Nuclear War by Mistake – Inevitable or Preventable?

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The time is ripe for restraint – national restraint, leadership restraint and technological restraint. Every new scientific discovery must not be promoted regardless of its consequences. Every new weapon

The West German Lawyers' Lawsuit against the Missile Deployment

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Since I speak to you as a lawyer, it is not surprising that a good deal of my report will concern legal questions. That does not mean, however, that the professional perspective should be considered as more important than the other problems. The West German peace movement does not regard law as an order of perfect justice.

We know very well that the interpretation and application of rules – both national and international – depends not only on good arguments but also on power relations in the national and international fields. From the beginning it has been quite clear that the battle must be won in the political area. Going to the courts could only bring some support: For the public it was important to hear that the legality of nuclear weapons is not unchallenged, that lawyers, too, protest against the enhanced danger of nuclear war. The main activities of the peace movement have been in other areas: Manifestations, sit-ins, declaration of nuclear free zones, privately-organized votes of the deployment of missiles and so on. The law is on our side but we are realistic enough not to rely too much on it.

Now let me go to the concrete facts. The first complaint which was brought against the Federal Government at the Constitutional Court did not deal with nuclear weapons, but has given a model for most of the following complaints. Some 15 citizens of Pirmasens, supported by the local trade union, claimed their basic right to life and health is threatened by the deployment of *chemical* (c) weapons in that region. The right to sue the Government at the Constitutional Court is given to everybody under condition that no other court is competent and that the plaintiff is directly concerned by an act of the Government. The most important precedents were two judgements of the Constitutional Court on the subject of nuclear power plants: The Court had stated that the government is obliged to minimize the risks to the population according to all technical and scientific possibilities. The remaining risk must be a more or less theoretical one. The plaintiffs argued that the risks of chemical weapons in peace-time, as well as war-time, are at least as important as those deriving from nuclear power plants. The complaint was filed in September 1982 and requested the removal of the C-weapons from German

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territory. Some 9 months later, the complaint was admitted. "Admission" in this case means that unlike more than 97 % of all other complaints the affair will be examined by a whole department of the Court, i.e., by eight judges and not dismissed by three. In this moment there has still been no hearing at the court and no further decision – citizens sometimes have to wait until 10 years before justice comes into force.

The procedure on chemical weapons was followed by some 200 citizens' complaints against the deployment of the Pershing II. More than 1 000 judges of the different branches of jurisdiction signed a declaration that the deployment of first-use nuclear weapons is in contradiction with international law and hurts the basic right to life and health. The parliamentary group of the Green Party addressed itself to the Constitutional Court, claiming that the deployment had constituted a substantial deviation from the Constitution, which requires a majority of two thirds in Parliament – which is impossible to get for the actual majority.

Until now, the Constitutional Court has pronounced two judgements which treated, however, only a part of the problem discussed among lawyers. In December 1983, the Court decided 3 cases in which the plaintiffs had demanded the immediate stop of the deployment by injunction. The complaints were dismissed. The reasons given by the Court were very surprising: There are no legal standards to evaluate whether the new missiles will enhance or reduce the danger to life and health. That was the first time the American "political question doctrine" was used in German constitutional law. In all other cases the court had since 35 years broadly interpreted its competence and established a strong legal control even on foreign policy questions. The judgement was criticized because the rule of law forbids any exceptions and because of a second more practical reason: evaluation of the danger of war is a military and technical question, as it is up to the natural sciences to determine whether the environment has been polluted or not. It needs no "legal standards" to know the facts – it has only to provide for the consequences.

The Court itself, however, seemed to have some bad conscience because the judges gave a second conclusion: Even if the danger of war were enhanced that fact cannot be imputed to the West German Government; Attacks on life and health of German citizens as the plaintiffs would depend on the sovereign decision of a foreign state which would be responsible for all the consequences (but which of course cannot be sued). This reason is still less convincing. Taken seriously even a provocation of a foreign state would not be illegal.

Finally, the court concluded that the deployment of the Pershing II missiles was not in contradiction to the rules of international law: There is no formal prohibition of nuclear weapons and customary law does not prohibit their deployment for defence purposes – the practice of states gives a clear indication in this sense. The court thus circumvented the real problem of international law. It is quite true that there is no general interdiciton of nuclear weapons but the question is whether the deployment based on an explicit first-use strategy is not unlawful. This special case of the Federal Republic was not even mentioned by the court. German legal scholars, however, have largely developed the idea that the first use of nuclear weapons violates the protection of the civil population and that a threat based on an unlawful behaviour is unlawful in itself.

The second judgement was published some days before Christmas 1984 and dealt with the complaint of the parliamentary group of the Green Party. The text comprises more than 160 pages; I can give you only some basic reasoning.

According to article 59 of our Constitution, international treaties require the consent of Parliament if they have an impact on legislation matters or if they concern the political relations of the Federal Republic. As there is no statute voted by Parliament on the missile question, the government was in a delicate situation. The majority of the court decided, however, that the declaration of the government permitting the deployment of the new missiles within the framework of the NATO treaty was a unilateral act and therefore did not require any interference of Parliament.

The second topic was the problem of sovereignty. Article 24 of the Constitution requires a statute if a part of German sovereignty is given to an international organization or to a system of collective defence. The deployment of the missiles was considered by the Court to fulfil this condition because the American President has the decision power on the launch of the missiles. But in 1954, the Parliament had voted in favour of the NATO Treaty; this decision covers all the measures which are taken in accordance with the general "intergration program" of the NATO Treaty. The Court cannot evaluate whether a concrete measure really serves the purposes of the alliance; it is up to the government to decide. The Court can only intervene when a decision is arbitrary. In the concrete case this was not admitted. The complaint was, therefore, dismissed.

One judge gave a dissenting opinion – he agreed with the plaintiff that the deployment of the missiles required a statute. His paper contains the main points of critique. The intervention of the legislator must not depend on the form of the government activity – a unilateral act requires the consent of the Parliament as well as a Treaty when it shapes the political relations of the Federal Republic. As to the second conclusion, the NATO Treaty does not give any concrete indications about the possible defence measures: The very existence of an "integration program" stated by the majority of the court has no legal basis in the text of the NATO Treaty. The abandonment of sovereignty seems to be unlimited in practice as every military measure can be declared to be useful for the defence purposes of the NATO Treaty. The majority of the Court had at least seen the problem that the American President can use his own power not submitted to NATO structures and order military measures including the launch of missiles. Whether he will do so or not must, however, be evaluated by the government. To trust in his willingness to fulfil the NATO Treaty is not arbitrary – the Court stressed the fact that no partner of the alliance had committed an aggression for 30 years in Europe. Should this change the Court would probably use its competences and declare the further collaboration within the framework of NATO to be unconstitutional, but it is not very clear on this point.

The Court did not decide on some aspects of basic rights. The danger of accidents, for instance, was excluded because such a question can not be examined in a procedure dealing with the rights of Parliamentary groups. It was therefore quite logical that six citizens of Heilbronn and Schwäbisch Gmünd brought in a complaint, as the missile accident in Heilbronn had occured some weeks previously.

Until now there is no decision on the question which is in the centre of this congress. Nuclear war by mistake has been greatly discussed in the Federal Republic since 1983. Five professors – lawyers and data processing specialists – brought an action against the government claiming that the German participation in the missile warning system is unconstitutional. The main argument is that the lives of the plaintiffs, like that of an immense number of other citizens, is daily exposed to a danger whose exact degree is unknown. If the missile warning system fails and launches are effected on the basis of a false alert we will be the victims of a Soviet reprisal. Living with this danger is not only a permanent threat to the right to life, but also to the right of living without fear which is part of the dignity of man guaranteed in article 1 of our constitution.

The complaint tries to give a lot of informations which is available in non-classified documents – false alerts, possible reasons and the time restrictions under which the American President has to decide. It is quite clear that some uncertainty still remains. The West German minister of defence declared, for example, that there is no launch on warning in the NATO defence plans. A counter-attack would be executed only when the impact of a Soviet missile was clearly established. This would of course exclude a nuclear war by mistake. The plaintiffs did not accept this declaration for the following reasons:

- The missile warning system, which is extremely expensive, would be useless if there were no possible launch on warning.
- The deployment of Pershing II missiles would lose a big part of its military importance. If they are not to be used for a first strike, they can be used only for a counter-attack. Vulnerable as they are, this counter-attack must start before Soviet missiles have reached German territory. Without launch on warning, this is not possible.
- It is unconceivable that the American President would order no launches when the missile warning system showed a big number of missiles hurtling towards Europe and/or the United States since this would destroy large parts of these countries. False alerts of that kind have happened and cannot be excluded in future times.

It is not up to the plaintiffs to prove the real danger – the government has to prove that everything has been done to protect the lives of the citizens.

Coming now to the end of my report, please let me stress once more that lawsuits are only *one* way of defending ourselves. Even if the result is not satisfactory – we have to try it; small chances are better than no chances. Lawyers have become part of the West German peace movement and they have decided to remain in it. Their task will be not only to go to court but to show the contradiction which exists between the pretension of the rules, on the one hand, and the reality of the arms race, on the other. We have to give our small contribution to a peaceful international order.