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To cite this article: Anne Peters (2018) Between military deployment and democracy: use of force under the German constitution, *Journal on the Use of Force and International Law*, 5:2, 246-294, DOI: [10.1080/20531702.2018.1521066](https://doi.org/10.1080/20531702.2018.1521066)

To link to this article: <https://doi.org/10.1080/20531702.2018.1521066>



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Published online: 16 Sep 2018.



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# Between military deployment and democracy: use of force under the German constitution

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## ABSTRACT

The German regime on the use of military force provides an important reference point for legal comparison. In a seminal judgment of 1994, the Constitutional Court identified a constitution-based requirement for each military deployment to have parliamentary approval. The formalities of the involvement of the *Bundestag* were, in 2005, codified in a statute. Recent German participation in coalitions of the willing have raised the question whether such operations are still covered by the constitutional bases, and participation in anti-Islamic State action in Syria is currently under review by the Constitutional Court. The article concludes that the tension between the need to effectively integrate military forces into multinational operations, democratic accountability, and judicial oversight has been uniquely resolved in the German constitution and statutory and case law. It illustrates the feasibility of upholding standards of democracy and the rule of law in foreign and military affairs.

**ARTICLE HISTORY** Received 25 April 2018; Accepted 21 August 2018

**KEYWORDS** Collective security; self-defence; anti-terrorist action; parliamentary approval; NATO; deployment

## 1. Historical context and current practice

German history has produced a unique and complicated constitutional regime on the deployment of the German military abroad. In acknowledgment of its responsibility for the wars of aggression the nation waged since 1939, and in line with the initial complete demilitarisation of the country after defeat in 1945, the state is constitutionally committed to world peace and to the renunciation of aggression.

Germany became a member of NATO in 1955. In 1956, it amended its constitution, the Basic Law of 1949, in order to allow the state to contribute to the integrated forces of NATO for defending Western Europe against a possible communist aggression (which never materialised). In 1968, the

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constitutional provisions on the use of the military both inside the country and abroad were again revised in the context of drawing up a so-called ‘constitution on the state of emergency’. The text of the German constitution regarding military matters and armed forces is frozen in the status of those two historical moments. The resulting incoherence mirrors the intense political controversies of the time.

The end of the global East–West split went hand in hand with German reunification and the formal international recognition of the state’s national sovereignty in 1990,<sup>1</sup> enabling the UN Security Council to overcome its prior paralysis and to authorise military action against threats to the peace. This contributed to a ‘fundamental reorientation’<sup>2</sup>: both from the side of Germany’s allies and in some quarters from inside the country, the expectation arose that Germany would actively engage its military towards achieving world peace and security. But the nation remained reluctant to participate in collective security efforts – a reluctance rooted in the deeply pacifist, and some might say irresponsible, attitude of the population and the *classe politique*. Refusal of any military involvement had until the reunification of 1990 been masked with the somewhat legalist argument that the Basic Law prohibited it.<sup>3</sup> The Basic Law served ‘as a shield and pretext’ for Germany to avoid participation in UN peace missions.<sup>4</sup>

After the national and international political and legal context had changed profoundly in the 1990s, sections of the German population gradually accepted this new responsibility, and scholars argued that military engagement within the UN would be constitutionally admissible.<sup>5</sup> Nevertheless, it remained impossible to amend formally the constitutional text so as to explicitly allow for and regulate such military action.

In this political deadlock, the German constitutional court issued in 1994 a truly law-making judgment.<sup>6</sup> By holding that the constitutional text did allow German military participation both in NATO and in UN peacekeeping missions (a thesis that had been deeply controversial up to that moment), while at the same time giving (without much textual basis in the *Grundgesetz*) the *Bundestag* (Parliament’s first chamber) the last word on military operations abroad, the

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<sup>1</sup>Article 7(2) of the Treaty on the final settlement with respect to Germany (‘Two-plus-four-treaty’) (12 September 1990) 1696 UNTS I-29226.

<sup>2</sup>Dieter Wiefelspütz, *Der Auslandseinsatz der Bundeswehr und das Parlamentsbeteiligungsgesetz* (Verlag für Polizeiwissenschaft, 2nd edn 2012).

<sup>3</sup>See, e.g. Eckart Klein, ‘Rechtsprobleme einer deutschen Beteiligung an der Aufstellung von Streitkräften der Vereinten Nationen’ (1974) 34 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 429, 443.

<sup>4</sup>Wiefelspütz (n 2) 3.

<sup>5</sup>See, e.g. Torsten Stein, ‘Die verfassungsrechtliche Zulässigkeit einer Beteiligung der Bundesrepublik Deutschland an Friedenstruppen der Vereinten Nationen’ in Jochen Abr. Frowein and Torsten Stein (eds), *Rechtliche Aspekte einer Beteiligung der Bundesrepublik Deutschland an Friedenstruppen der Vereinten Nationen* (Springer-Verlag, 1990) 29.

<sup>6</sup>BVerfGE [Decisions of the Federal Constitutional Court] 90, 286, judgment of 12 July 1994 – 2 BvE 3/92 –, – 2 BvE 5/93 –, – 2 BvE 7/93 –, – 2 BvE 8/93 –.

Constitutional Court opened the way for German participation in multilateral peace and security missions and in collective defence efforts. Since then, the piecemeal-like constitutional text on military matters, which is stuck in the status of 1956 and 1968, has been complemented by a judge-made regime<sup>7</sup> the principles of which were partly codified in a parliamentary statute of 2005.<sup>8</sup>

Since the start of German foreign deployments in 1992 more than 130 mandates for foreign deployments have been issued and prolonged by the *Bundestag*, amounting to more than 60 different operations.<sup>9</sup> By 2015, the additional costs amounted to €19 billion.<sup>10</sup> In December 2017 alone, Parliament issued seven mandates. One of them, by way of example, is participation in UNIFIL Lebanon (involving up to 300 German troops; with 131 currently deployed).<sup>11</sup> Examples for operations in the framework of the EU common security and defence policy (on the basis of European Council decisions adopted under Article 42(4) and 43(2) TEU) include the anti-piracy operation ATALANTA<sup>12</sup> off the Somali coast (to which Germany agreed to contribute up to 950 troops; with 197 currently deployed<sup>13</sup>) and the anti-human trafficking operation SOPHIA<sup>14</sup> in the Mediterranean Sea (German participation of up to 950 troops; with 66 currently deployed).<sup>15</sup>

The most controversial operations were those that led to proceedings before the Federal Constitutional Court and some other deployments, namely German participation in the monitoring of compliance with the UN-authorized embargoes against Serbia and the monitoring of a no-fly zone over Bosnia and Hercegovina (1992–1995),<sup>16</sup>

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<sup>7</sup>See section 2.

<sup>8</sup>See section 4.

<sup>9</sup>Since 1990, eight parliaments have been elected, currently (since the elections of 24 September 2017, the 19th parliament is sitting, and has so far authorised 15 operations). See for a complete list of all mandates until 2012 with exact documentation Wiefelspütz (n 2) 357–75, later data based on the author's own research.

<sup>10</sup>Salary of soldiers not included. Of this, €9.25 billion was spent on the operation in Afghanistan (ISAF and participation in Enduring Freedom/Resolute Support). Die laufenden Auslandseinsätze der Bundeswehr; Rechtliche Grundlagen, politische Begründungen, Personalumfänge und Kosten (Aktualisierung des Sachstands WD 2-3000-122/14), *Deutscher Bundestag, Wissenschaftliche Dienste* (BT-WD) [Research Services of the German Bundestag] 2-3000-037/16 (21 March 2016).

<sup>11</sup>Most recent prolongation until 30 July 2018. Government Request of 24 May 2017 (*Bundestagsdrucksache* (BT-Drs.) [Bundestag Document] 18/12492), authorisation on 29 June 2017 (*Deutscher Bundestag, Plenarprotokoll* (BT-PP) [German Bundestag Plenary Protocols] 18/243, 25005).

<sup>12</sup>Council Decision (CFSP) 2016/2082 of 28 November 2016 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ EU L 2016, 321/53.

<sup>13</sup>Last Gov. Request 'Fortsetzung der Beteiligung bewaffneter deutscher Streitkräfte an der durch die Europäische Union geführten EUNAVFOR Somalia Operation Atalanta zur Bekämpfung der Piraterie vor der Küste Somalias' (BT-Drs. 18/11621 (22 March 2017)). Last parliamentary approval on 18 May 2017 (until 31 May 2018): BT-PP 18/234, 23699 *et seq.*, vote at 23706.

<sup>14</sup>Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ EU 2015, L 122/31.

<sup>15</sup>Gov. Request of 24 May 2017 (BT-Drs. 18/12491 (24 May 2017)); parliamentary approval of 29 June 2017 (authorisation until 31 June 2018): BT-PP 18/243, 24924 *et seq.*, vote at 24933.

<sup>16</sup>Only after the judgment of the Constitutional Court of 12 July 1994, the government formally requested approval of the *Bundestag* (Gov. Request 'Deutsche Beteiligung an Maßnahmen von NATO und WEU zur

humanitarian support for the peace mission UNOSOM II in Somalia (1993),<sup>17</sup> the NATO-led intervention in Kosovo, which lacked a Security Council mandate (starting in 1998),<sup>18</sup> the anti-terror Operation Enduring Freedom (OEF) against al-Qaida in the aftermath of 9/11,<sup>19</sup> German monitoring of Turkey's airspace in 2003 against a potential attack by Iraq in the context of the US-led Iraq war,<sup>20</sup> contributions to training missions in Erbil/Iraq (2014–2018),<sup>21</sup> and, finally, 'Operation Inherent Resolve' (OIR) to fight the Islamic State (IS) since 2015.<sup>22</sup> However, KFOR remains the most important German engagement due to its duration (ongoing since 2000) and the number of troops involved (around 800 German personnel).<sup>23</sup>

## 2. The constitutional framework

### 2.1. The text of the Basic Law, notably Article 24(2) and 87a(2) GG

The most immediately relevant provisions for military operations are Article 24(2), dating from 1949, and Article 87a GG on armed forces, which in its current form dates from 1968.<sup>24</sup> Further relevant constitutional provisions

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Durchsetzung von Beschlüssen des Sicherheitsrats der Vereinten Nationen zum Adria-Embargo und Flugverbot über Bosnien-Herzegowina', BT-Drs. 12/8303 (19 July 1994)).

<sup>17</sup>See n 269.

<sup>18</sup>Gov. Request for the authorisation of the deployment of around 14 aircraft and around 500 troops: 'Deutsche Beteiligung an den von der NATO geplanten begrenzten und in Phasen durchzuführenden Luftoperationen zur Abwendung einer humanitären Katastrophe im Kosovo-Konflikt' (BT-Drs. 13/11469 (12 October 1998)). The *Bundestag* approved on 16 October 1998 after an intensive debate on the extraordinary character of this mission on the basis of a NATO Council decision, without a Security Council mandate, in the view of an upcoming humanitarian catastrophe, refugee flows and spill over, and to demonstrate that Germany is a reliable partner and to contribute to a 'European peace order' (BT-PP 13/248, 23127–61, vote at 23161).

<sup>19</sup>The Gov. Request of 7 November 2001 to contribute to the operation Enduring Freedom with up to 3900 troops relied both on collective self-defence (Article 5 NATO, the NATO Council decisions after 9/11 and Article 51 UN Charter) and on the two Security Council resolutions 1368 and 1373 (which did *not* constitute an authorisation under Chapter VII), and additionally cited a press release of the President of the Security Council of 8 October 2001 who 'confirmed' the determination to 'fully implement' these SC resolutions. The government then invoked Article 24(2) Basic Law (*Grundgesetz* [GG]) (but not Article 87a GG) as the constitutional basis of deployment ('Einsatz bewaffneter deutscher Streitkräfte bei der Unterstützung der gemeinsamen Reaktion auf terroristische Angriffe gegen die USA auf Grundlage des Artikels 51 der Satzung der Vereinten Nationen und des Artikels 5 des Nordatlantikvertrags sowie der Resolution 1368 (2001) und 1373 (2001) des Sicherheitsrats der Vereinten Nationen' (BT-Drs. 14/7296 (7 November 2001)). The *Bundestag* approved on 16 November 2001 (BT-PP 14/202, 19855 *et seq.*, vote at 19892–5).

<sup>20</sup>See n 62 on the refusal of the government to request authorisation by the *Bundestag*.

<sup>21</sup>See n 203–n 204 and accompanying text.

<sup>22</sup>See n 112–n 114 and accompanying text.

<sup>23</sup>See n 271–n 272 and accompanying text. The most recent Gov. Request of 30 May 2018 cited Article 24 (2) GG as a constitutional basis (BT-Drs. 19/2384). Approval of the *Bundestag* of 14 June 2018 (BT-PP 19/39), for 12 months until June 2019.

<sup>24</sup>See section 3 for the relationship of these constitutional provisions to the evolving principles of international law.

are Article 26 (the ban on a war of aggression)<sup>25</sup> and Article 115a (declaration of state of defence).<sup>26</sup> Article 24(2) GG runs:

With a view to maintaining peace, the Federation may enter into a *system of mutual collective security*; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting *peace* in Europe and among the nations of the world.<sup>27</sup>

The relevant sections of Article 87a GG read: '(1) The Federation shall establish Armed Forces for purposes of defense. [...] (2) Apart from defense [*Verteidigung*], the Armed Forces may be employed [*eingesetzt*] only to the extent expressly permitted by this Basic Law.'<sup>28</sup>

Article 87a(2) GG has so far always been considered as the second-best legal ground, as a residual constitutional basis for military operations abroad that cannot be called 'collective' in the sense of Article 24(2) GG. In fact, except for two evacuation operations (in Albania in 1997 and in Libya in 2011), Germany has, as yet, never acted outside a multilateral scheme – very broadly conceived as acting alongside the UN and/or NATO, or as a minimum in a coalition of the willing. The government regularly cites Article 24(2) GG as the constitutional basis for German participation in these operations.

In the lead judgment of 1994 (which will be discussed in section 2.2), the Court defined a system of 'mutual collective security'<sup>29</sup> as one

which – through a peace-securing system of rules and the establishment of a specially dedicated organisation – creates for each member a status of being bound by international law, by which all of them mutually commit themselves to secure peace and to provide security.<sup>30</sup>

Put differently, in order to qualify as a system of mutual collective security in the sense of Article 24(2) GG, an arrangement must possess three characteristics: (1) its rules must be directed at securing peace; (2) it must be institutionalised, and (3) it must impose legally binding rules.

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<sup>25</sup>Article 26(1) GG runs: 'Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offense.'

<sup>26</sup>This provision was inserted into the Basic Law by amendment of 24 June 1968. Section 1 reads:

Any determination that the federal territory is under attack by armed force or imminently threatened with such an attack (state of defense) shall be made by the Bundestag with the consent of the Bundesrat. Such determination shall be made on application of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least a majority of the Members of the Bundestag.

The precursor norm was Article 59a GG of 19 March 1959 which foresaw the declaration of the state of defence by the *Bundestag* and which was repealed in 1968.

<sup>27</sup>Emphasis added.

<sup>28</sup>Emphasis added. This contribution uses the official English translation by Christian Tomuschat, David P Currie, Donald P Kommers, in cooperation with the Language Service of the German *Bundestag*.

<sup>29</sup>Article 24(2) GG.

<sup>30</sup>BVerfGE 90, 286 (n 6) paras 231 and 236, and holding no. 5a); author's translation.

The Court settled that the constitutional concept covers not only the UN but NATO also.<sup>31</sup> It is notably irrelevant whether the intention of the treaty scheme is to guarantee peace among members (as with the UN) or whether it obliges members to furnish support in case of attack from the outside (as with NATO).<sup>32</sup>

The Court also found that the WEU qualifies,<sup>33</sup> whereas the post-Lisbon EU 'does not yet take the step towards a system of mutual collective security', despite the TEU's collective defence obligation exactly mirroring NATO's.<sup>34</sup> A mere coalition of the willing *without* any link to the UN or NATO would not qualify as a system in terms of Article 24(2) GG.<sup>35</sup> Lacking a treaty basis and possessing no institutions, it could not be called a 'system'. A bilateral treaty, for example between Germany and Iraq, would not qualify either.

Next, Article 24(2) GG forms not only the basis of German membership to the system but also constitutionally covers the individual deployments 'insofar as these occur within and pursuant to the rules of such a system'.<sup>36</sup> This condition is easily satisfied by UN peacekeeping operations.<sup>37</sup> Article 24(2) GG also covers peace-enforcement actions, namely military operations authorised by the Security Council under Chapter VII of the UN Charter.<sup>38</sup> The constitutional clause further covers operations conducted within NATO (Article 5 and non-Article 5 operations<sup>39</sup>) and finally NATO actions implementing UN enforcement decisions.<sup>40</sup>

Before the 1994 Constitutional Court's seminal judgment, scholarship struggled to bring into line the facially restrictive constitution – notably the seemingly clear wording of Article 87a GG – with the emerging practice of military activity abroad (such as airspace monitoring and humanitarian aid), and attempted to declare constitutionally admissible German participation in peace and collective defence missions.

Interpretative strategies ranged from either construing the notion of 'defence' in Article 87a GG very broadly so as to include, for example, rescue operations for German nationals abroad; reading the notion of

<sup>31</sup>BVerfGE 68, 1, judgment of 18 December 1984 – 2 BvE 13/83 – *Pershing-2*, para 156, had still left open whether NATO was covered.

<sup>32</sup>BVerfGE 90, 286 (n 6) para 231 and holding no. 5a).

<sup>33</sup>*Ibid*, para 232. Scholarship further counts the OSCE as a system in the sense of Article 24(2) GG.

<sup>34</sup>BVerfGE 123, 361 – *Lisbon* (2009), para 390. See Article 42(7) TEU, subsection 1 sentence 1 TEU. Arguably, practice since the *Lisbon*-judgment has been treating the EU as a system of collective security in the constitutional sense.

<sup>35</sup>See section 3 for the problematic operation against IS which has some link to the UN through UN SC res 2249.

<sup>36</sup>See n 49.

<sup>37</sup>Peacekeeping was the object of the lead judgment BVerfGE 90, 286 (n 6) para 240.

<sup>38</sup>This follows from BVerfGE 90, 286 (n 6) para 245 which mentions the UN Security Council resolutions 713, 757, 781, and 816 (all adopted under Chapter VII).

<sup>39</sup>As long as these can be counted as practice developing the NATO Treaty as opposed to tacitly amending it. See n 245–n 246 and accompanying text.

<sup>40</sup>See in scholarship for the various types of NATO operations Christian Hillgruber 'Article 24' in Hans Hofmann and Hans-Günter Henneke (eds), *GG Kommentar zum Grundgesetz* (Carl Heymanns, 13th edn 2014) paras 45, 51.

employment very narrowly,<sup>41</sup> for example by distinguishing military from police operations; or by qualifying small-scale activities as a mere ‘usage’ (*Verwendung*) of the army as opposed to employment (*Einsatz*).

It was also pointed out that the original intent of Article 87a GG<sup>42</sup> was chiefly or even exclusively concerned with the deployment of the *Bundeswehr* domestically, and therefore no obstacle to military non-defensive engagement abroad. However, the plain wording of Article 87a(2) GG does not distinguish between domestic and foreign deployments and thus stands against limiting the applicability of the constitutional rule to purely internal deployments.<sup>43</sup> To conclude, the facial constitutional prohibition of any non-defensive military action until the early 1990s furnished a convenient explanation for not participating in UN peace missions, as these were not expressly permitted by the Basic Law.

## **2.2. The lead judgment of 1994: the invention of the parliamentary prerogative**

In the eminently important judgment of 1994,<sup>44</sup> the Constitutional Court found a way out of the impasse. It clarified the key parameters both for the admissibility of military deployment (and the substantive requirements flowing from the choice of the legal basis) and the respective powers of government and Parliament when deciding on deployments.

This judgment was rendered in a dispute between constitutional organs,<sup>45</sup> upon requests by two parliamentary factions and their members, and joined together four proceedings concerning the German government’s decisions to contribute to various military operations.<sup>46</sup> All operations were authorised by the UN Security Council (partly mediated by implementation decisions of NATO and WEU) and were located in two different settings: Yugoslavia and Somalia. Germany contributed planes, ships, and troops. For example, German soldiers participated in an integrated NATO unit in AWACS planes (Airborne Early Warning and Control System) to monitor the no-fly zone over Bosnia and Hercegovina, German ships patrolled the

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<sup>41</sup>In this article, the author uses the terms employment, deployment, dispatch, and operation as synonymous translations of the German word *Einsatz*.

<sup>42</sup>In 1956, when the ‘rearmament’ provision was adopted, the text figured in then Article 143 GG.

<sup>43</sup>The Constitutional Court left the doctrinal question whether Article 87a GG applies to operations abroad or not, open: BVerfGE 90, 286 (n 6) para 354.

<sup>44</sup>BVerfGE 90, 286 (n 6). There is no official English translation of this judgment. See for two related summarial proceedings: BVerfGE 88, 173–85, judgment of 8 April 1993, – 2 BvE 5/93 –, – 2 BvQ 11/93 – *No fly zone Bosnia Hercegovina* (provisional measures denied) and BVerfGE 89, 38–47, judgment of 23 June 1993, – 2 BvQ 17/93 – *Somalia UNOSOM II* (provisional measures granted). See for detailed analyses Georg Nolte, ‘Bundeswehreinsätze in kollektiven Sicherheitssystemen, Zum Urteil des Bundesverfassungsgerichts vom 12. Juli 1994’ (1994) 54 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 652; Claus Kreß, ‘The External Use of German Armed Forces – The 1994 Judgment of the Bundesverfassungsgericht’ (1995) 44 *International and Comparative Law Quarterly* 414–26.

<sup>45</sup>‘*Organstreitverfahren*’, see section 6 for detail on this type of proceeding.

<sup>46</sup>See n 6.



Mediterranean Sea to enforce an embargo against the then Federation of Serbia and Montenegro, and German supply and transport battalions distributed humanitarian aid under UNOSOM II. Hence, the judgment dealt exclusively with military operations in the framework of international organisations proper, as opposed to unilateral action or coalitions of the willing.

As regards the constitutional admissibility of extraterritorial military activity and their legal basis, the Court made four points: first, that NATO is a ‘system of mutual collective security’ in the sense of Article 24(2) GG, although the drafters had the UN in mind; second, the parliamentary statute under Article 59(2) GG, which approved of German accession to NATO in 1955,<sup>47</sup> also covers the incorporation of military staff into integrated units and their participation in military action conducted by NATO and under NATO command to the extent that such integration or participation has already been pitched in the founding treaty;<sup>48</sup> third, in a kind of implied powers argumentation, the Court held that Article 24(2) GG, which expressly allows the German Federation to ‘enter’ (*einordnen*) into such a system of mutual collective security, must likewise implicitly allow the country to assume those tasks that are typically connected to membership – importantly, this means that Article 24(2) GG is also the constitutional basis for the use of German armed forces in operations ‘insofar as these occur within and pursuant to the rules of such a system’;<sup>49</sup> and fourth, Article 87a GG does not bar such operations.<sup>50</sup>

Having clarified that the German constitution allows extraterritorial operations, the next set of findings concerns the constitutional powers of the executive and legislative branch in this matter: first, the out-of-area action under NATO’s new strategy of 1991 did not require a parliamentary statute under Article 59(2) GG because this new strategy did not constitute a treaty amendment.<sup>51</sup> However, the bench (*Senat*) was split on this point. It has already been the case that in the 1994 judgment, four of the eight judges opined that the powers of Parliament were undermined by the purely executivist development

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<sup>47</sup>Article 59(2) GG demands a parliamentary statute for the ratification of certain types of important international treaties, namely those ‘that regulate the political relations of the Federation or relate to subjects of federal legislation’.

<sup>48</sup>BVerfGE 90, 286 (n 6) para 238.

<sup>49</sup>This English translation is taken from BVerfGE 121, 135 (n 59) para 62, which uses the identical German phrase as BVerfGE 90, 286 (n 6) para 255: ‘*im Rahmen und nach den Regeln*’ (no official translation available of the 1994 judgment). See section 3 for detail on this requirement.

<sup>50</sup>*Ibid.*, paras 253–56. The Court left open the doctrinal relationship between the two constitutional provisions which can be construed in two ways so as to allow foreign deployments: Either Article 24(2) GG might be qualified as an ‘express permission’ as required by Article 87a GG (although Article 24 does not say anything expressly on deployments), or Article 87a GG (of 1956/1968) might be read as regulating only the use of the armed forces inside the country, and therefore as leaving completely untouched the clause of Article 24(2) GG, which is older (it dates from 1949).

<sup>51</sup>BVerfGE 90, 286 (n 6) paras 257–95, esp. at para 291. The more prominent judgment on this point was BVerfGE 104, 151, judgment of 22 November 2001 – 2 BvE 6/99 – *NATO new strategic concept of 1999*. See text accompanying n 245.

of NATO.<sup>52</sup> In order to accommodate this concern, and to avoid that the executive branch could have decided alone on military deployment, the Court ruled that ‘The Basic Law requires a constitutive parliamentary approval for any military deployment of armed forces.’<sup>53</sup> This requirement corresponded to constitutional tradition since 1918, the Court said.<sup>54</sup> Secondly, the Court described in detail which types of military action demanded parliamentary assent in each concrete case. Thirdly, it asked the legislature to draw up a statute, which was finally adopted a decade later in 2005.<sup>55</sup>

Any assessment of the judgment must note that the parliamentary prerogative<sup>56</sup> was unknown in the constitutional landscape until its invention by the Constitutional Court.<sup>57</sup> It was a stretch to extrapolate from Parliament’s ‘classic’ right to declare (defensive) war<sup>58</sup> the requirement of parliamentary approval for every single military action. But this extrapolation facilitates military engagement to protect peace and security, which was in principle favoured already by the original constitution even though the founders did not anticipate when and how Germany would become part of this collective endeavour. Hence, the creative reading adapted the constitution to totally new circumstances after 1990, something that had not been foreseen in 1949. The requirement of parliamentary approval was not the only possible answer to the global change, but it was an admissible progressive interpretation of the Basic Law (probably transgressing the blurry boundary with judicial law-making) in line with the constitutional spirit.

### 2.3. The AWACS II judgment of 2008: when is parliamentary approval required?

The second key judgment was rendered in 2008,<sup>59</sup> four years after the adoption of the Statute on Participation.<sup>60</sup> It was, again, issued in a proceeding of a

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<sup>52</sup>The four defeated judges found the Constitutional provision on parliamentary ratification of treaties to be applicable in an analogous fashion to the strategic documents expanding the NATO mandate independent of their qualification as a treaty under international law or not (BVerfGE 90, 286 (n 6) paras 296–310).

<sup>53</sup>*Ibid.*, para 324 (author’s translation). See on the parliamentary power *ibid.*, paras 319–50. ‘Constitutive’ means that the approval by the *Bundestag* is a necessary basis of the constitutional legality of the deployment. If it is missing, deployment is unconstitutional.

<sup>54</sup>*Ibid.*, paras 325, 329.

<sup>55</sup>*Parlamentsbeteiligungsgesetz* of 18 March 2005 (BGBl. 2005 I, 775).

<sup>56</sup>The German term is ‘Parlamentsvorbehalt’.

<sup>57</sup>In the eyes of some critics, the Constitutional Court thereby overstepped its mandate. Gerd Roellecke, ‘Bewaffnete Auslandseinsätze: Krieg, Außenpolitik oder Innenpolitik? Ein verfassungsänderndes Urteil des Bundesverfassungsgerichts’ (1995) 34 *Der Staat* 415.

<sup>58</sup>Under Article 59a GG of 1956 (repealed); since 1968 under Article 115a GG.

<sup>59</sup>BVerfGE 121, 135, judgment of 7 May 2008, – 2 BvE 1/03 –, *AWACS Turkey*. The plaintiffs had also requested provisional measures which were rejected on the merits, because the competences of the *Bundestag* did not clearly outweigh competence of the executive branch (BVerfGE 108, 34–52, order of 25 March 2003 – 2 BvQ 18/03 –).

<sup>60</sup>See n 55.

dispute between constitutional organs. It related, again, to a German contribution to airspace monitoring by AWACS, this time over Turkey in the spring of 2003. The context was the Iraq war waged by the US and its allies. Turkey feared that Iraq might target its territory and had requested consultations under Article 4 of NATO. Airspace surveillance with German planes was thus seen (including by the Court) as preparing for possibly needed collective self-defence under Article 5 of NATO.<sup>61</sup> In March 2003 the German Chancellor, Gerhard Schröder, explained to Parliament that the German military's exclusive duty was strictly defensive aerial surveillance of Turkish airspace and did not extend to providing any support for deployment in or against Iraq. There was 'a strict dividing line' between the NATO-led AWACS aircraft, under the command of NATO's Supreme Allied Commander Europe (SACEUR), and the US command. The geographical separation and the difference in mandates was, the Chancellor said, the reason why there was no need for an approval by the *Bundestag*.<sup>62</sup>

The applicant, a faction of the liberal Opposition party *Freie Demokratische Partei*, (FDP), successfully complained against the government for bypassing Parliament.<sup>63</sup> The Court found that German involvement in the aerial surveillance of Turkish airspace was a deployment of armed forces. Even if no actual combat took place, German forces were involved in armed operations and this would have required parliamentary approval.<sup>64</sup>

The first and major contribution of this judgment was to flesh out in more detail when exactly a parliamentary approval was needed. Doctrinally, this hinges on the question of when a 'deployment' is present. 'Deployment' is the key term of the 2005 statute, but it is a constitutional (and not merely a statutory) concept which goes back to the 1994 judgment.<sup>65</sup>

Second, the judgment offered a new rationale for the involvement of Parliament. It moved away from the bookish constitutional tradition on armed forces and placed the approval squarely into the context of democracy and the separation of powers.<sup>66</sup> This judgment had the consequence of further strengthening the *Bundestag*.

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<sup>61</sup>The Court which framed the case as explained probably got the international legal aspects of the case wrong: on the premise that the attack by the United States on Iraq was unlawful, Iraq had the right to self-defence. This might have lawfully included some action spilling over to Turkey. Then, self-defence would not have been permitted against such action.

<sup>62</sup>Federal Chancellor Gerhard Schröder on 19 March 2003 (BT-PP 15/34, 2727).

<sup>63</sup>The respondent was the government composed by the Social Democratic Party and the Green Party. It should be noted that the Social Democratic faction had, a decade earlier, when it was in the opposition, successfully sued the conservative (CDU/CSU) government and obtained the 1994 judgment. In the *AWACS II*-proceedings, the Court issued an order denying the requested provisional measures on the merits. Plaintiffs had sought an injunction to compel the government to seek approval of the lower house or otherwise immediately discontinue the operation. But the Court found the negative consequences of an injunction stopping the operation to prevail (BVerfGE 108 (n 59) 34–52).

<sup>64</sup>BVerfGE 121, 135 (n 59) para 83.

<sup>65</sup>As the Court recalls in BVerfGE 121, 135 (n 59) para 61. See section 4.

<sup>66</sup>See section 5.

#### 2.4. The Lisbon treaty judgment of 2009: red line for EU operations?

The judgment on the Treaty of Lisbon examined the newly designed European scheme for a Common Security and Defence Policy (Article 42–46 TEU) and whether a German ratification of the EU reform treaties of 2007 would be compatible with the Basic Law.<sup>67</sup> Article 42(1) TEU allows for ‘missions outside the Union for peacekeeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter’. The undertakings are further detailed in Article 43(1) TEU which, *inter alia*, mentions the ‘tasks of combat forces’. The concrete missions and measures must be decided by the Council (Article 43(2) in conjunction with Article 42(2) sentence 1 TEU). The actual performance then falls on the member states.<sup>68</sup> Article 42(7) TEU contains an ‘obligation of aid and assistance’, which explicitly refers both to Article 51 of the UN Charter and to ‘commitments under NATO’. The principle of voluntariness governs: only willing and able member states will be entrusted and must agree among themselves and in association with the High Representative of the Union for Foreign Affairs and Security Policy on the management of the tasks.<sup>69</sup>

The Court examined – detached from any concrete case – the treaty’s compatibility with the Basic Law’s provision<sup>70</sup> on collective security.<sup>71</sup> The scheme manifests, according to the Court, the EU member states’ ‘intention to retain the sovereign decision on the deployment of their armed forces which is rooted in the last instance in their constitutions’.<sup>72</sup>

Under the TEU, any common defence operation would have to be unanimously decided by the European Council.<sup>73</sup> This decision would only have the legal force of a recommendation, and would need to be implemented by the EU member states ‘in accordance with their respective constitutional requirements’.<sup>74</sup> Should some member states propose an amendment of the EU Treaty to abolish the requirement of unanimity for a Council decision on this matter, then ‘[t]he Federal Republic of Germany would be constitutionally prohibited to take part in such a treaty amendment’, the Court said.<sup>75</sup> In other words, majority voting in the European Council on a

<sup>67</sup>BVerfGE 123, 267 of 30 June 2009 (– 2 BvE 2/08 –, – 2 BvE 5/08 –, – 2 BvR 1010/08 –, – 2 BvR 1022/08 –, – 2 BvR 1259/08 –, – 2 BvR 182/09 –), *Organstreit* proceeding.

<sup>68</sup>Article 42(1) sentence 4 TEU: ‘The performance of these tasks shall be undertaken using capabilities provided by the Member States.’

<sup>69</sup>Article 44(1) TEU.

<sup>70</sup>Article 24(2) GG.

<sup>71</sup>BVerfGE 123, 267 (n 67) paras 254–55 and 381–91. It found the EU not to form a ‘system of collective security’ in terms of Article 24(2) GG (*ibid*, para 390).

<sup>72</sup>*Ibid*, para 384. The Court here pointed to wording and legislative history of the new TEU.

<sup>73</sup>Article 42(2) sentence 2 TEU.

<sup>74</sup>Article 42(2) sentence 3 TEU.

<sup>75</sup>BVerfGE 123, 267 (n 67) para 391.

common defence operation could only be introduced after a German constitutional amendment.<sup>76</sup>

The Court notably interpreted Article 42(7) sentence 2 TEU ('This shall not prejudice the specific character of the security and defence policy of certain Member States') as catering for the German requirement of parliamentary approval to deployment decisions.<sup>77</sup> Moreover, 'the constitutive requirement of parliamentary approval for the deployment of the *Bundeswehr* abroad is not open to integration'.<sup>78</sup> This means that any concrete deployment decision – also within an EU operation – will always require a specific approval by the *Bundestag*. This principle cannot be overturned by any (potential) supranationalisation of collective security and by the primacy of EU law over German law as allowed by Article 23 GG.<sup>79</sup> The requirement of parliamentary approval may not be circumvented by secondary EU law either.<sup>80</sup>

The judgment stated *obiter dictum* (possibly by mistake) that deployments abroad, if outside a system of mutual collective security, are constitutionally permitted only 'in case of national [territorial] defense [*Verteidigungsfall*]'.<sup>81</sup> This seems to preclude other types of operations that may be permitted by international law.<sup>82</sup> The best view is that, rather than outlawing these forms of military force, the Court simply left them aside as negligible for the purposes of this judgment, which concerned the EU and European integration.<sup>83</sup> In sum, it is doubtful whether the judgment really drew a 'red line'<sup>84</sup> for military supranationalisation; in any case it created legal confusion.

## 2.5. The Pegasus judgment of 2015 on rescue operations and the obligation to inform

A 2015 judgment concerned Operation Pegasus, a rescue mission in 2011 in which 22 German nationals and 110 citizens of other states had been evacuated from Nafurah in Libya during the country's civil war.<sup>85</sup> The question was

<sup>76</sup>Such a constitutional amendment would however have to respect the intangible core of the German Basic Law (Article 79 GG).

<sup>77</sup>BVerfGE 123, 267 (n 67) para 386.

<sup>78</sup>*Ibid*, para 255 ('*integrationsfest*'; official English translation).

<sup>79</sup>*Ibid*, para 255.

<sup>80</sup>*Ibid*, para 387.

<sup>81</sup>*Ibid*, para 254. The phrase is misleading, because it is the technical term used in Article 115a GG (territorial defence of Germany), and does not cover the broader scenario permitted by Article 87a GG ('*Verteidigung*' ['defence'] *tout court*).

<sup>82</sup>See section 3.

<sup>83</sup>Juliane Kokott, 'Art. 87a GG' in Michael Sachs (ed), *Grundgesetz Kommentar* (C.H. Beck, 8th edn 2018) para 32.

<sup>84</sup>Andreas Paulus and Henrik Jacobs, 'Neuere Entwicklungen bei der Parlamentsbeteiligung für den Auslandseinsatz der Bundeswehr' (2012) 87 *Die Friedenswarte* 23, 47.

<sup>85</sup>BVerfGE 140, 160, judgment of 23 September 2015, *Pegasus*, - 2 BvE 6/11 - *Organstreit* proceeding Fraktion BÜNDNIS 90/DIE GRÜNEN versus the Federal Government. For safety reasons, the evacuation of February 2011 was performed with military means and under military protection. Because the area in the

whether the approval of the *Bundestag* is constitutionally required for urgent military actions once they are completed. Under the statute of 2005, the government is empowered to decide alone on a deployment in the case of ‘imminent danger’ and ‘for the rescue of humans from specific danger when their lives would be endangered by the public involvement of the *Bundestag*’.<sup>86</sup> The statute says the *Bundestag* must be informed before and in the course of action. It also says that the government must ‘immediately raise the request for approval. If the *Bundestag* rejects the request, deployment must be terminated’.<sup>87</sup>

Most commentary had opined that the obligation to ask for approval would also govern deployments that are *completed*.<sup>88</sup> But the Court followed the opposing scholarly view<sup>89</sup> and held that in this scenario the Constitution does not oblige the government to seek an *ex post* approval, but only to furnish timely, complete, detailed, and written information to the *Bundestag* as a whole. In this judgment, the Court for the first time defined the legal effects of a parliamentary approval and clarified, and maybe slightly modified, the rationale of the parliamentary prerogative. It also sharpened the concept of ‘deployment’, which triggers the need for parliamentary approval, denied a political or military margin of appreciation of the government, and for the first time spelt out the parameters of the constitutional obligation to inform.

The doctrinal explanation was that the government’s lawful use of its urgency powers has the same legal effect as the exercise of the combined governmental and parliamentary power<sup>90</sup> in normal situations. It is an ‘auxiliary’ stand-alone power which ‘modifies’ the principle of parliamentary co-decision in situations where – for purely factual reasons – Parliament cannot exercise its competence.<sup>91</sup> If an operation is ongoing, parliamentary approval or disapproval has only an *ex nunc* effect. In the words of the official translation of the judgment: ‘The required immediate involvement

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Eastern part of Libya was already in the hands of the opposition’s armed forces with whom no diplomatic contacts existed, the 132 persons were flown out in two military transportation airplanes (Transall C-160), staffed with 32 troops, equipped with pistols, guns, and machine guns. See in more detail on this judgment Anne Peters, ‘The (Non-) Judicialisation of War: German Constitutional Court Judgment on Rescue Operation Pegasus in Libya of 23 September 2015’, *EJIL TALK!* (22 October 2015) [www.ejiltalk.org/author/anne-peters/](http://www.ejiltalk.org/author/anne-peters/).

<sup>86</sup> *Parlamentsbeteiligungsgesetz* (n 55) § 5(1). The scenario that the urgent action is *completed* before a vote in the *Bundestag* can be taken (as opposed to ongoing) is probably typical.

<sup>87</sup> *Parlamentsbeteiligungsgesetz* (n 55) § 5(3).

<sup>88</sup> See, e.g. Matthias G Fischer and Manuel Ladiges, ‘Die Evakuierungsoperation “Pegasus” in Libyen – militärisch erfolgreich, aber verfassungsrechtlich problematisch’ (2011) 53 *Neue Zeitschrift für Wehrrecht* 221.

<sup>89</sup> See, e.g. Claus Kreß, ‘Die Rettungsoperation der Bundeswehr in Albanien am 14. März 1997 aus völker- und verfassungsrechtlicher Sicht’ (1997) 57 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 329–62, cited by the Court.

<sup>90</sup> ‘*Entscheidungsverbund*’ (BVerfGE 140, 160 (n 85) para 83, author’s translation). See also BVerfGE 121, 135 (n 59) para 71.

<sup>91</sup> BVerfGE 140, 160 (n 85) para 88 (the official English translation of the judgment says ‘subsidiary’). See also *ibid*, para 99.

of Parliament after a deployment has begun [...] does not have the legal effects of a retrospective decision, namely that if such retrospective approval were denied, the deployment would have been illegal from the beginning.<sup>92</sup>

The rationale and effect of parliamentary involvement as identified by the Court points against the need for an *ex post* approval of operations that are already terminated. Normally, the purpose of the parliamentary prerogative is that Parliament decides jointly with the executive and influences the concrete shape of the operation. Once the operation is over, this function can no longer be fulfilled.<sup>93</sup> By contrast, the purpose of parliamentary approval is not to assess authoritatively (*verbindlich*) the legality of an operation; this is incumbent upon the Court.<sup>94</sup> Political control by Parliament can be exercised through other types of instruments, for example parliamentary resolutions or even a motion of censure against the government.<sup>95</sup>

Importantly, the Court for the first time ruled that parliamentary approval is needed for *all* deployments of German armed military forces abroad ('warlike' or not), and for deployments outside a system of collective security;<sup>96</sup> indeed approval is needed for 'every unilateral deployment'<sup>97</sup> – irrespective of its military or political relevance – including, notably, purely humanitarian operations.<sup>98</sup> The legal threshold, namely at what point a 'deployment' calls for parliamentary involvement, is identical in all cases; it is a 'uniform threshold'.<sup>99</sup> The executive branch does *not* enjoy a margin of purely military and political appreciation that would be beyond the reach of Parliament and of the Constitutional Court. Such leeway does not exist, not even in situations of emergency.<sup>100</sup> The key concept of 'imminent danger' is a legal concept, too; it is fully reviewable by the Court and does not leave space for political assessment by the government.<sup>101</sup>

Applying these principles as a benchmark, the Court found that the rescue operation in Nafurah was indeed a 'deployment' in the sense of the Basic Law and the relevant statute of 2005, not least because 'at the time of the executive's decision on the deployment the likelihood of having to use armed force was particularly high'.<sup>102</sup> The non-occurrence of actual combat activity

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<sup>92</sup>*Ibid*, para 87.

<sup>93</sup>*Ibid*, para 99.

<sup>94</sup>*Ibid*, para 99.

<sup>95</sup>*Ibid*, para 101.

<sup>96</sup>*Ibid*, headnote 1; see also para 66.

<sup>97</sup>*Ibid*, para 69. A parliamentary deliberation is even more needed in operations that have not been discussed with allies (*ibid*). The question whether there was an enabling provision in the constitution for the unilateral operation (which is controversial) was not submitted for decision in this proceedings (para 69); see section 3 on this question.

<sup>98</sup>*Ibid*, paras 71 and 80.

<sup>99</sup>*Ibid*, para 77.

<sup>100</sup>*Ibid*, para 70: The Constitution 'does not [...] grant any interpretative leeway'.

<sup>101</sup>*Ibid*, paras 91–94.

<sup>102</sup>*Ibid*, para 115.



did not alter the fact that there had been a concrete expectation that German soldiers would be involved in combat during the evacuation.<sup>103</sup>

The core contribution of the judgment is the new constitution-based obligation to inform. In order to allow Parliament to exercise the various forms of political control, it is the duty of the government to inform it in detail about military operations. Parliament enjoys an ‘entitlement to information’<sup>104</sup>: the government ‘must inform the Bundestag promptly and in a qualified manner about the deployment of armed forces’.<sup>105</sup> Furthermore, it must present the factual and legal considerations on which the government based its decision, and details regarding the operation (with the level of detail depending on its political and military importance) and its outcome. This must happen as soon as possible, to the *Bundestag* as a whole, and normally in writing. The information must be ‘clear, complete’ and such that it ‘can be easily reproduced’.<sup>106</sup>

The 2015 *Pegasus* judgment has been criticised on the grounds that the Court without sufficient justification cut back both the parliamentary prerogative<sup>107</sup> and also failed to do justice to the democratic and rule of law rationale of the requirement.<sup>108</sup> The critique is that even after completion of a deployment, a parliamentary approval could still deploy the legally relevant function of assuming ‘democratic’ co-responsibility for the entire operation.<sup>109</sup> The government would factor into its urgent decision-making the necessity to ask Parliament afterwards, and this prospect alone – foreseeable deliberation in the *Bundestag* – would influence government decisions. The control of legality by the Constitutional Court cannot fully replace scrutiny by Parliament because the scope of review is limited.<sup>110</sup>

Against this criticism, this author would argue that a backward-looking political responsibility seems quite empty, and that a more extended legal control beyond the review of the Constitutional Court is not necessary. Intensified information to the *Bundestag*, as required by the judgment, is feasible

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<sup>103</sup>*Ibid*, paras 105–17.

<sup>104</sup>*Ibid*, para 104, author’s translation of ‘der parlamentarische Informationsanspruch’. The government has an ‘obligation of formal information’ (para 103; official translation).

<sup>105</sup>*Ibid*, headnote 4. Most likely, the information provided by the government in this case had not satisfied these conditions. However, because the plaintiffs had not even claimed insufficient information, this question was outside the subject matter of the proceedings (*ibid*, para 105).

<sup>106</sup>*Ibid*, paras 103–04, quotes from para 104.

<sup>107</sup>See for the critique the authors mentioned in n 109–n 110. In 2008, the Court had found that ‘[t]he German *Bundestag* must approve every deployment of armed forces *without exception [ausnahmslos]*’ (BVerfGE 121, 135 (n 59) para 89).

<sup>108</sup>See section 5 on the rationales of the requirement.

<sup>109</sup>Heiko Sauer, ‘Anmerkung’ (2016) 71 *Juristenzeitung* 46, 49. The Court had denied this (BVerfGE 140, 160 (n 85) para 99).

<sup>110</sup>Thomas Kleinlein, ‘Kontinuität und Wandel in Grundlegung und Dogmatik des wehrverfassungsrechtlichen Parlamentsvorbehalts’ (2017) 142 *Archiv des öffentlichen Rechts* 43, 71–72 perceives a ‘gap of judicial protection’ (at 72). But see BVerfGE 140, 160 (n 85) para 99.



and satisfies democratic and the rule of law principles.<sup>111</sup> With its clear statements against any executive leeway, the judgment does not mark a turn towards de-parliamentarisation.

## 2.6. The operations against the Islamic State in Syria and Iraq since 2015 and the stretch of 'collective security'

Since 2015<sup>112</sup> the German military has participated in OIR against Islamic State (IS) in Iraq and Syria, deploying not only around 500 troops but a number of Tornado and aerial refuelling aircrafts, as well as one frigate. Action includes the training of Peshmerga combatants in Northern Iraq, aerial refuelling and surveillance, reconnaissance, the exchange of information, and evacuation. The *Bundestag* was properly involved and provided a mandate for up to 1200 troops, which has so far been extended until 31 October 2018.<sup>113</sup> In its formal request to the *Bundestag*, the German government relied on both traditional justifications in the law of nations for using military force. It stated that the international legal basis for the deployment decision was 'Art. 51 of the UN Charter in conjunction with Art. 42(7) TEU as well as resolutions 2170 (2014), 2199 (2015), 2249 (2015) of the Security Council'.<sup>114</sup> From the perspective of international law, neither justification works easily for the military action in and over Syria,<sup>115</sup> and this has an impact on their constitutionality, as will be shown in section 3.

Members and factions of the parliamentary Opposition filed a complaint before the Constitutional Court against the deployment decisions in the context of OIR.<sup>116</sup> It is unlikely that the Constitutional Court will reach the merits of the case.<sup>117</sup> Should this happen, the Court might scrutinise the constitutional basis of the deployment and then would have to pronounce itself incidentally on its international lawfulness as well.

<sup>111</sup>A further statute-based argument in favour of the Court's reasoning is that the wording of *Parlamentsbeteiligungsgesetz* (n 55) § 5(3) only covers ongoing deployments because Parliament cannot request termination of a deployment which is already over.

<sup>112</sup>See details in n 128.

<sup>113</sup>*Bundestag*: Initial approval decision of December 4, 2015 giving a mandate until 31 December 2016 (BT-PP 18/144, 14110 *et seq.*). Most recent (third) prolongation for further six month until 31 October 2018: Gov. Request, BT-Drs. 19/1093 (7 March 2018); approval of the *Bundestag* of 22 March 2018 (BT-PP 19/23, TOP 7, 2062 C, vote at 2072 A).

<sup>114</sup>Initial Gov. Request of 1 December 2015 (BT-Drs. 18/6866 (1 December 2015); author's translation).

<sup>115</sup>In contrast, the operations in and over Iraq are fully covered by the invitation of Iraq. See for more detail Anne Peters, 'German Parliament Decides to Send Troops to Combat ISIS – Based on Collective Self-Defense "in Conjunction With" SC Res. 2249', *EJIL TALK!* (8 December 2015) [www.ejiltalk.org/author/anne-peters/](http://www.ejiltalk.org/author/anne-peters/).

<sup>116</sup>See n 165 for the pending complaint by the Left faction. Further complaints were manifestly inadmissible: A complaint by the *Grundrechte-Partei* (BVerfG, order of 18 February 2016 (– 2 BvE 6/15 –) and a constitutional complaint (*Verfassungsbeschwerde*) by three German activists against the decision on the prolongation of deployment of 9 November 2016 (BT-Drs. 18/9960 (13 October 2016)), Court order of 3 July 2017 (– 2 BvR 1400/17 –).

<sup>117</sup>See section 6 for detail on the procedural requirements of the *Organstreit* proceedings.

### 3. The alignment between the constitutional and international law on the use of force

#### 3.1. Overview

The German constitution specifically hooks onto and refers to the international law of peace. It contains a ‘constitutional command of peace’<sup>118</sup> and a constitutional principle of ‘friendliness towards international law’.<sup>119</sup> Moreover, Article 25 GG says that the ‘general rules of international law shall be an integral part of federal law’. This clause thus transports the international law-based prohibition on the use of force into domestic law.<sup>120</sup> A breach of the ban on force as a ‘general rule’ of international law will, however, not automatically lead to a violation of the constitution, because the ‘general rules’, while taking precedence over federal laws, still rank below the Basic Law.

Finally, the constitutional prohibition of a war of aggression<sup>121</sup> is ‘tied to the concept in international law’.<sup>122</sup> The constitutional concept follows the definition of aggression as spelt out in the UN GA resolution of 1974 and in Article 8*bis* ICC-Statute after the amendments of Kampala. Any activity that evidently constitutes an aggression in the sense of international law is at the same time unconstitutional.<sup>123</sup>

The result of the combination of these constitutional provisions is that any manifest violation of the relevant rules of international law in the area of the use of force<sup>124</sup> *will normally also violate the German constitution*. This means that German constitutional law cannot, as a rule, be more permissive towards the use of force than international law.

The more difficult question is whether the constitution sets a higher bar and is more pacifist than international law. As a historical matter, this assumption was and is widespread as a lesson to learn from Germany’s past as an aggressor state. Because the Basic Law mentions only defence and

<sup>118</sup>BVerfGE 104, 151 (n 51) para 159 (para 30 of the English shortened translation). This ‘precept’ is read out of numerous provisions that mention peace (notably the prohibition of aggression in Article 26, the preamble, Article 24(2), and Article 1(2) GG).

<sup>119</sup>Most recently BVerfGE 141, 1, judgment of 15 December 2015 – 2 BvL 1/12 – *Treaty Override*, paras 65–72.

<sup>120</sup>BVerfGE 104, 151 (n 51) para 160 (para 31 in the official English translation).

<sup>121</sup>Article 26 GG.

<sup>122</sup>BVerwGE [Decisions of the Federal Administrative Court] 127, 302, judgment of 21 June 2005, – 2 WD 12.04 –, section 4.1.2.5 (author’s translation).

<sup>123</sup>Matthias Herdegen, ‘Article 26’ in Theodor Maunz and Günter Dürig (eds), *Grundgesetz Kommentar* (C.H. Beck, loose leaf 81th suppl September 2017) paras 25–27. ‘Evidently’ or ‘manifestly’ here means that a legal justification appears not even arguable (*ibid*, para 27). Aggression is also a crime under § 13 *Völkerstrafgesetzbuch* of 26 June 2002, last amended on 22 December 2016 (*Bundesgesetzblatt* (BGBl.) [Federal Law Gazette] 2016 I, 3150).

<sup>124</sup>Besides the general rules on the use of force and the Charter norms, Articles 5 and 6 NATO (on self-defence and the NATO area) have been most pertinent for the German debate.

collective security, there is no obvious constitutional basis for other types of military action.<sup>125</sup>

Also, the relationship between the two explicit constitutional bases among each other is not fully clear. Under international law, self-defence (Article 51 of the UN Charter) and Chapter VII of the Charter are two distinct tracks. Under German constitutional law, these two modes are not mutually exclusive; there is ‘no strict antagonism between collective security and collective defense’, as the Constitutional Court put it (referring to Article 24(2) and Article 87a GG).<sup>126</sup> Finally, the constitutional bases are not fully congruent to international law. Article 24(2) GG is broader than Chapter VII, while Article 87a GG has been understood by some constitutional lawyers to be narrower than Article 51 of the UN Charter. Because of a traditionally narrow reading of ‘defence’ under Article 87a GG, the alternative constitutional basis – collective security<sup>127</sup> – has during the history of German military deployments been continuously expanded.

### 3.2. ‘Collective security’ under Article 24(2) GG

#### 3.2.1. Military action outside Chapter VII of the UN Charter also covered by Article 24(2) GG? The example of Operation Inherent Resolve against IS

The key contemporary constitutional question is whether military action that is only loosely linked to the UN or NATO still occurs ‘*within and pursuant to the rules*’ of such ‘systems’ (organisations). Examples of German actions that are not easily described as actually occurring within a system of collective security are the contributions to Operation Enduring Freedom (OEF) at various places on the globe from October 2001–2010, the participation in the anti-IS coalition (OIR) in Syria and Iraq since 2014, which has in 2018 been modified towards capacity building in Iraq,<sup>128</sup> and involvement in the training mission in Mali (EUTM) since 2013.

In all instances, the German government argued that – from a constitutional perspective – the German deployments pursuant to these resolutions do ‘occur within and pursuant to the rules’ of a system of collective security and are therefore safely covered by Article 24(2) GG.<sup>129</sup> But this constitutional coverage has been doubted by critics. Qualms relate to the international

<sup>125</sup>See subsection 3.4.

<sup>126</sup>BVerfGE 90, 286 (n 6) para 232.

<sup>127</sup>Article 24(2) GG.

<sup>128</sup>Germany started to contribute to the Anti-IS action basically in the fall of 2015. Training of Peshmerga in Northern Iraq had already begun in 2014. The Peshmerga training mission was completed in the spring of 2018. The new mandate combining Anti-IS action and capacity building in Iraq was approved by the Bundestag on 22 March 2018 and is currently set until 21 October 2018. See also the text accompanying n 112–n 115 in section 2.6.

<sup>129</sup>See for EUTM Mali: Last Gov. Request of 11 April 2018 (BT Drs. 19/1597; Bundestag approval of 26 April 2018 (BT-PP. 19/29), 2744 *et seq.*).

legality of the operation and to the constitutionality of German participation, and both aspects are linked. Herein the present author will concentrate on OIR, the ongoing anti-IS operation in and over Syria and Iraq.<sup>130</sup>

Resolution 2249 (2015) is itself not sufficient as an authorisation for the use of force against IS under *international law*.<sup>131</sup> The resolution is not based on Chapter VII and therefore had to use a milder wording ('calls upon' as opposed to 'authorises'). Thus, the Security Council did not exactly 'authorise' the operations, as the Constitutional Court had formulated in its lead judgment of 1994.<sup>132</sup> Moreover, the resolution specifically asked the member states to act 'in compliance with international law', which can be understood as referring to the parameters of self-defence (as opposed to enforcement action). Another special feature is that OIR is directed against a terror group (IS), and not against an attacker state, and therefore resembles collective defence as opposed to 'collective security', which is the object of the constitutional provision of Article 24(2) GG.

The non-activation of Chapter VII of the UN Charter might taint the constitutionality of the deployment. Does it kick the Security Council resolution out of the 'framework' of a 'system of mutual collective security', as a decision exactly *not* taken 'within and pursuant to the rules' of the 'system'? This is what the critics of German contributions to the anti-IS operation had argued in Parliament. They opined that the German deployment decision is not covered by the state's ratification of the UN Charter in 1973 and therefore lacks a constitutional basis (not covered by Article 24(2) GG).<sup>133</sup>

Against this critique, it is submitted that the German contribution to the anti-IS operations is linked to the UN Security Council exercising a competence laid out in the Charter, and thus fulfils the Federal Constitutional Court's legal requirements for coverage by Article 24(2) GG, even short of

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<sup>130</sup>The legal situation was similar with regard to Operation Enduring Freedom (OEF) after 9/11 in 2001. The Security Council did not authorise the use of force under Chapter VII but only mentioned self-defence (in the preambles of resolutions 1368 (2001) and 1373 (2001)).

<sup>131</sup>Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution' *EJIL TALK!* (21 November 2015) [www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/](http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/) (arguing that the resolution 'does not actually authorize any actions against IS, nor does it provide a legal basis for the use of force against IS either in Syria or in Iraq' but provides political support). Marc Weller, 'Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence Against Designated Terrorist Groups' *EJIL TALK!* (25 November 2015) [www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/](http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/).

<sup>132</sup>BVerfGE 90, 286 (n 6) para 240 said that membership in the UN was the constitutional basis for German participation in 'peacekeeping operations *authorized by the UN Security Council*' (emphasis added).

<sup>133</sup>See *Bundestag* debate of 4 December 2015 (BT-Plenarprotokoll 18/144, 14110, e.g. Sahra Wagenknecht (*Die Linke*), 14115; Alexander Neu (*Die Linke*), 14117; Katja Keul (*Bündnis 90/Die Grünen*), 14121). See in scholarship for the argument that the anti-IS-operation is neither covered by Article 24(2) GG nor by Article 87a GG Mehrdad Payandeh and Heiko Sauer, 'Die Beteiligung des Bundeswehr am Antiterrorereinsatz in Syrien' (2016) 49 *Zeitschrift für Rechtspolitik* 34. This is also the main claim in the pending constitutional *Organstreit* proceedings (see section 6).

‘authorisation’.<sup>134</sup> In its lead judgment, the Constitutional Court had said that UN membership will be the constitutional basis for German participation in operations ‘when the competent organs of the UN assume tasks, competences, and powers that are laid out in the Charter’.<sup>135</sup>

With resolution 2249 (2015) the Security Council issued a binding decision, albeit outside of Chapter VII.<sup>136</sup> The resolution was adopted unanimously and qualified IS as ‘a global and unprecedented threat to international peace and security’ (in the preamble). It used typical Chapter VII language, namely to ‘take all necessary measures’.<sup>137</sup> The operation against IS, undertaken pursuant to this resolution, is multilateral. Germany never launched a unilateral strike. This satisfies the rationale of the constitutional provision of Article 24(2) GG, which is intended to make Germany a reliable ally, and which in turn requires that Germany does not shy away from military contributions.<sup>138</sup> The German contribution has therefore been given – it is submitted – ‘within and pursuant to the rules’ of the UN and is thus covered by Article 24(2) GG. However, it is a borderline case that strains the constitution, notably because the operation against IS is ‘collective’ only in a minimal sense (with two UN members, the US and Russia, basically fighting *against* each other).

It notably does not and should not follow that Security Council resolutions simply condemning terrorism without suggesting any member state action would suffice to bring military deployments under the umbrella of Article 24(2) GG. But such an extrapolation can hardly be avoided once the slippery slope of reliance on a rather soft Security Council resolution has been taken.

### 3.2.2. The training mission in Northern Iraq of 2014

Article 24(2) GG had been stretched further with the ongoing training mission in Northern Iraq, to which Germany contributed from the summer of 2014 to the spring of 2018,<sup>139</sup> and which was in 2018 transformed into a mandate on capacity building in Iraq.<sup>140</sup> The most solid international legal

<sup>134</sup>Arguably, the Court used the verb ‘authorise’ in BVerfGE 90, 286 (n 6) para 240, because the case it had to decide was a *peacekeeping mission*, but not in order to demand an authorisation for all other constellations.

<sup>135</sup>Nehmen die zuständigen Organe der Vereinten Nationen Aufgaben, Kompetenzen und Befugnisse wahr, die in der Satzung angelegt sind, [...] (BVerfGE 90, 286 (n 6) para 240, author’s translation).

<sup>136</sup>See Article 25 UN Charter.

<sup>137</sup>UN SC res 2249, para 5.

<sup>138</sup>Staatliche Selbstverteidigung gegen Terroristen: Völkerrechtliche Bewertung der Terroranschläge von Paris vom 13. November 2015, Aktualisierung und Ergänzung des Gutachtens WD – 3000–191/15 vom 23. November 2015 um: Völkerrechtliche Implikationen der VN-Resolution 2249 (2015), Völkerrechtliche Grundlagen und Verfassungsmäßigkeit einer Beteiligung der Bundeswehr an der Bekämpfung des ‘Islamischen Staates’ in Syrien, BT-WD 2-3000-203/15 (30 November 2015), 18–19.

<sup>139</sup>The government involved Parliament only five months after starting the training. Gov. Request of 17 December 2014 (BT-Drs. 18/3561); Bundestag approval of 29 January 2015, Plenarprotokoll 18/82, at 7814 *et seq.*; vote at 7823).

<sup>140</sup>Gov. Request of 7 March 2018 (BT-Drs. 19/1093); Bundestag approval of 22 March 2018, Plenarprotokoll 19/23, at 2062–74).

basis of this operation is a formal invitation by the government of Iraq in June 2014.<sup>141</sup> In its initial request for approval by the *Bundestag*,<sup>142</sup> the German government relied on that letter, as well as mentioning UN Security Council resolution 2178 (2014) against foreign terrorist fighters, a statement by the President of the Security Council of 19 November 2014,<sup>143</sup> and the conclusions of the EU Council of Foreign Ministers of 20 October 2014.<sup>144</sup> The interventions by MPs on international law in the *Bundestag* debate were muddled. The academic legal service of the *Bundestag* opined that the international legal basis was both intervention by invitation and Article 51 of the UN Charter (in the form of collective self-defence), and that no additional Security Council authorisation was needed.<sup>145</sup>

Again, the constitutional basis of the operation is to some extent linked to the international legal basis. The government relied *only* on Article 24(2) GG.<sup>146</sup> But the government's view that the Security Council's presidential statement suffices to bring a military operation 'within and pursuant to the rules' of a system of collective security is far-fetched. Such presidential statements are not legally binding and are issued as political pronouncements exactly because no agreement could be reached in the Security Council, and because the Council President is not empowered to determine a 'threat to the peace' in terms of Chapter VII. It is better therefore to admit that the training mission in Northern Iraq during its initial eighteen months (before the adoption of UN Security Council resolution 2249) was not covered by Article 24(2) GG.<sup>147</sup> In contrast, it should and could have been based on Article 87a (2) GG, which would have meant entering 'constitutional virgin territory', as the Parliament's academic service put it.<sup>148</sup>

It has rightly been criticised that the 'key' of Article 24(2) GG risks becoming a *passé-partout*.<sup>149</sup> The breaking point of Article 24(2) GG might have been reached with OIR. To avoid a further dilution of the constitutional concept of a 'system of mutual collective security', and instead of using

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<sup>141</sup>Letter by the Iraq of 25 June 2014 to the UN Secretary General (UN Doc S/2014/440) in which the foreign minister wrote: 'we call on Member States to assist us by providing military training, advanced technology and the weapons required to respond to the situation'.

<sup>142</sup>See Request of 17 December 2014 (n 139).

<sup>143</sup>The President of the Security Council had written: 'The Security Council urges the international community, in accordance with international law to further strengthen and expand support for the Government of Iraq as it fights ISIL and associated armed groups' (UN Doc S/PRST/2014/23, 2).

<sup>144</sup>European Union: Council of the European Union, Council Conclusions on the ISIL / Da'esh crisis in Syria and Iraq, Foreign Affairs Council, 20 October 2014, 14463/14, <http://data.consilium.europa.eu/doc/document/ST-14463-2014-INIT/en/pdf> (accessed 4 September 2018).

<sup>145</sup>Völkerrechtliche und verfassungsrechtliche Grundlagen des Bundeswehreinsetzes im Irak, BT-WD 2-3000-239/14 (9 January 2015) 4. The academic opinion did not pronounce itself on the question how the entitlement under the heading of 'invitation' relates to the entitlement collective self-defence.

<sup>146</sup>Request of 17 December 2014 (n 139).

<sup>147</sup>BT-WD 2-3000-239/14 (n 145) 9.

<sup>148</sup>*Ibid*, at 12 (author's translation).

<sup>149</sup>Bardo Fassbender, '§ 244, Militärische Einsätze der Bundeswehr' in Paul Kirchhof and Josef Isensee (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland Vol. XI* (C.F. Mueller, 3rd edn 2013) para 69.

Article 24(2) GG as a mere facade, it might be better to ‘activate’ Article 87a GG – where possible – as a legal basis. However, Article 87a, to which we now turn, is also fraught with problems and notably does not offer a clear solution for anti-terror operations such as OIR.

### 3.3. ‘Defence’ under Article 87a GG

Article 87a GG only covers operations ‘for purposes of defence’.<sup>150</sup> The interpretative question is what ‘defence’ means here. The constitutional notion of ‘defence’ is a concept of domestic law and as such autonomous from international law. On its face, the constitutional principle of friendliness towards international law would seem to require that the interpretation of the constitutional term should follow the evolution of international law. Indeed, both the German Federal Administrative Court<sup>151</sup> and prevailing commentary assumes that the constitutional term ‘defence’ in Article 87a GG is *fully congruent* with the international law of self-defence,<sup>152</sup> and therefore would seem to obey the same yardstick of legality.

This discussion has involved two questions. Who may be defended? And against whom? Both questions have emerged simultaneously and have been merged, because all controversial German contributions to collective action outside the framework of Article 5 of NATO or Chapter VII of the UN Charter (after 2011 in Afghanistan and after 2014/2015 in Syria) took place far away from German soil and were directed against terrorist attacks.

#### 3.3.1. Defence of Germany and other states

The first question is whether defence in terms of Article 87a GG means only defence of German statehood. A conventional understanding had been that the constitution only allows military action needed to defend against attacks that *threaten Germany as a state* – even if remotely.<sup>153</sup> This assumption led a German minister of defence in 2002 to proclaim, with regard to German engagement in Afghanistan, that the security of Germany is also defended at the Hindukush.<sup>154</sup>

<sup>150</sup>See section 1.

<sup>151</sup>BVerwGE 127, 302 (n 122) section 4.1.2.

<sup>152</sup>See among many voices, e.g. Heike Krieger, ‘Art. 87a GG’ in Hans Hofmann and Hans-Günter Henneke (eds), *GG Kommentar zum Grundgesetz* (Carl Heymanns Verlag, 14th edn 2017) para 12; Stefanie Schmahl, ‘Art. 87a’ in Helge Sodan (ed), *Grundgesetz Kompakt-Kommentar* (C.H. Beck, 3rd edn 2015), paras 6–7; Kokott (n 83), paras 24–25; Fassbender (n 149), MN 50; Verfassungsrechtliche Grundlagen für Auslandseinsätze der Bundeswehr, Überlegungen zur Änderung der verfassungsrechtlichen Praxis, BT-WD 2-3000-025/16 (16 February 2016) 8 and 10.

<sup>153</sup>Werner Heun, ‘Art. 87a’ in Horst Dreier (ed), *Grundgesetz-Kommentar*, Vol 3 (Article 83–148) (Mohr Siebeck, 3rd edn 2018) para 17; Otto Depenheuer, ‘Art. 87a’ in Theodor Maunz and Günter Dürig (eds), *Grundgesetz Kommentar* (C.H. Beck, loose leaf 53th suppl October 2008) para 119. These contributions had the merit of clarifying that the constitution does not allow the defence of random goods or interests, such as a German interest in commerce, but only the defence against *armed attacks*.

<sup>154</sup>Peter Struck, first in a press conference of 2 December 2002.



Today, basically all scholarly commentary acknowledges that Article 87a GG covers actions to defend Germany as a state, to defend German allies (*Bündnisverteidigung*, notably within NATO<sup>155</sup>), and that Article 87a(2) GG also covers the collective defence of non-allied states even if this requires operations outside and far away from the country. This would mean that collective self-defence, for example in favour of France (as an ally) and Iraq (asking for military support) in 2015, is permitted under Article 87a GG *as long as it is covered by the international law of self-defence*.<sup>156</sup>

### 3.3.2. Defence against non-state actors, notably in the operation against IS

‘Defence’ as a constitutional concept might be read as including defence against *non-state actors*. Along that line, the constitutional concept would follow a putative evolution of the international legal concept of self-defence moving towards allowing self-defence against large-scale armed attacks by terrorists (with a tenuous link to a state, or even without any attribution to the territorial state in which defensive military action unfolds).

Proponents of relying on Article 87a GG as the basis for defence against terrorist threats argue that this constitutional construction would avoid the overuse of the constitutional concept of ‘collective security’, bring the constitution more in line with the two distinct tracks (collective security or self-defence) available under international law, and open the way for more military engagement. The preference of German political actors always to rely on Article 24(2) GG had the historical motive of signalling to its citizens and to the world that Germany was firmly integrated into multilateral structures and would not go it alone. Such a signal and reassurance is arguably no longer needed.

On the other hand, important arguments speak in favour of sticking to a narrow reading of the constitutional concept of ‘defence’. The chief consideration is that the international law of self-defence is currently unclear and in flux. This counsels against schematically linking the constitutional concept to the (blurry) international one.

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<sup>155</sup>A source of confusion was that NATO has, after the disappearance of the communist threat, expanded its range of action with help of a row of ‘new strategies’. The member states have thereby mandated NATO to go ‘out of area’ both in a geographic and a material sense, notably responding to non-state threats such as terrorists and pirates, far beyond the traditional armed attack by states which Article 5 NATO in conjunction with Article 51 UN Charter originally addressed. A proper Article 5 operation has actually never been conducted. Article 5 NATO was invoked by the North Atlantic Council so far once in history (on 12 September and 4 October 2001, after the terrorist attacks of 9/11). Since then, the *casus foederis* (‘case for the alliance’) has not been formally lifted. The German Left and Green parties occasionally but in vain tried to bring the German government to work towards the termination of the *casus foederis* within NATO bodies. See Zur Dauer des NATO-Bündnisfalles, BT-WD 2-3000-142/08 (13 November 2008).

<sup>156</sup>See the scholarly voices in n 152.



The problem shows up in the anti-IS OIR. The international legal basis conjured by the German government, namely *collective self-defence* for Iraq (and initially also for France),<sup>157</sup> is problematic. In its letter to the Security Council, Germany argued:

ISIL has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not at this time exercise effective control. States that have been subjected to armed attack by ISIL originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence.

The letter claimed that ‘support [to] the military measures of those States that have been subjected to attacks by ISIL’ was a lawful exercise of the right of collective self-defence by Germany.<sup>158</sup> In the *Bundestag*’s debate some days earlier, the German government and the parliamentary majority heavily relied on a legal opinion by the parliamentary academic service in which that service opined that ‘obviously, last but not least against the background of the recent Paris attacks – an evolution of customary law is ongoing’ in the direction of admitting self-defence against non-state actors.<sup>159</sup> But this evolution is less obvious than the academic service claims. The international lawfulness of self-defence against armed attacks by non-state actors without any imputation to the state on the territory of which the defensive action strikes back is disputed.<sup>160</sup>

This uncertainty is mirrored in the controversial interpretation of Article 87a(2) GG. The literature is actually split on this point. Some authors allow defence against terrorist attacks without further conditions.<sup>161</sup> Others opine that military reactions against terrorist attacks count as ‘defence’ in the sense of Article 87a GG only if the threat resembles an inter-state armed attack.<sup>162</sup>

<sup>157</sup>France had invoked the EU-assistance clause (Article 42(7) TEU) (M. François Hollande, ‘Les messages du Président de la République au Parlement’ (16 November 2015) [www.senat.fr/evenement/archives/D46/hollande.html](http://www.senat.fr/evenement/archives/D46/hollande.html)). The EU member states responded with the promise for assistance (Council of the European Union, Outcome of the Council Meeting, 3426th Council Meeting, Foreign Affairs, Council Doc 14120/15 (16 and 17 November 2015) 6. In the latest governmental request for prolongation of the mandate of March 2018 (note 113), the German government did not mention France any longer.

<sup>158</sup>Letter dated 10 December 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/946 (10 December 2015).

<sup>159</sup>BT-WD 2-3000-203/15 (n 138) 14 (author’s translation). The legal opinion takes UNSC Res 2249 as a manifestation of state practice and *opinio iuris* for this new rule (*ibid*).

<sup>160</sup>See on this controversy the contributions in Anne Peters and Christian Marxsen (eds), ‘Self-Defence Against Non-State Actors: Impulses from the Max Planck Dialogues on the Law of Peace and War’ (2017) 77 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1.

<sup>161</sup>Deppenheuer (n 153) para 95; Manfred Baldus and Sebastian Müller-Franken, ‘Art. 87a’ in Hermann von Mangoldt, Friedrich Klein and Christian Starck (eds), *Kommentar zum Grundgesetz: GG*, (C.H. Beck, 7th edn 2018) para 51; Volker Epping, ‘Art. 87a’ in Volker Epping and Christian Hillgruber (eds), *Grundgesetz: Kommentar* (C.H. Beck, 2nd edn 2013) para 11–11.2; Karl-Andreas Hernekamp, in Ingo von Münch and Philip Kunig (eds), *Grundgesetz: Kommentar*, Vol 2 (Article 70–146) (C.H. Beck, 6th edn 2012) para 4.

<sup>162</sup>Bernd Grzeszick, ‘Art. 87a’ in Karl-Heinrich Friauf and Wolfram Höfling (eds), *Berliner Kommentar zum Grundgesetz*, Vol 4 (Article 62–91e) (Erich Schmidt Verlag, loose leaf 17th suppl 2006) para 28; Juliane Kokott, ‘Art. 87a’ in Michael Sachs (ed), *Grundgesetz: Kommentar* (C.H. Beck, 8th edn 2018) para 36.

Finally, a sizeable number of commentators insists on the need of attributing the attack to a state.<sup>163</sup> However, they do not explain which criteria of attribution must be satisfied so as to trigger ‘defence’ in terms of Article 87a GG.

Presuming that an evolution of the international law of self-defence is ongoing (which is controversial) and that a novel, broader reading of Article 51 of the UN Charter is gaining ground,<sup>164</sup> it is not clear that the *constitutional* concept of ‘defence’ automatically follows. The parliamentary oppositional faction of *Die Linke* (the Left Party), in its pending complaint to the Constitutional Court, argues that, should the Constitutional Court follow the broad (and fairly novel) interpretation of Article 51 of the UN Charter in the direction of admitting self-defence against armed attacks by non-state actors, this would be an inadmissible judge-driven evolution of the UN Charter. Then, so the argument runs, this judicial law-making would no longer be covered by the initial approval of Germany’s accession to the UN Charter by the federal statute of 1973, but would require a fresh approval by the legislative branch or at least by the *Bundestag*.<sup>165</sup>

Against the fluent and uncertain state of international law, in order to be safely in conformity with international law on the use of force (as the Basic Law prescribes<sup>166</sup>), German constitutional law needs to remain restrictive as long as the presumed evolution of international law towards extension is not yet firm. This author would therefore argue that, for the time being,<sup>167</sup> Article 87a GG only covers operations that respond to ongoing or imminent armed attacks by a state or are attributable to a state under the ‘classic’ uncontroversial *Nicaragua* criteria.<sup>168</sup> This interpretation safeguards legal certainty

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<sup>163</sup>Krieger (n 152) para 13; Schmahl (n 152) para 7; Bodo Pieroth, ‘Art. 87a’ in Hans D Jarass and Bodo Pieroth (eds), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* (C.H. Beck, 14th edn 2016) Article 87a para 9a; Dieter Hömig, ‘Art. 87a’ in Dieter Hömig and Heinrich A Wolff, *Grundgesetz für die Bundesrepublik Deutschland, Handkommentar* (Nomos, 11th edn 2016) para 3.

<sup>164</sup>See the reference to scholarship in n 160. The author leaves aside the additional problem of a putative evolution of underlying customary law and its interplay with the interpretation of the UN Charter. She also leaves aside the view that Art. 51 of the Charter has always covered self-defensive actions against non-state actors, so that the current practice does not constitute any expansion. The assessment of past (pre-9/11) incidents is mixed, and the ICJ leans towards limiting self-defence to actions against states.

<sup>165</sup>*Organstreit* proceeding, launched by the parliamentary faction *Die Linke* against the deployment decision (complaint lodged on 31 May 2016; proceeding is pending). The complaint is directed both against the Federal government and against the *Bundestag* as respondents. The applicants seek the declaration that the respondents, with their joint deployment decision (of 1 and 4 December 2015), violated competences of the *Bundestag* flowing from Article 24(2) in conjunction with Article 59(2) GG. Applicants’ memo of 31 May 2016, at 110–20.

<sup>166</sup>See n 118–n 124 and accompanying text.

<sup>167</sup>As long as the state of international law has not shifted towards a clear espousal of the lawfulness of self-defence against non-state actors, Art. 87a of the Basic Law could not easily be amended and complemented by a phrase which clarifies that ‘defence’ in the constitutional sense includes defence against terrorist attacks. Besides being in political terms highly unlikely, such an amendment would risk of infringing international law.

<sup>168</sup>*Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (merits) [1986] ICJ Rep 14, para 195. Attacks by non-state armed groups are attributable to a state when the state has sent them or when it is ‘substantially involved’. Under those conditions, self-defence is allowed against the territory of that state.

and at the same time avoids constitutional practice violating international law (and by extension the constitutional principle of friendliness towards international law). In contrast, anti-terrorist and anti-piracy operations need to be based on Article 24(2) GG and can thus be conducted only within a collective, as a multilateral action broadly conceived. Thereby, because the scope of the constitutional authorisation under Article 24(2) GG is much broader than Chapter VII of the UN Charter, Germany is able to shape a practice that might contribute to the crystallisation of the permission of self-defence against non-state actors.

### 3.4. Constitutional law is more restrictive than the international law on the use of force

Other types of military action that are under some conditions allowed under international law, notably rescue operations of own nationals, intervention by invitation, humanitarian interventions in the framework of the responsibility to protect, and anti-terror and anti-piracy operations, are more difficult to justify under the Basic Law. Subsuming all these actions under Article 24(2) GG or, as recently suggested, under Article 87a GG is a stretch.

Firstly, and contrary to a scholarly suggestion, Article 87a GG should not be seen to cover the ‘defence of nationals’<sup>169</sup> (twinning territorial defence), that is, operations to evacuate and *rescue nationals* abroad. So far Germany has twice conducted such operations, but the Constitutional Court itself did not pronounce on their constitutional basis.<sup>170</sup>

Unilateral ‘Blitz-type’ rescue operations, especially non-combat evacuation operations, such as the aforementioned Operation *Pegasus* in Libya, are mostly (and rightly) considered to be permitted under the law of nations, although opinion is divided as to the legal explanation. Many scholars allow such action under the heading of self-defence. This qualification opens the door to Article 87a GG. If, however, the international lawfulness is sought elsewhere (notably in an independent rule of customary law), Article 87a GG would not be available. Then, a constitutional basis found either in Article 32 GG (conduct of foreign affairs),<sup>171</sup> in the right to life (Article 2(2) GG),<sup>172</sup> or in Article 25 GG (general rules of international law as part of the law of the land) would seem to work only on the premise (not shared in this article) that unilateral non-defensive action is allowed by the Basic Law, and not barred by Article 87a GG.<sup>173</sup> The issue illustrates

<sup>169</sup>In favour of personal defence notably Depenheuer (n 153) paras 39–40.

<sup>170</sup>The evacuation from Libya led to BVerfG *Pegasus*, but the proceeding was only about the division of competences between government and parliament and not about the constitutionality of the operation in the first place. See section 2.5.

<sup>171</sup>Wiefelspütz (n 2) 183–85.

<sup>172</sup>Fassbender (n 149) para 77.

<sup>173</sup>*Cf.* on the doctrine n 50.

the tensions arising from the mismatch between the international legal bases and the constitutional grounds for military action abroad.

Secondly, a military strike upon *invitation* (such as the request by Iraq in 2014<sup>174</sup>) may only be conducted if covered by either of the two constitutional provisions as discussed previously. Thirdly, current international law does not recognise an independent allowance to undertake *humanitarian intervention*. Any military delivery of the responsibility to protect may only happen in the framework of Chapter VII of the UN Charter,<sup>175</sup> and this would then also be covered by Article 24(2) GG.

Overall, the constitutional situation for Germany is that the state may *not* undertake all forms of military operations that are allowed under international law, except if multilaterally embedded. This is fully in line with the constitution's wording and intent, based on Germany's historic legacy. In terms of legal policy, Germany should avoid hiding behind a sham 'collective security' that is no more than several states acting in parallel and should likewise avoid pursuing a 'defence interventionism'.<sup>176</sup>

#### 4. Procedures and modalities under the statute on parliamentary participation of 2005

The case-law has interpreted the Basic Law as creating a 'combined power'<sup>177</sup> of the government and Parliament's first chamber to decide on any military deployment abroad.<sup>178</sup> The 2005 statute on parliamentary participation (*Parlamentsbeteiligungsgesetz*)<sup>179</sup> says that any 'deployment of German armed forces outside the scope of the Basic Law requires approval of the Bundestag',<sup>180</sup> a requirement that flows 'directly from the constitution'.<sup>181</sup> The statute only regulates the 'form and extent of the *Bundestag*'s participation', as its opening paragraph puts it.<sup>182</sup>

##### 4.1. The trigger concept of 'deployment'

The term around which the parliamentary approval turns is 'deployment'. The provision of § 2(1) of the statute defines this as: 'A deployment of armed forces

<sup>174</sup>See n 141.

<sup>175</sup>Resolution adopted by the General Assembly, World Summit Outcome, UN Doc A/RES/60/1 (24 October 2005) paras 138–39.

<sup>176</sup>BT-WD 2-3000-025/16 (n 152) 10.

<sup>177</sup>See n 90.

<sup>178</sup>The Constitutional Court never explained or justified that only the first chamber and not the entire Parliament needs to get involved (as the German 'constitutional heritage' on which the court relied would have suggested).

<sup>179</sup>See n 55.

<sup>180</sup>*Parlamentsbeteiligungsgesetz* (n 55) § 1(2) (author's translation).

<sup>181</sup>BVerfGE 90, 286, (n 6) para 349; see also BVerfGE 121, 135 (n 59) para 53.

<sup>182</sup>*Parlamentsbeteiligungsgesetz* (n 55) §1(1) sentence 1 (author's translation). Also, the statute does not regulate the determination of the state of national defence (*Verteidigungsfall*, Article 115a GG). Neither is the statute applicable to deployments inside the country.

is present when soldiers of the German army are *involved in armed undertakings or when the involvement in an armed undertaking is to be expected*.<sup>183</sup> The provision of § 2(2) defines which activities are *not* to be considered as a 'deployment'. These are, firstly, 'preparatory measures and planning' and, secondly, 'humanitarian aid service and auxiliary action [*humanitäre Hilfsdienste und Hilfsleistungen*]' with arms carried only for self-defence 'when it is not to be expected that soldiers will be involved in armed undertakings'.<sup>184</sup>

In 2008, the Federal Court fleshed out in more detail the concept of deployment. It also established a legal *presumption* for the requirement of parliamentary approval.<sup>185</sup> 'Deployment' can be distinguished from law enforcement activities by looking at the 'genuinely military' character of an operation and at the belligerence of the context.<sup>186</sup> The qualification as a 'deployment' is independent of the constitutional and international legal basis of the military operation. This also means that putative illegality under national or international law is irrelevant to the requirement of the *Bundestag's* approval.

The need for secrecy is no reason in itself to forego Parliament<sup>187</sup> but might justify the delegation to parliamentary committees whose sessions are not public and which can be committed to strict confidentiality, for example the committee on defence.<sup>188</sup>

#### 4.2. Concrete expectation of combat is sufficient

Most importantly, the 2008 judgment of the Constitutional Court clarified that it is irrelevant whether an armed conflict or combat was already happening. The 'concrete expectation that German soldiers will be involved in *armed conflicts* [*bewaffnete Auseinandersetzungen*] suffices', says the Court.<sup>189</sup> The statute uses the term armed undertakings (*bewaffnete Unternehmungen*).<sup>190</sup> What is meant here is combat activity, not the existence of an armed conflict in terms of IHL.

<sup>183</sup>*Parlamentsbeteiligungsgesetz* (n 55) § 2(1) (author's translation, emphases added).

<sup>184</sup>The ultimately defeated amending bill of the 2005 Statute 'Entwurf eines Gesetzes zur Fortentwicklung der parlamentarischen Beteiligung bei der Entscheidung über den Einsatz bewaffneter Streitkräfte im Ausland im Zuge fortschreitender Bündnisintegration', § 2(2) and § 2a (BT-Drs. 18/7360 (26 January 2016)) had proposed to extend the negative list of non-deployment to include also logistic support, medical aid, training missions in safe environment, certain observer missions and the delivery of tasks in integrated or multinational staff in headquarters, posts, or staff outside combat zones.

<sup>185</sup>BVerfGE 121, 135 (n 59) para 72.

<sup>186</sup>*Ibid*, para 81 ('*militärisches Gepräge*'); BVerfGE 140, 160 (n 85) para 109 ('*kriegerischer Gesamtkontext*').

<sup>187</sup>This follows *e contrario* from *Parlamentsbeteiligungsgesetz* (n 55) § 5, which allows on rescue operations without parliamentary approval only if public debate would endanger lives.

<sup>188</sup>§ 69 of the Rules of Parliament (*Geschäftsordnung des Deutschen Bundestages und Geschäftsordnung des Vermittlungsausschusses*, last amended on 12 June 2017 (BGBl. 2017 I, 1877)), esp. section 7 for secrecy.

<sup>189</sup>BVerfGE 121, 135 (n 59) headnote (official translation). The Court confusingly used 'armed conflicts' ('*bewaffnete Auseinandersetzungen*') and 'combat' ('*Kampfgeschehen*') and 'use of armed force' ('*Anwendung von Waffengewalt*') interchangeably.

<sup>190</sup>*Parlamentsbeteiligungsgesetz* (n 55) § 2(1).

The Court spelt out the statute and cut back the parliamentary prerogative slightly: if combat is only a remote and abstract ‘mere possibility’, then the action does not yet require approval by the *Bundestag*.<sup>191</sup> The expectation of combat must be ‘concrete’ and ‘well-founded’, with ‘sufficient tangible actual evidence that a deployment [...] may lead to the use of armed force’ and a ‘particular proximity to the use of armed force’.<sup>192</sup> Involvement in armed conflicts, in the sense of actually using arms, ‘must be expected immediately’.<sup>193</sup> The assessment of probability must examine the ‘aggregation of factual circumstances’.<sup>194</sup> In integrated NATO operations, the participation of German soldiers, for example in the aerial surveillance of an adjacent country, can quasi ‘automatically’ lead to their use of armed force, because once the soldiers are dispatched, Germany can no longer influence the course of events.<sup>195</sup> It is irrelevant whether combat actually takes place; what counts is the *ex-ante* assessment of factual and temporal proximity.<sup>196</sup>

It is neither necessary nor sufficient that the deployed personnel carry arms themselves. The threshold to deployment can be reached even if members of the military only supply combat-relevant information, perform reconnaissance, or give orders for the use of arms.<sup>197</sup>

In order to assess when Parliament needs to be involved, the most difficult line to draw is probably between the ‘preparatory measures’ and the point where deployment begins. Borderline activities are the movement of troops to the territory of an ally, the delivery of arms, training, surveillance, and the furnishing of information. Training missions, which are in practical terms highly relevant, will normally qualify as ‘deployment’ only if they take place in a dangerous environment (such as those in Afghanistan<sup>198</sup>). Another example of a borderline case is Germany’s participation in the EU ‘Sea Guardian’ operation in the Mediterranean. The ‘multifunctional mandate’ comprises surveillance, capacity building, and combatting terrorism and weapons smuggling. Government and Parliament treated this as a ‘deployment’ not least because it was in political terms controversial (due to its scope).<sup>199</sup>

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<sup>191</sup>BVerfGE 121, 135 (n 59) para 77. In terms of the statute, such activity then would not qualify as a ‘deployment’ in the first place and falls outside the scope of the statute.

<sup>192</sup>*Ibid*, paras 76–79. Put the other way round: it is not sufficient that combat activity cannot be ruled out. Such a mere probability does not lead to the determination of a ‘deployment’.

<sup>193</sup>*Ibid*, para 79.

<sup>194</sup>*Ibid*, para 79.

<sup>195</sup>*Ibid*, para 89 [‘*Bündnisautomatik*’]. The structure of command and the importance of German troops’ tasks is immaterial (*ibid*).

<sup>196</sup>BVerfGE 140, 160 (n 85) para 108.

<sup>197</sup>BVerfGE 121, 135 (n 59) para 81. These criteria resemble the criteria for ‘direct participation in hostilities’ under IHL. On the other hand, if the deployment has a non-military character and soldiers carry arms only for personal self-defence, the threshold is not yet reached (*ibid*, para 81). Conversely, a robust mandate for soldiers is an indication of a dangerous environment in which combat may break out.

<sup>198</sup>See, e.g. the German contribution to ‘Resolute Support’ (Gov. Request of 19 November 2014; BT Drs. 18/3246). Bundestag (*Plenarprotokoll* 18/76 of 18 December 2014, p. 7282 C).

<sup>199</sup>Gov. Request of 15 September 2016 (BT-Drs. 18/9632) and Bundestag approval of 29 September 2016 (*Plenarprotokoll* 18/193, p. 19266, 19268). Latest prolongation until 31 March 2019 by Gov. Request of 7

In the aftermath of 9/11, logistical activities – such as air transports of other nations’ peacekeeping soldiers and of materials, as well as the dislocation of AWACS airplanes in October 2001 to the US – were considered to be below the threshold. In contrast, the dispatch of German soldiers and the transfer of AWACS aircrafts from their home base in Germany to a Turkish base with a view to monitoring the airspace over Turkey in 2003 was determined to be a deployment by the Court because of the fear of a spill-over from the Iraq war.<sup>200</sup>

An important question, linked to the definition of the threshold, is the timing of parliamentary approval. If approval is sought late it risks ratifying a *fait accompli*.<sup>201</sup> But when exactly does an operation reach the point that the *Bundestag* must approve it? Under the statute, the request by government must be ‘in time [*rechtzeitig*] before the beginning of the deployment’.<sup>202</sup> An example is the training of Kurdish Peshmerga forces. The German government decided on 31 August 2014 to support training in Northern Iraq by furnishing military equipment, weapons and ammunition to the Peshmerga. Earlier in August, six German soldiers had been dispatched in Northern Iraq. In September 2014, further ‘non-lethal’ equipment was delivered and more soldiers stationed. In parallel, Iraqi Peshmerga combatants were trained in Germany.<sup>203</sup> The government requested approval by the *Bundestag* only in December 2014, specifically for the ‘training mission in the Kurdistan-Iraq region’. Approval was then granted by the *Bundestag* in January 2015.<sup>204</sup>

At the opposite end of the spectrum, approval sought and given very early would risk becoming a blanket authorisation. So only the right timing will allow the *Bundestag* to embrace responsibility in a meaningful way.

### 4.3. Formalities

Normally, deployments are authorised for one year. The government starts to prepare the decision for prolongation several months before the lapse of this time period. The governmental request must contain information on the mandate, the territory, the international and constitutional legal basis, the maximum number of troops, the capacities, the planned duration, and

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March 2018 (BT-Drs. 19/1097) and approval by the *Bundestag* of 22 March 2018 (*Plenarprotokoll* 19/23, p. 2095, at 2097).

<sup>200</sup>BVerfGE 121, 135 (n 59) paras 83–92. Critically Wiefelspütz (n 2) 317–23 who found the concrete expectation of involvement in combat lacking. The airplanes then conducted 105 surveillance flights over roughly two months, each with participation of German staff.

<sup>201</sup>BVerfGE 121, 135 (n 59) para 80.

<sup>202</sup>*Parlamentsbeteiligungsgesetz* (n 55) § 3(1).

<sup>203</sup>Die laufenden Auslandseinsätze der Bundeswehr, Rechtliche Grundlagen, politische Begründungen, Personalumfänge und Kosten (Aktualisierung des Sachstands WD 2-3000-122/14), BT-WD 2-3000-037/16 (21 March 2016) 43.

<sup>204</sup>See n 139.



expected costs and financing. The government diligently complies with this and even goes beyond it, for example by explaining the political context.<sup>205</sup>

The governmental requests are treated like parliamentary bills except that the second and third reading in the plenary are joined.<sup>206</sup> Four committees (foreign affairs, defence, budget, and legal affairs) are usually involved in the preparation.

Practice shows that lengthiness in Parliament is no real problem. Normally, the processing of a request by the government runs over several weeks. But the rules of procedure of the *Bundestag* allow for accelerated treatment under certain conditions.<sup>207</sup> For example, the approval of OIR took only four days.<sup>208</sup> The decision in the *Bundestag* must be taken by a simple majority.<sup>209</sup>

The statute foresees a simplified procedure for ‘deployments with low intensity and moderate consequences’,<sup>210</sup> which requires involvement of two parliamentary committees, the foreign affairs committee and the defence committee. This has very rarely been used for prolongations of peace missions<sup>211</sup> and has not become particularly practical.<sup>212</sup>

The *Bundestag* can make an explicit reservation or formulate a condition, and thus tie its approval to specific factual or legal circumstances. Indeed, the government has occasionally asked for approval explicitly conditioned on the persistence or renewal of a Security Council mandate, for example for participation in peace missions in Sudan and Lebanon.<sup>213</sup> This means that the approval would expire should the Security Council not renew its authorisation. Otherwise, the approval will expire *eo ipso* only when circumstances have *manifestly* changed: an easy *eo ipso* expiration would create legal insecurity and thus compel the government to constantly seek renewal.<sup>214</sup>

<sup>205</sup>See, e.g. the six-page initial Gov. Request on the anti-IS operation OIR (n 208), the six-page Request on the first prolongation until 31 December 2017 (BT-Drs. 18/9960 (13 October 2016)); and the eight-page Request on the second prolongation until 31 March 2018 (BT-Drs. 19/23 (25 October 2017)). See for the concomitant parliamentary approvals n 113.

<sup>206</sup>Rules of Parliament (n 188) § 96a. § 78 of the Rules which regulates federal statutes approving international treaties is applied.

<sup>207</sup>Rules (n 188) § 126 leaves room for deviations.

<sup>208</sup>Gov. Request of 1 December 2015 (BT-Drs. 18/6866 (1 December 2015)); ‘Beschlussempfehlung und Bericht des Auswärtigen Ausschusses’ of 2 December 2015 (BT-Drs. 18/6912 (2 December 2015)); first reading in the *Bundestag* on 2 December 2015 (BT-PP 18/142, 13882 *et seq.*); second reading and decision in the *Bundestag* of 4 December 2015 (BT-PP, 14110 *et seq.*). See for the prolongation n 113.

<sup>209</sup>General rule under Article 42(2) GG (see BVerfGE 90, 286 (n 6), para 345). This differs from the formal determination of the state of defence under Article 115a(1) sentence 2 GG which requires a 2/3 majority of the votes cast in the *Bundestag* and consent of the second chamber (*Bundesrat*).

<sup>210</sup>*Parlamentsbeteiligungsgesetz* (n 55) § 4.

<sup>211</sup>E.g. for two prolongations of the peace mission in Sudan (UNMIS) on the basis of UNSC Res 1590 (2005) and subsequent resolutions see, e.g. BT-PP 16/58, 5755 (20 October 2005); also BT-Drs. 16/5142 (26 April 2007) 2.

<sup>212</sup>The main reason is that it is sufficient that 5% of the members of the *Bundestag* can contest that the deployment is unimportant and thus easily demand the normal procedure, notably a debate in the plenary.

<sup>213</sup>See, e.g. Gov. Request for the prolongation of the Lebanon-mandate (BT-Drs. 16/6278 (28 August 2007) 1).

<sup>214</sup>See on the *Kosovo*-decision of 2009 text accompanying n 272.



Also, in less obvious situations of change, expiration is unnecessary because Parliament can always make use of its right to recall;<sup>215</sup> the *Bundestag* remains the ‘master of its assent’.<sup>216</sup> Recall is a matter of political discretion (within the limits of the law) and may become relevant after elections. If Parliament recalls, then the government is obliged to withdraw as quickly as possible. The remote risk of incurring state responsibility, for example for failure to honour commitments under international law, is inherent in the constitutional division of competences.

The clause of § 5 of the *Parlamentsbeteiligungsgesetz* allows deployment without prior approval of the *Bundestag* in two scenarios: imminent danger<sup>217</sup> or rescue operations, when public involvement of the *Bundestag* would endanger the lives of those to be rescued.<sup>218</sup> In these two cases, government must inform the *Bundestag*,<sup>219</sup> and must promptly ask for subsequent approval for the operation. If the *Bundestag* refuses, the operation must be terminated.<sup>220</sup> This statutory scheme implies that the urgent or rescue operation is still ongoing and not yet completed when the approval is sought. The Constitutional Court’s *Pegasus* judgment of 2015 clarified the legal situation, notably the obligation to inform, for *completed* rescue operations.<sup>221</sup>

To conclude, the practice of parliamentary approval leans towards the extensive involvement of Parliament. Government reckons with the fact that the parliamentary Opposition will reclaim the prerogative, and therefore readily ask for approval in order to avoid a complaint before the Federal Constitutional Court. Practice also shows serious and engaged debates which have not become ritualised. The only routine are mandates on the basis of Security Council resolutions (Chapter VII-authorisations or peacekeeping).<sup>222</sup>

#### 4.4. The aborted statutory reform

Against the background of the intensification of military engagement, the need for rapid action (for example within the NATO response force), and the prospects of pooling military capacities (such as foreseen by the Permanent Structured Cooperation (PeSCo) of the EU),<sup>223</sup> and constant worries about Parliament obstructing the reliability of Germany as a military ally, a reform of the 2005 statute was ventilated but ultimately

<sup>215</sup>*Parlamentsbeteiligungsgesetz* (n 55) § 8.

<sup>216</sup>BVerfGE 124, 267, order of 13 October 2009, - 2 BvR 4/08 - *independence of Kosovo* (inadmissibility decision by judicial order because the complaint was manifestly ill-founded; § 24 BVerfGG), para 23.

<sup>217</sup>*Parlamentsbeteiligungsgesetz* (n 55) § 5, section 1, sentence 1.

<sup>218</sup>*Ibid*, section 1, sentence 2.

<sup>219</sup>*Ibid*, section 2.

<sup>220</sup>*Ibid*, section 3.

<sup>221</sup>See section 2 of this article.

<sup>222</sup>See, e.g. Wiefelspütz (n 2), 8, 308, 430–32 (the author was himself an MP).

<sup>223</sup>PeSCo is a legal framework aimed at incentivising defence cooperation among member states, launched in 2017.

abandoned. The reform bill of 2016,<sup>224</sup> based on a parliamentary committee report of 2015,<sup>225</sup> sought to define operations below the threshold of deployment that would not need parliamentary approval. The bill also sought to codify the *Pegasus* judgment by prescribing the *ex post* information of Parliament on urgent rescue operations. Finally, it foresaw an *ex post* evaluation of deployments, reporting about secret operations, and annual reporting about ‘multilateral military alliance capacities’. The reform agenda had been from the outset criticised by *Die Linke* and *Die Grünen* (the Green Party) as a manoeuvre to undermine parliamentary power. Parliament could not and should not surrender its political responsibility for each and every single deployment by adopting a statute which would make government more of a gatekeeper.<sup>226</sup> The reform petered out in 2017, not least because constitutional law experts doubted its compatibility with the nuanced constitutional case-law. The possible gain in legal security would have been lost through the risk of judicial proceedings (*Organstreit*) before the Constitutional Court.

## 5. The requirement of parliamentary approval

The requirement of parliamentary approval to military deployments was in 1994 created through judicial law-making as an informal constitutional amendment.<sup>227</sup> What are its rationales?

### 5.1. Separation of powers

In Germany, as in other democratic states, foreign affairs have traditionally been viewed as the domain of the executive. The perceived needs for secrecy, swiftness, uniformity (speaking with one voice), and the demands of military alliances (*Bündnisfähigkeit*)<sup>228</sup> stand in tension with parliamentary debate, which is open, slow, and a cacophony of many voices.

<sup>224</sup>See n 184.

<sup>225</sup>The committee (*Kommission zur Überprüfung und Sicherung der Parlamentsrechte bei der Mandatierung von Auslandseinsätzen der Bundeswehr*), requested by the parliamentary groups of CDU/CSU and SPD, established on 19 March 2014 (BT-Drs. 18/870 (19 March 2014)) under the chairmanship of the former minister of defence Volker Rühle had published its final report with recommendations on 16 June 2015 (BT-Drs. 18/5000 (16 June 2015)). The bill only marginally changed the committee’s proposal.

<sup>226</sup>*Cf.* notably one of the experts heard in a Parliamentary committee, Ulrich Hufeld, ‘Stellungnahme zur Fortentwicklung der parlamentarischen Beteiligung bei der Entscheidung über den Einsatz bewaffneter Streitkräfte im Ausland – Anhörung zum Gesetzentwurf der Fraktionen der CDU/CSU und SPD (BT-Drs. 18/7360) im Ausschuss für Wahlprüfung, Immunität und Geschäftsordnung des Deutschen Bundestages am 13. April 2016’ (6 April 2016) [www.bundestag.de/blob/418844/cf5b54aedde68d6dd7aac2b1a8b5d3c3/hufeld-data.pdf](http://www.bundestag.de/blob/418844/cf5b54aedde68d6dd7aac2b1a8b5d3c3/hufeld-data.pdf), 4.

<sup>227</sup>Meanwhile, the requirement might have matured into ‘constitutional customary law’. Wiefelspütz (n 2) 266; Kleinlein (n 110) 45.

<sup>228</sup>See on this the foundational study by Roman Schmidt-Radefeldt, *Parlamentarische Kontrolle der internationalen Streitkräfteintegration* (Duncker & Humblot, 2005).

Still in 1984, the Constitutional Court admitted a ‘tendency of parliamentarisation in the formation of foreign affairs objectives’ but nevertheless strictly limited the involvement of Parliament to the approval of specific treaties, as explicitly foreseen in Article 59(2) GG.<sup>229</sup> It denied any further powers of Parliament in the field of foreign relations and rejected the idea of an ‘erroneous all-encompassing parliamentary prerogative’ by pointing to the separation of powers, and it postulated a ‘core field of executivist responsibility’.<sup>230</sup> Ten years later (in 1994), parliamentary involvement was still seen by the Court as an exception to the allocation of foreign affairs to the executive.<sup>231</sup> Today, this view has been overcome: both foreign and military affairs are generally regarded as a mixed power.<sup>232</sup>

The German political system is a parliamentary democracy in which the government emerges out of Parliament and mirrors the result of the elections to Parliament. In such a system, the separation between the legislature and the executive does not have great political significance. The parliamentary majority does not need an additional instrument because its political viewpoint is catered for in the government itself. So, politically speaking, parliamentary approval *is a tool of the Opposition*. This tool enjoys judicial protection because the Opposition possesses standing to instigate an *Organklage* proceeding claiming the violation of parliamentary power.<sup>233</sup>

## 5.2. Shifting rationale: from military to democracy

In the course of the almost twenty-five years since the invention of the requirement of parliamentary approval, its justification and rationale has evolved. In 1994, the Constitutional Court originally anchored the requirement in an ostensible German constitutional tradition and framed the requirement as a feature of the constitution of the armed forces (*Wehrverfassung*<sup>234</sup>). The conceptualisation, which prevailed from 1994 to 2008, placed the power to deploy the military *outside* the area of foreign affairs and thus avoided contradicting the aforementioned traditional view that foreign affairs was the domain of the executive.<sup>235</sup> While this legal pedigree rendered the requirement of approval acceptable to traditionalists, it was more an

<sup>229</sup>See text accompanying n 242.

<sup>230</sup>BVerfGE 68, 1 (n 31) paras 136–37 (author’s translation).

<sup>231</sup>BVerfGE 90, 286 (n 6) para 321.

<sup>232</sup>This view has forerunners in Eberhard Menzel ‘Die auswärtige Gewalt der Bundesrepublik’ (1954) 12 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 179, 194–200 (foreign affairs as a ‘combined power’); Rüdiger Wolfrum, ‘Kontrolle der auswärtigen Gewalt’ (1997) 56 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 38, 40.

<sup>233</sup>See section 6.

<sup>234</sup>BVerfGE 90, 286 (n 6), para 338. The ‘*Wehrverfassung*’ are the provisions inserted into the Basic Law in 1956 (*Gesetz zur Ergänzung des Grundgesetzes* of 19 March 1956, BGBl. 1956 I, 111 (Nr. 11 of 21 March 1956)).

<sup>235</sup>Kleinlein (n 110) 60.

academic postulate than living constitutional law. The German Parliament had the constitutional power to declare war only during a brief period of the Weimar Republic (1918–1933), though in practice never used it. German constitutional reality was such that the *Reichs* President held the dominant power over the army. By inventing the ‘parliamentary army’ in 1994,<sup>236</sup> the Federal Constitutional Court belatedly satisfied the nineteenth-century quest for a constitutionalised citizens’ army and elevated a liberal aspiration to constitutional law.<sup>237</sup>

In later judgments and decisions, this special doctrinal construct was abandoned. Parliamentary approval was fitted into the pattern of the rule of law and democracy and thus ‘normalised’.<sup>238</sup> In our times of increasing global interdependence and the blurring of the spheres of internal and external political affairs, the need for a thick democratic basis of ‘foreign’ relations is generally acknowledged. The involvement of the *Bundestag* in military dispatches is no longer an anomaly but in hindsight turns out to be a forerunner<sup>239</sup> of an ongoing parliamentarisation and democratisation of foreign affairs, which is visible, for example, in the publication of traditionally secret treaty negotiations that have come under intense public and parliamentary scrutiny.

### 5.3. Making good for executivist NATO transformations

The requirement of parliamentary approval is also a corollary and a counterpoint to the government’s monopoly on developing the relevant treaty regimes, notably NATO. Parliament has been kicked out of participation in making the strategic decisions, that is, the successive NATO strategies by which the range of NATO activity has been much expanded. Inversely, it has gained the ultimate say on each single deployment. During the epochal change in the decade following the end of the Cold War, the executive branch’s power in the military sphere was amplified through constitutional interpretation in two ways: firstly by facilitating foreign deployments through a broad reading of Article 24(2) GG,<sup>240</sup> and secondly by acknowledging the executive’s power to ‘develop’ international treaties, notably NATO, without the involvement of Parliament on the basis of a narrow reading of Article 59(2) sentence 1 GG. In this context, the function of the prior approval of Parliament on the domestic level is to counterbalance the executive’s power.

Under the Basic Law, important international treaties, namely those ‘that regulate the political relations of the Federation or relate to subjects of

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<sup>236</sup>BVerfGE 90, 286 (n 6) para 321.

<sup>237</sup>Fassbender (n 149) paras 90–91, 94–98.

<sup>238</sup>Kleinlein (n 110).

<sup>239</sup>*Ibid.*, 60.

<sup>240</sup>See section 2.

federal legislation', need to be approved by federal statute (Article 59(2) GG). The function of this statute is to make the treaty part of the domestic legal order and to secure the democratic basis of the treaty which was negotiated and concluded by the executive.<sup>241</sup>

While NATO had regularly adopted strategic concepts since its foundation in 1949, it was only after 1989 that 'new' strategic concepts led to a pronounced substantive and geographic expansion of the organisation's activity.<sup>242</sup> Thereby, the organisation reacted to the melting away of the military menace posed by the Socialist Block, which had been its *raison d'être*, by refocusing on the emergence of new threats, notably global terrorism. NATO here gave allowance to 'non-Article 5 operations'. Because these operations are beyond the substantive and geographical scope of the collective defence against an armed attack under Article 5 and 6 of NATO, they have come to be called 'out-of-area' operations.<sup>243</sup>

From a democratic perspective, the question is whether these strategic concepts are still covered by the original treaty and thus merely 'developed' the treaty-based system of collective security. If not, they would have actually *changed* the system and thus amounted to (informal) treaty revisions (amending treaties), which, given their political importance, fall under the rule of Article 59(2) sentence 1 GG and would thus have required a consenting statute by the German Parliament. The Constitutional Court had to deal repeatedly with this question.<sup>244</sup> It stated that even important strategic documents that are not treaties will *not* require a parliamentary statute (or any other form of participation by the *Bundestag*). A statute is needed only for the conclusion of treaties (including amending them).<sup>245</sup>

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<sup>241</sup>In the tradition of considering foreign affairs to be a prerogative of the government, parliamentary participation in treaty-making was seen as an exception, as an extraordinary interference of parliament in the executive's domain (BVerfGE 1, 372, judgment of 29 July 1952 – 2 BvE 2/51 – *Deutsch-Französisches Wirtschaftsabkommen*, paras 96–97; BVerfGE 1, 351, judgment of 29 July 1952 – 2 BvE 3/51 – *Petersberger Abkommen*, para 83).

<sup>242</sup>After 1989, new strategic concepts and similar documents were adopted in 1991, 1999, 2006, 2009, and, most recently, 2010.

<sup>243</sup>The term 'out-of-area' confusingly referred to an extended geographic area of action, to an extension of tasks, and to the extensions of members of NATO. It was in the German debate mostly used to denote military action beyond collective defence as foreseen in Article 5 and 6 NATO Treaty and notably referred to the German participation in UN peace missions or sanctions, partly implemented by NATO.

<sup>244</sup>The leading case is BVerfGE 104, 151 (n 51), official English translation shortened. See already BVerfGE 90, 286 (n 6) paras 257–95 (no official English translation).

<sup>245</sup>The Court opined that the application of the clause on treaty-making (Article 59(2) GG) in an analogous fashion to the informal evolution of international treaties (and thus requiring a formal parliamentary statute of assent) would give rise to legal uncertainty, stymie the executive, and would run against the separation of powers (BVerfGE 104, 151 (n 51) para 149 in the German text; para 20 in the English shortened official translation). The follow-up question then is when a treaty (as opposed to a political or soft law document) is present. The Court here looked at the 'intention to be legally bound' as the decisive criterion (*ibid*, German text paras 133–38) (which it found to be absent). This is almost completely circular because the task is exactly to find out whether and when the parties intended to conclude an amending treaty to the NATO Treaty.

From the perspective of the Basic Law, every German military contribution to each specific operation that ‘grows out of the seeds planted in the founding treaty’<sup>246</sup> enjoys a democratic basis. The reason is that German participation is covered by the initial parliamentary statute (under Article 59(2) GG) assenting to the founding treaty of the relevant organisation (such as the UN, NATO, and the EU). This also means that an *ultra vires* operation would not only be outside the particular organisation’s founding treaty but at the same time outside the parliamentary statute that brought that treaty into the domestic legal order and would thus lack constitutional and democratic legitimacy.<sup>247</sup>

The gist of the newer Constitutional Court decisions on military deployments is that the parliamentary decision on each single military deployment is seen as *compensating for the overall strategic decisions lacking parliamentary foundation*.<sup>248</sup> The *AWACS II* judgment of 2008 exposes this:

German participation in the overall strategic direction of NATO and in decision-making as to specific deployments of the alliance is quite predominantly in the hands of the Federal Government [...] But the freedom of the Federal Government to structure its alliance policy does not include the decision as to who, on the domestic level, is to determine whether soldiers of the Bundeswehr will take part in a specific deployment that is decided in the alliance. *By reason of the political dynamics of an alliance system, it is all the more important that the increased responsibility for the deployment of armed forces should lie in the hand of the body that represents the people.*<sup>249</sup>

The *Lisbon treaty* judgment of 2009 holds (in the awkward official English translation) that ‘[p]articularly sensitive for the ability of a constitutional state to *democratically shape itself* are decisions [...] on the disposition of the monopoly on the use of force by [...] the military towards the exterior’.<sup>250</sup>

Curiously, the division of labour between the executive and Parliament has been reversed. Normally the legislature sets the general rules and the executive implements them. With regard to foreign military engagement, Parliament has been kept at bay from setting the rules in the form of developing NATO, and instead now decides on concrete cases of deployment.<sup>251</sup>

To sum up, the question of *democratic legitimacy* has arisen not only with regard to concrete operations but with regard to strategic changes in relating to NATO. The involvement of Parliament has been designed as ‘an essential corrective’, as the Court put it<sup>252</sup>: as a counterweight to the executivist grand

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<sup>246</sup>BVerfGE 90, 286 (n 6) para 238 (author’s translation of ‘soweit Eingliederung oder Beteiligung in Gründungsvertrag [...] bereits angelegt sind’).

<sup>247</sup>See also section 6 on the judicial review of ‘excess’.

<sup>248</sup>Paulus/Jacobs (n 84) 55.

<sup>249</sup>BVerfGE 121, 135 (n 59) para 69 (emphasis added).

<sup>250</sup>BVerfGE 123, 267 (n 67) para 252 (emphasis added).

<sup>251</sup>Kleinlein (n 110) 63. See on the question of a ‘law-like’ quality section 6.

<sup>252</sup>BVerfGE 121, 135 (n 59) para 70: ‘[T]he requirement of parliamentary approval under the provisions of the Basic Law which concern defence is in this connection *an essential corrective* to the limits of

design. Today, this compensatory function has moved to the background – until another transformation of NATO happens to occur.

#### 5.4. *Non-delegation à l'allemande: 'Wesentlichkeitstheorie'*

The German conception of democracy requires important, or 'essential' (*wesentlich*), political decisions to have a parliamentary basis. The jurisprudential 'rule of essential matters' (*Wesentlichkeitstheorie*) is the functional equivalent to non-delegation doctrines. It was developed with a view to restrictions of fundamental rights and has more recently been applied to the projection of military force abroad. The *Lisbon treaty* judgment of 2009 uses the term '*wesentlich*' by stating that '[t]he deployment of armed forces is of *paramount importance* for the individual legal standing of soldiers and of others affected by military action and involves danger of far-reaching implication'.<sup>253</sup> It is not difficult to see that a military deployment *is* indeed an important decision, for foreign politics, for the lives of soldiers and their licence to kill in armed conflict, and their ensuing obligations under international humanitarian law.

Now neither the German constitution nor the 2005 statute offer much guidance for deployments. This indeterminacy of the legal basis is normally problematic under *Wesentlichkeitstheorie*. The requirement of parliamentary approval is apt to compensate for the weak substantive legal limits on foreign deployments by furnishing fine-tuned deliberative and public procedures for taking decisions.<sup>254</sup> By endorsing the government's request, the *Bundestag* does not give a one-off assent but 'assumes an ongoing co-responsibility'.<sup>255</sup> Political (democratic) accountability is thus supplied. The essentiality rationale notably explains why parliamentary approval is needed for all deployments independent of NATO (purely within the UN framework), including potential defensive action under Article 87a(2) GG. In those cases, executivist treaty development requiring a parliamentary 'corrective' is no issue. But because deployment is always essential, Parliament must be involved.

## 6. Judicial control of deployment decisions

Deployment decisions are subject to judicial review by the Federal Constitutional Court. Although judicial scrutiny is closely circumscribed, it is –

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parliament's assumption of responsibility in the field of foreign security policy' (emphasis added). See also *ibid*, paras 66 and 72.

<sup>253</sup>BVerfGE 123, 267 (n 67) para 254 (emphasis added).

<sup>254</sup>Paulus/Jacobs (n 84) 58; Kleinlein (n 110) 53, 54, 57. Implicitly, the jurisprudential rule of 'essential matters' was already present in the 1994 lead judgment, see Georg Nolte, 'Germany: ensuring political legitimacy for the use of military forces by requiring constitutional accountability' in Charlotte Ku and Harold K Jacobson (eds), *Democratic Accountability and the Use of Force in International Law* (Cambridge University Press, 2003) 231, 244.

<sup>255</sup>BVerfGE 124, 267 (n 216) para 18.



from a comparative law perspective – a far reaching involvement of the judicial branch in foreign and military affairs.<sup>256</sup>

### 6.1. Abstract control of norms?

It has been suggested<sup>257</sup> that the *Bundestag*'s approval (not the government's request) of a deployment should be challengeable in a judicial proceeding called '(abstract) control of norms'.<sup>258</sup> The chamber's approval decisions belong to the body of federal law, but they are not 'norms' in a technical sense.<sup>259</sup>

The argument in favour of subjecting these acts to judicial proceedings is that they function like parliamentary acts: as 'quasi-statutes'.<sup>260</sup> Opening this type of proceeding could fill a gap in judicial protection because the benchmark here would be the entire constitution (and not only the competences of the *Bundestag*). Finally, the standing of the governments of the *Länder* in this judicial proceeding might compensate for the lack of involvement of the Parliament's second chamber (which represents the *Länder*) in the deployment decision.

On the other hand, the qualification of the *Bundestag*'s decisions as statute-like is unpersuasive not least because the chamber cannot modify the government's request and can only take it or leave it.<sup>261</sup> This does not have a law-making quality but rather amounts to 'military micromanagement' by Parliament.<sup>262</sup> The norm control proceeding does not fit and has so far never been tried. This situation is widely perceived to constitute a gap in the rule of law.

Against this background, and in response to the *Bundestag*'s approval of the first anti-IS mandate in December 2015, *Die Grünen* suggested introducing (through amendment of the statute on the Constitutional Court (*Bundesverfassungsgerichtsgesetz*)) a new type of procedure before the Constitutional Court, specifically to review the conformity of deployment decisions with the constitution (and indirectly with international law), with standing for three quarters of the Opposition in the *Bundestag*.<sup>263</sup> But the proposal was defeated,

<sup>256</sup>See for the stark contrast between the German constitutional regime (parliamentary army and full judicial review) to the US where the constitutional interpretation has favoured the President and where the courts apply the political question doctrine and do not review the constitutionality of the decisions to deploy military force: Russel A Miller, 'Germany's Basic Law and the Use of Force' (2010) 17(2) *Indiana Journal of Global Legal Studies*, 197–206.

<sup>257</sup>Christian Hillgruber and Christoph Goos, *Verfassungsprozessrecht* (C.F. Müller, 4th edn 2015) para 502; Fassbender (n 149) paras 125–29 (with good arguments).

<sup>258</sup>'Abstrakte Normenkontrolle', Article 93(1) No. 2 GG; §§ 13 No 6, 76 *et seq.* BVerfGG.

<sup>259</sup>In German legal doctrine, 'norms' are general and abstract legal acts, as opposed to legal measures that are concrete and specific. The deployment approvals of the *Bundestag* are no 'norms' in this sense but relate to concrete incidents. But according to the Basic Law's wording, the object of scrutiny in this type of proceeding is 'federal law' (*Bundesrecht*), and does not require a 'norm'.

<sup>260</sup>Paulus/Jakobs (n 84) 58 and 41.

<sup>261</sup>*Parlamentsbeteiligungsgesetz* (n 55) § 3(3).

<sup>262</sup>Kleinlein (n 110) 63.

<sup>263</sup>BT-Drs. 18/8277 of 28 April 2016.



and instead the Left faction tried an *Organstreit* against the anti-IS mandate, which will be explained in the next section.

## 6.2. *Organstreit* proceedings

The *Organstreitverfahren* ('dispute between constitutional organs')<sup>264</sup> is a weapon in the hands of the Opposition. It looms over every government and motivates careful legal assessment both in the formal written request for authorisation of a military deployment by the executive and in parliamentary debates. The double legal scrutiny performed by both branches of government is then often complemented or rectified by the third layer of *limited* legal scrutiny by the Court. This has so far happened to more than ten cases on foreign deployments since the early 1990s, sometimes accompanied by provisional measures.

### 6.2.1. Procedural requirements, standing, and limitation of judicial review

The *Organstreit* proceeding, *inter alia*, allows a political group (faction) in the *Bundestag* to file a complaint.<sup>265</sup> So far, every complaint against a military deployment has been instituted by one or several factions. The purpose of the *Organstreit* proceeding is to protect the competences of constitutional organs. This means that plaintiffs cannot directly attack the substantive decision of the government to participate in military action.<sup>266</sup> The only admissible grievance is that a constitution-based power ('right') of the *Bundestag* has been breached by the government.<sup>267</sup> The Court may thus only examine whether the constitutional competences of the organs have been respected and whether the procedure of parliamentary involvement was correct.

Historically, the first two cases arose because the government had omitted to seek the parliamentary chamber's approval or had not sought approval as a

<sup>264</sup>Article 93(1) No. 1 GG; § 13 No. 5 and § 63 *et seq.* BVerfGG [Federal Constitutional Court Act] in the version of 11 August 1993 (BGBl. 1993 I, 1473), last amended on 18 July 2017 (BGBl. 2017 I, 2730).

<sup>265</sup>Factions are parts of a constitutional organ equipped with own rights under the rules of parliament and therefore enjoy standing. The complaint of a faction is technically a representative action called '*Prozessstandschaft*', for defending the powers of the *Bundestag* against the government. A faction cannot claim a violation of its own powers as a faction, because such powers exist only inside Parliament; a faction does not enjoy any constitutional power against the government (BVerfGE 100, 266 (n 275) para 20). Also, the *Organstreit* proceeding may neither be lodged by individual members of Parliament nor by a minority which is not a faction, and only against the government as a whole, not against the minister of defence (see for all this BVerfGE 90, 286 (n 6) paras 199, 204, 210–17).

<sup>266</sup>The 'wrong' claim normally leads the Court to reject the application as inadmissible and is not treated in the merits.

<sup>267</sup>§ 64(1) BVerfGG:

The application shall only be admissible if the applicant asserts that an act or omission on the part of the respondent violated or directly threatened to violate the rights and obligations conferred on the applicant or on the applicant's organ by the Basic Law. (Official translation)

matter of constitutional obligation.<sup>268</sup> In both instances, one or several political factions complained that the *Bundestag*'s right to participation was violated by those decisions.<sup>269</sup> Since then, governments have been careful to seek the approval of the *Bundestag*. The more difficult question now is under what conditions an *Organstreit* proceeding might be admissible and meritorious even after the *Bundestag* had approved a deployment.

### 6.2.2. Overstepping the mandate of the *Bundestag*

It would seem admissible for a parliamentary faction to claim that the *Bundestag*'s right to participation is violated when a concrete operation oversteps the confines of the *Bundestag*'s prior approval in geographic, temporal, or substantive terms. So far, no judicial decision on a putative *ultra vires* operation has been rendered. The proceeding coming closest to this scenario relates to Kosovo. The ongoing German deployment is based on Security Council resolution 1244 (1999) and Article 24(2) GG. The Security Council authorisation itself is not time-limited. It is a constitutional practice to annually renew the mandate in the *Bundestag*.<sup>270</sup>

When Kosovo declared its independence in 2008, the parliamentary faction of *Die Linke* instituted an *Organstreit* proceeding against the government, arguing that government should have sought a new approval of the *Bundestag* for German participation in KFOR because the new circumstances (Kosovan independence) had led to an expiry of the *Bundestag*'s mandate. The Court ruled that only a manifest change of circumstances could lead to an expiration of parliamentary assent, and that the declaration of independence of Kosovo was not such a case. The Court was not allowed to examine the overall constitutionality or the international lawfulness of the deployment and only declared that the competences of the *Bundestag* had not been violated.<sup>271</sup>

### 6.2.3. No overall constitutional control

The more difficult situation is that the faction claims that the deployment violated international law, and by extension also the parallel constitutional law. In 1998, the German CDU/FDP government decided to contribute to the air operations of the intervention troops formed by NATO members and under

<sup>268</sup>For example, on the governmental decision to contribute humanitarian support to UNOSOM II (decision of 21 April 1993, Bulletin No. 32 of 23 April 1993, at 280), the *Bundestag* voted several times, first approving of the deployment on 21 April 1993 (BT-PP 12/151, 12925 *et seq.*, votes at 12974), and several times refusing requests of the opposition to terminate the engagement. But these votes were considered to be purely political and were then not seen as constitutionally mandatory. See BVerfG, provisional measures of 23 June 1993, – 2 BvQ 17/93 –, BVerfGE 89, 38–47 (n 44) paras 23–24.

<sup>269</sup>This was the scenario giving rise to the lead cases BVerfGE 90, 286 (n 6) and BVerfGE 121, 135 (n 59).

<sup>270</sup>See for the beginning of this constitutional convention on 8 June 2000: BT-PP 14/108, 10155 (MP Lamers, CDU/CSU). See the latest Gov. Request of 30 May 2018 (n 23) for deployment with KFOR until 1 June 2019.

<sup>271</sup>BVerfGE 124, 267 (n 216) esp. paras 21–27. See for the statutory limitation of judicial review in the *Organstreit* proceeding § 64(1) BVerfGG, text in n 267.

NATO leadership against Serbia and which were undertaken without a UN Security Council authorisation. The *Bundestag* approved it.<sup>272</sup> The *PDS* faction (*Partei Deutscher Sozialisten*, Party of German Socialists), having been outvoted in Parliament then instituted a complaint on the grounds that the ‘humanitarian’ intervention in Kosovo breached international law and thus *also the constitutional ban* on aggressive war.<sup>273</sup> The Federal Constitutional Court, however, found this complaint inadmissible because the *Organstreit* proceeding does not permit an ‘overall constitutional review’.<sup>274</sup> Constitutional law as a whole is no benchmark in the *Organstreit* proceeding because the *Bundestag* was not installed to make sure that measures taken by the executive are in conformity with the Basic Law.<sup>275</sup>

#### 6.2.4. The logic and review of ‘excess’

In contrast, the 2007 *Tornados* judgment<sup>276</sup> introduced a specific type of constitutional scrutiny that even considers clear breaches of international law in individual deployments. The background to the *Tornados* judgment was that the UN Security Council had in 2003 geographically extended the ISAF mission to Afghanistan as a whole, and NATO had agreed to continue carrying out the extended mission. This led to a territorial overlap with the US Operation Enduring Freedom (OEF). In parallel, NATO had successively revised its overall strategy in the direction of responding to global security and novel threats, notably at the 2006 Riga summit.<sup>277</sup> On this basis, NATO provided airborne intelligence and surveillance in Afghanistan, and German *Tornados* contributed to this. The *Bundestag* had approved the German participation in ISAF annually. The mandate allowed the transfer

<sup>272</sup>See n 18.

<sup>273</sup>Articles 25 and 26(1) GG.

<sup>274</sup>BVerfGE 100, 266, order finding inadmissibility, of 25 March 1999 - 2 BvE 5/99 -, para 13. Also, the *PDS*’s claim that the *Bundestag* acted *ultra vires* with its approval could only be directed against the *Bundestag* as a whole (not against the government). But in this respect, too, the faction enjoyed no standing, because the rights of the faction are limited to participating in the parliamentary procedure leading to the approval of the deployment (*ibid*, para 20).

<sup>275</sup>See also BVerfGE 126, 55, order of 4 May 2010 - 2 BvE 5/07. In order to protect a G8 summit in Heiligendamm of 2007, the government had decided to employ the military, without seeking approval of the *Bundestag*. The Court rejected the application by the faction *Bündnis 90/Die Grünen* as manifestly ill-founded, because Article 87a GG does not require parliamentary approval for deployments inside the country (*ibid*, para 45). An approval by the *Bundestag* would not have been apt to remedy the purported unconstitutionality of the deployment but would rather have deepened the alleged breach of the constitution (*ibid*, para 48).

<sup>276</sup>BVerfGE 118, 244, judgment of 3 July 2007 - 2 BvE 2/07. This was an *Organstreit* proceeding instituted by the parliamentary faction of *PDS/Die Linke* against the prolongation of ISAF, although the *Bundestag* had approved on 9 March 2007. In these proceedings, two orders had been issued: A denial of provisional measures (BVerfGE 117, 359, order of 12 March 2007 - 2 BvE 1/07 -) on a request by individual MPs (CDU/CSU). The Court found the request inadmissible, because individual members of Parliament were not entitled to claim rights of the *Bundestag* (by way of *Prozeßstandschaft*) and they did not show a threat to their ‘status rights’ as MPs. A similar order was issued on 29 March 2007 (- 2 BvE 1/07 -).

<sup>277</sup>See the ‘Comprehensive Political Guidance’ endorsed by NATO Heads of State and Government on 29 November 2006.

of data gathered by German surveillance to OEF ‘only if necessary for the successful realisation of the ISAF-operation or for the security of ISAF-forces’.<sup>278</sup>

The grievance of the suing factions *PDS/Die Linke* (as interpreted and partly reformulated by the Constitutional Court) was that the government’s decision to participate in the extended ISAF mission overstepped the statutory approval of Germany’s original accession to NATO (in 1955) and thus violated the rights of the *Bundestag*.

The Court examined both the *regional* extension of NATO activity beyond the Euro-Atlantic area and its *substantive* orientation towards peace. An excess in either dimension would not be covered by the original NATO treaty and thus not covered by the parliamentary statute approving Germany’s accession to the organisation and would thus escape parliamentary co-responsibility. The Court first performed a ‘constitutional review as to whether essential structural decisions of the NATO Treaty – in this case a connection to NATO’s regional purpose – have been exceeded’.<sup>279</sup> Importantly, the Court did not review the actions of NATO in themselves but limited itself to a ‘review of the *connection* between the NATO actions and the regional framework’.<sup>280</sup> On this point, the Court found that NATO had not ‘departed in a general sense from its connection to a specific region’.<sup>281</sup> Notably:

[t]hose responsible in connection with NATO were and are entitled to assume that the securing of the rebuilding of Afghanistan’s civil society also contributes directly to the *Euro-Atlantic area’s own* security; in view of present-day threats from globally acting terrorist networks, as 11 September 2001 showed, threats to the security of the NATO area cannot any longer be territorially restricted’.<sup>282</sup>

Second, NATO’s (putative) *turning away from peace* would constitute a substantive excess.<sup>283</sup> Such an excess would not only mean that NATO and its operations were no longer covered by the NATO Treaty (and the complementary federal statute) but also would violate the constitutional provision of Article 24(2) GG, which allows Germany to participate only in systems of collective security that are directed at maintaining peace. This would mean that Germany would have to leave NATO. If not, the powers of the *Bundestag* would be violated

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<sup>278</sup>Gov. Request ‘Beteiligung bewaffneter deutscher Streitkräfte an dem Einsatz einer Internationalen Sicherheitsunterstützungstruppe in Afghanistan unter Führung der NATO auf Grundlage der Resolutionen 1386 (2001), 1413 (2002), 1444 (2002), 1510 (2003), 1563 (2004), 1623 (2005) und 1707 (2006) des Sicherheitsrates der Vereinten Nationen’ of 8 February 2007 (BT-Drs. 16/4298, at 3, author’s translation).

<sup>279</sup>BVerfGE 118, 244 (n 277) para 66. The alleged regional excess is discussed in paras 51–71.

<sup>280</sup>*Ibid*, para 68 (emphasis added).

<sup>281</sup>*Ibid*, para 71.

<sup>282</sup>*Ibid*, para 67 (emphasis added).

<sup>283</sup>The Court reviewed the substantive excess in paras 72–90.

because it [the excess] removes the treaty basis of the alliance from the responsibility of the German Bundestag and in doing so infringes the German *Bundestag*'s right under Article 59(2) sentence 1 of the Basic Law in conjunction with Article 24(2) of the Basic Law.<sup>284</sup>

Importantly, this review allowed for and required an incidental assessment of international law. The reason is that a breach of international law through individual NATO military operations, 'in particular the violation of the prohibition of the use of military force, may be an indicator' that NATO has transformed itself and that it 'is structurally departing from its constitutionally mandatory orientation towards the maintenance of peace'.<sup>285</sup> On this point, the Court did not see any tendency of NATO to turn away from its objective to secure peace. Notably, the cooperation of ISAF with OEF did not change the character of the NATO Treaty because the two operations remained distinct in legal and factual terms.<sup>286</sup> The Court therefore rejected the application as unfounded on the merits. However, the judgment marks some extension of judicial review, the exact scope and impact of which is not yet fully clear.

This extension will be tested in a pending proceeding launched by the *Die Linke* faction against the anti-IS OIR, which had been approved by the *Bundestag*. The complaint filed in 2016 is directed both against the Federal government and against the *Bundestag*.<sup>287</sup> The applicant seeks the declaration that the respondents, with their joint deployment decision (of 1 and 4 December 2015), violated competences of the *Bundestag* flowing from Article 24(2) in conjunction with Article 59(2) GG. The faction argues that the deployment occurred outside a system of collective security<sup>288</sup> and would therefore have required a new statute<sup>289</sup> and that the deployment constituted an extensive reading of Article 51 of the UN Charter, which oversteps the parliamentary statute approving Germany's accession to the United Nations in 1973.

It remains to be seen whether the logic of 'excess' and 'departure' from the original federal statutes approving membership in the two organisations (NATO and UN) – which is the only window to constitutional review – will suffice to confer standing on the faction. The related question is whether this logic will, on the merits, allow for an assessment, however summarial, of the lawfulness of self-defence against non-state actors (under the

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<sup>284</sup>BVerfGE 118, 244 (n 277) para 74. This grievance did not allow a general assessment of the overall *constitutionality* of an operation: 'For in the constellation of *Organstreit* proceedings an infringement of the requirement to maintain peace is *only* significant as the constitutional limit of the integration programme of a system of mutual collective security' (*ibid*, para 74, emphasis added).

<sup>285</sup>*Ibid*, para 74. So the *Organstreit* does not allow an international-law-based review *tout court* (*ibid*, and paras 66 and 87).

<sup>286</sup>*Ibid*, paras 77–84.

<sup>287</sup>Application filed on 31 May 2016; judicial decision expected in the course of 2018 (see n 165 and accompanying text).

<sup>288</sup>See for the relevant concerns section 3.

<sup>289</sup>Article 24(2) GG, in conjunction with Article 59(2) GG.

heading of an ‘excess’ beyond the original meaning of Article 51 of the UN Charter and Article 5 of NATO).

Besides the issue of ‘overstepping’ the federal statutes of 1955 (NATO accession) and 1973 (UN accession), the constitutional law claim in the IS case is that OIR finds no basis in either Article 24(2) GG, because it is not conducted inside a system of collective security, or in Article 87a (2) GG, because it is directed against non-state actors. However, the lack of a constitutional basis as such (beyond the logic of ‘excess’) is not reviewable by the Court in the *Organstreit* proceeding.<sup>290</sup>

### 6.3. No constitutional complaints of soldiers

It has occasionally been argued that an individual soldier could file a constitutional complaint (*Verfassungsbeschwerde*)<sup>291</sup> with the argument that a military command ordering his participation in a specific operation violates his fundamental rights.<sup>292</sup>

On the level of statutory law, the Statute on Soldiers regulates the military duties of obedience. A soldier may refuse to obey only when an order runs against human dignity, and he must refuse to obey when the order asks for the commission of a crime.<sup>293</sup> Orders of this kind are nonbinding. So far, no one has claimed that these statutory provisions are not in conformity with the constitution. The statute as such lawfully restrains the soldiers’ fundamental right to personal liberty.<sup>294</sup> A war of aggression is a felony under the German statute on international crimes,<sup>295</sup> so that an order to participate in such a war would be nonbinding. Beyond this, most commentary opines that orders that request manifest grave violations of international law are nonbinding as well.

Against this legal background, it is unlikely that a constitutional complaint could be admissible let alone successful on the merits because the soldiers would (and could) first of all have to attack the commands by reference to the statutory law. In contrast, in a constitutional complaint, the Federal Constitutional Court only examines violations of fundamental rights, and the scrutiny is limited specifically to constitutional law. International law cannot become a benchmark for the Court simply via Article 25 or 26 GG. It is conceivable that a soldier’s freedom of conscience<sup>296</sup> is affected by a

<sup>290</sup>See n 275–n 276 and accompanying text.

<sup>291</sup>Article 93(1) No. 4a GG, §§ 13 No. 8a, 90 *et seq.* BVerfGG. Such a complaint is admissible only after exhaustion of ordinary remedies. Soldiers must first resort to the disciplinary tribunal and to the Federal Administrative Court.

<sup>292</sup>Fassbender (n 149) para 124.

<sup>293</sup>§ 11(1) and (2) *Soldatengesetz* of 19 March 1956, last amended on 8 June 2017 (BGBl. 2017 I, 1570).

<sup>294</sup>Article 2(1) GG.

<sup>295</sup>See n 123.

<sup>296</sup>Article 4(1) GG.

military command to obey an unlawful (and potentially even nonbinding) order, to the extent that the soldier bases his personal moral convictions on the presumed illegality.<sup>297</sup> In this way, requesting obedience or sanctioning disobedience might be seen as a disproportionate curtailment of the soldier's freedom of conscience. In contrast, it is not self-evident that a soldier's right to life<sup>298</sup> encompasses protection specifically against the illegality of an operation. Factually, the risk of life and limb is not increased by legal flaws in the military commands the soldier receives. Nevertheless, but a proceduralised reading of the right to life might give rise to an entitlement not to be subjected to unlawful risks. Finally, the soldier's general liberty<sup>299</sup> could be breached by an unlawful command or by a military sanction in response to a refusal to obey an unlawful or even nonbinding military order.

However, the Federal Constitutional Court's scrutiny upon a constitutional complaint would be limited to the question of whether the decisions of lower courts were arbitrary when denying that a command manifestly asked for a grave breach of international law.

## 7. Conclusions

Military activities abroad since the 1990s have become part and parcel of Germany's foreign and security policy. The self-image of the German army evolved, as captured in the slogan: 'From a defensive army to a deployment army.' This shift has been facilitated by the army's transformation from a citizens' militia based on a general draft into a fully professionalised army, as brought about by the suspension of the compulsory basic military service in 2011.<sup>300</sup> Nevertheless, Germany has not morphed into a military power – quite to the contrary. Most operations are small scale, and it is for this reason only that politicians and the population as a whole find them acceptable.<sup>301</sup>

The political fault lines are conventional but not fixed. After 1990, various governments of all parties have supported military engagement abroad. Federal Chancellor Gerhard Schröder of the Social Democratic Party (SPD) stressed the historical importance of Germany's contribution to the US-led Operation Enduring Freedom in the aftermath of 9/11 by combining his request to Parliament to authorise the deployment with the so-called 'question of confidence' in his office.<sup>302</sup> A negative vote (against deployment and thus

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<sup>297</sup>Cf. BVerwGE 127, 302 (n 122).

<sup>298</sup>Article 2(2) GG.

<sup>299</sup>Article 2(1) GG.

<sup>300</sup>*Gesetz zur Änderung wehrrechtlicher Vorschriften* of 28 April 2011 (BGBl. 2011 I, 678), with effect as of 1 July 2011.

<sup>301</sup>Fassbender (n 149) para 30.

<sup>302</sup>Article 68 GG.



also against the Chancellor) would have empowered the latter to request the dissolution of Parliament – but confidence was expressed with only a two-vote majority.<sup>303</sup> Roughly speaking, the conservative CDU/CSU faction seems to construe the scope of parliamentary power a bit narrower than the Left factions. Finally, most *Organstreit* proceedings against deployments have been launched by Liberal, Left, and Green factions.

From a comparative law perspective, the German constitutional regime on the use of military force abroad is heavily legalised through case-law and codification. The dominant role of the Constitutional Court (which created the regime) stands out but corresponds to the overall strong position and eminent political function of this body in the German constitutional set-up. It is the Court that insists on the strong role of Parliament, with the ‘joint decision-making power’<sup>304</sup> of the government and the first parliamentary chamber (*Bundestag*) on each single deployment. The judicial concept of a ‘requirement of constitutive parliamentary approval’<sup>305</sup> on military operations abroad was in 2005 codified in a statute.<sup>306</sup> But the prerogative of the Court remains and has so far prevented a statutory amendment. The main reason for abandoning a well-prepared reform of the statute in 2017 was the consideration that the Constitutional Court demands a parliamentary decision in each *individual* deployment, and that generalisations enshrined in the statute would not suffice for the securing of political accountability.

In the German parliamentary system of government, in which the government is elected by Parliament and accountable to it, the case for an *additional* parliamentary decision on the use of military force might seem less obvious than in a Presidential system where the executive branch enjoys legitimacy independent from Parliament. But it finds its explanation in the idea of the ‘parliamentary army’. Parliamentary involvement is not only superimposed onto a genuinely executive power but co-constitutes every deployment decision. The consequence for timing is that the approval of the *Bundestag* must be sought *at the outset* and not only after a certain lapse of time, such as after sixty days in the US, or after four months in France.

The tension between the potentially growing necessity to integrate a national army effectively into multinational forces on the one hand, and democratic accountability on the other hand has in Germany been resolved with an accent on parliamentary control.<sup>307</sup> This is compatible with the

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<sup>303</sup>See BT-PP 14/202, 19857 *et seq.* (agenda item 3 on 16 November 2001).

<sup>304</sup>See n 90 and accompanying text.

<sup>305</sup>See n 53 and accompanying text.

<sup>306</sup>See n 55.

<sup>307</sup>See Miller (n 257) 205–06 for praise for the Basic Law’s contribution to curbing Germany’s militarist tradition. The ‘reconciliation of military and democracy will have to count equally as one of the great successes of the German Basic Law’.

extant treaties (NATO and TEU), which leave room for member states' specific constitutional requirements.<sup>308</sup>

In a complicated and confusing legal web of international law, UN law, the law of NATO or EU, specific international agreements with host states, and domestic constitutional law, it is parliamentary approval which guarantees that every single military operation will be double-checked and allocates the ultimate political responsibility to the body that most represents the German people. From a cosmopolitan or transnational perspective, the strong role of Parliament is welcome. Although parliamentary involvement does not necessarily lead to greater consideration for foreign and global interests, it does lead to *public* debate. Together with the need for official governmental explanations in their formal request to Parliament, these procedures contribute to the expression of an *opinio iuris* of the state on matters of the use of force.

The historical reintegration of Germany into collective military action has been achieved. It seems that we are now entering a new political era on the use of force, characterised by the renewed blockade of the Security Council, and an increased acceptance of military action against terror groups under the guise of self-defence. This calls for reflection on how to adapt constitutional law to the new demands. The constitutional text's commitment to defence and to collective security and the historically motivated firm renunciation on unilateral or non-defensive military action makes it difficult to accommodate other types of engagement, ranging from operations to rescue German citizens abroad to anti-terrorist action and combatting piracy. The interpretation of the German constitution to tally every operation under the heading of either defence or collective security has become somewhat strained. Reminiscent of doctrinal suggestions before 1994, it is again proposed to construe 'defence' broadly so as to include defence against non-state (terrorist) attacks, and to use Article 87a GG as the constitutional basis for such action.<sup>309</sup>

The German experience is relevant for the debate on the *exceptionalism* of foreign and, notably, military affairs and their law.<sup>310</sup> The normative claim of exceptionalism is that governance decisions in this sphere are and need only be subjected to less demanding constitutional standards: perceived or assumed requirements of speed, uniformity, and flexibility would, according to the exceptionalist thesis, suffer less democracy, less transparency, less checks and balances, less rule of law, less judicial control, and less respect

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<sup>308</sup>Article 11 NATO 'This Treaty shall be ratified and its provisions *carried out* by the Parties *in accordance with their respective constitutional processes*' (emphasis added). See for Article 42(7) TEU the text accompanying n 77.

<sup>309</sup>BT-WD 2-3000-025/16 (n 152).

<sup>310</sup>*Cf.* for a discussion in US law: Ganesh Sitaraman and Ingrid B Wuerth, 'The Normalization of Foreign Relations Law' (2015) 128 *Harvard Law Review* 1897.

for human rights than other areas of law and governance. But this claim is weakened by the successful German practice, which shows that foreign affairs law need not follow a completely distinct logic of legitimacy than other constitutional law.

This ties back to global constitutionalism, which holds that in a world characterised by global flows of information and digital hyper-connectivity, global supply chains, intense global trade, foreign investment, and migration, the starting point of any analysis should be that foreign affairs is not a categorically distinct type of politics but, rather, resembles ‘world internal politics’. Therefore, *prima facie*, foreign relations measures and the law that governs them are and should be subject to the usual constitutional standards. The burden of explanation rests on those who advocate the exception and who seek to water down the constitutional standards governing foreign relations law. German constitutional law and practice in deciding on military deployments abroad demonstrates that it is sufficient to lower the standards only slightly.

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## Acknowledgements

The author thanks Jochen Frowein, Wiebke Rückert, and an anonymous reviewer for helpful suggestions on a prior version of this article, and her student assistants, notably Leander Beinlich, for their extensive research. A very short version of this article appears in Curtis A. Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press, 2019). The author thanks the handbook editor for the permission to use material from the handbook chapter for this article.

## Disclosure statement

No potential conflict of interest was reported by the author.