenden, 2019 p. 7.

⁶⁵ IALANA *ibid.*

⁶⁶ IALANA *ibid.*

⁶⁷ Several cases were documented by IALANA in *ibid* p.3 cont.

⁶⁸ Comp. Der Palme Bericht, Hrsg. Olof Palme/H. Rogge, Berlin 1982; IALANA *ibid.* p. 8.

Cold War. In the context of nuclear deterrence, in an emergency, they perform few tasks that could not be performed by the submarine-launched nuclear weapons available to NATO.⁶⁹

The German government will not be able to prevent the relocation of nuclear weapons from Germany to Poland, which is being contemplated by the U.S. government. However, a nuclear-weapon-free Germany would be an encouraging sign to the world and to opponents of nuclear armament. In a nuclear confrontation, Germany would have to be treated and protected like all other non-nuclear weapons states.

In ending nuclear sharing, Germany's membership in the NATO alliance would continue. Germany would have the same treaty rights and obligations as the other non-nuclear-weapon states in the alliance.

The path to German termination of nuclear sharing would be simple: since, according to the Federal Constitutional Court (BVerfG), Germany has not agreed to nuclear sharing by law but only by intergovernmental agreement,⁷⁰ its termination could be achieved by a government declaration and notification to NATO partner states. The German government could achieve the same result by acceding to the Treaty on the Prohibition of Nuclear Weapons (TPNW), which entered into force on January 22, 2021. This reaffirms existing prohibitions under international law and would also oblige Germany to ending nuclear sharing.

Bundestag would also have the opportunity to end nuclear sharing by passing a law. The large majority of Bundestag has already called on the Federal Government, in a resolution passed by the Bundestag on March 26, 2010, to strongly advocate the withdrawal of U.S. nuclear weapons from Germany.⁷¹

Ultimately, a BVerfG ruling on the illegality of nuclear sharing under international law would also have to be heeded and implemented by the Federal Government. Like the judiciary, the Federal Government, as part of the executive power, is bound by law and justice under Article 20(3) of the Constitution.

Summary:

In keeping a decades-old tradition, Germany continues to maintain delivery systems for U.S. nuclear bombs stationed in the country. In case of deployment, the nuclear bombs are transported and dropped by Bundeswehr soldiers using Tornado fighter-bombers. This nuclear sharing is part of NATO's strategic concept, which has been agreed upon by the member countries without a legal basis. The use of nuclear bombs and the threat of the use of nuclear weapons are prohibited by international humanitarian law and the human right to life. In addition, the use violates the Non-Proliferation Treaty (NPT), which prohibits Germany, a non-nuclear-weapon state, from any co-disposal of nuclear weapons. With the development of nuclear Trident missiles with small explosive power for the Ohio-class U.S. nuclear submarines, the tactical nuclear bombs stationed in Germany have lost their military significance anyway.

⁶⁹ See footnote 3, Otfried Nassauer on Bits.de „Aus der Zeit gefallen – Atomwaffen in Deutschland“, Interview 7.7.2020.

⁷⁰ See footnote 32.

⁷¹ Deutscher Bundestag – Plenarprotokoll 17/35.

This article is available in English and German on www.ialana.de and www.ialana.info.

Contact:

IALANA Germany

Marienstr.19/20

10117 Berlin

Email: info@ialana.de