Germany in Collective Security Systems – Anything Goes?

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For years German politicians and constitutional lawyers have quarrelled over the question whether the Basic Law, the German constitution, permits German armed forces to participate in peace-keeping activities of the United Nations or out-of-area operations of NATO. Political hesitance was quite often couched in constitutional arguments. Gradually the government's resistance against a German military engagement abroad eroded. What once started out as cheque-book diplomacy soon reached the stage where Germany contributed equipment, logistical support and finally even personnel.

International pressure on Germany to get more actively involved in UN operations for keeping or restoring peace increased after German unification and has become a bargaining chip in the considerations about a German seat in the Security Council. Aware of the growing demand to assume greater responsibility in international security affairs, the German Parliament started considering various proposals for constitutional amendments which would establish (or simply clarify) Germany's ability to take part in peace-keeping and military operations abroad.

At the same time, the international security environment is radically changing. NATO and WEU are tentatively searching for a new identity following the end of the cold war and are in the process of developing a new European security strategy. Peace-keeping operations of the UN include enforcement measures; the Security Council authorized the use of force in response to the Iraqi invasion of Kuwait or in the case of Haiti, for example. The reality of international security politics is far removed from the ideal of collective security laid down in the UN charter and everything seems to be in flux.

In this uncertain situation the German Government sent units of the *Bundeswehr*, the German army, to the peace-keeping operation UNOSOM in Somalia. And when NATO and WEU decided to carry out a coordinated maritime operation in the Adriatic Sea which should monitor compliance with the embargo against Former Yugoslavia on the basis of UN Security Council Resolutions 713 and 757, the

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6 EJIL (1995) 274-286

German Government contributed to these efforts with warships and surveillance aircrafts. Finally, the government consented to the participation of German air force personnel in integrated NATO units which monitored and enforced the flight interdiction in Bosnia and Herzegovina demanded in Security Council Resolutions 781 and 816.

For the first time *Bundeswehr* units were involved in NATO and UN operations which included the potential use of force. This new quality of *Bundeswehr* engagements in international security affairs predictably aroused wild protest by the SPD opposition in Parliament.[1] In complaints filed with the *Bundesverfassungsgericht* they argued that the Basic Law – the German constitution – does not authorize such uses of the *Bundeswehr* and that, at least, Parliament would have had to approve these engagements.[2]

The Court's decision about these complaints was Solomonic insofar as it gave a little bit to both sides. On the one hand, the Basic Law provides a sufficient general basis for the operations in question, on the other, each specific deployment of the *Bundeswehr* requires prior approval by Parliament. Since the Court does not present a comprehensive advisory opinion on Germany's future security operations, the judgment leaves many questions unanswered and is open to a narrow or broad interpretation. Which kind of collective security operations are authorized by the Basic Law? Which decisions are left to the political process?

I. Article 24 Basic Law: Germany's Gate to Collective Security

The German constitutional debate over external uses of the *Bundeswehr*[3] had focused on the interpretation of Article 87(a)(2) of the Basic Law[4] and its interrelationship with Article 24(2) of the Basic Law.[5] Predictably enough, the complainants argued that Article 87(a)(2) prohibits all external uses of the

1 Curiously enough, the FDP fraction, the party of Foreign Minister Klaus Kinkel and a partner in the government coalition, joined the SPD's complaint against AWACS surveillance flights. In a dissenting opinion two judges regarded the FDP's complaint as inadmissible because the FDP had not taken any steps in the cabinet or in the Parliament to stop an operation which they now regard as unconstitutional (Judgment, *EuGRZ* (1994) 313).

2 An application for an injunction against the participation in AWACS flights had been rejected by the *Bundesverfassungsgericht* on 8 April 1993 (BVerfGE 88, 173 = *EuGRZ* (1993) 168). In its decision about an injunction against the *Bundeswehr* involvement in UNOSOM II, the Court demanded that Parliament's approval to the operation is required (BVerfGE 89, 38 = *EuGRZ* (1993) 326).

3 For a general overview of this debate see Kahn, Zöckler, 'Germans to the Front? or Le Malade imaginaire', 3 *EJIL* (1992) 163-177.

4 Art. 87(a)(2) of the Basic Law: 'Apart from defence, the Armed Forces may only be used to the extent explicitly permitted by this Basic Law'.

5 Art. 24(2) of the Basic Law: 'For the maintenance of peace, the Federation may enter a system of mutual collective security; in doing so it will consent to such limitations upon its rights of sovereignty as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world'.

Bundeswehr (except for defence purposes) and that Article 24(2) does not explicitly authorize the involvement of the *Bundeswehr*, as required by Article 87(a)(2).[6]

The reasoning of the constitutional Court, however, starts from Article 24(2). The Court asserts that the permission to enter collective security systems granted in Article 24(2) also includes the authorization to fulfil all tasks typically arising from the membership in such systems. Hence Article 24(2) also authorizes the involvement of the *Bundeswehr* in activities performed within the framework and according to the rules of collective security systems.[7]

In the Court's view, this authorization is not affected in any way by the restrictive wording of Article 87(a)(2) because none of the constitutional amendments was intended to prohibit uses of the *Bundeswehr* which were already permitted by norms of the Basic Law such as for example Article 24(2) (the opinion as a whole relies heavily on arguments from the legislative history which are usually only employed as ancillary arguments). The Court tends to regard the authorization to participate in collective security systems as a *lex specialis* in relation to the general provision on uses of the *Bundeswehr* contained in Article 87(a)(2).[8]

With the help of arguments based on the *ratio* and legislative history of constitutional amendments, the Court managed to bypass the convoluted debate over the meaning and scope of Article 87(a)(2) this time. Of course, the question of constitutional limits for external uses of the *Bundeswehr* remains a crucial issue for all scenarios where the *Bundeswehr* could be used outside the framework of a collective security system. In an *obiter dictum* the Court indicates that the intention of the drafters of Article 87(a)(2) was 'to limit the possibilities for *internal uses* of the *Bundeswehr*' (emphasis added) by requiring an explicit authorization in the constitution. This should not be interpreted in such a way that all other external uses outside collective security systems would be allowed by the Basic Law. After all, the Court explicitly refuses to elaborate on the interpretation of Article 87(a)(2) itself.

The main problem thus is the definition of the concept 'collective security system' and how to determine what kind of activities are performed within the framework and according to the rules of such a system.

II. The Concept of 'Collective Security' in the Basic Law

In order to define the terms 'mutual collective security' in Article 24(2), the Court could simply have referred to the classical international law concept of collective security, i.e. a system designed to deter or overcome illegal resort to the use of force

6 Judgment, sec. A.III.2.a.
7 Judgment, sec. C.I.1.
8 At least the Court does not adopt the position that Art. 24(2) should be regarded as one of the explicit authorizations referred to in Art. 87(a)(2).

by a member State. On the basis of such an interpretation, however, German participation in NATO operations could hardly be authorized by Article 24(2) because NATO is certainly not a collective security system in the classical sense but the prototype of a collective defence system which guarantees mutual assistance in the protection against attacks of a non-member of the alliance. The question whether NATO could be qualified as a collective security system in the sense of Article 24(2) was explicitly left open in the 1984 *Pershing-II* judgment of the *Bundesverfassungsgericht*.[9]

Instead the Court develops a specific concept of 'mutual collective security' for German constitutional law which is based mainly on the legislative history and the rationale underlying Article 24(2). From the fact that neither the drafters of the Basic Law nor later commentaries on German constitutional law have reached a common understanding whether 'mutual collective security' should also cover defence alliances, the Court concludes that this concept may not be limited to collective security in the classical sense. Article 24 expresses the credo that Germany could (and should) not provide for its own security standing alone because peace and security must be established and safeguarded through international cooperation. Hence a collective security system in the sense of Article 24(2) must be designed to preserve international peace and security through establishing an organization and a normative framework with mutual obligations and corresponding benefits for all members. From this perspective it is irrelevant whether the system protects against attacks by members or non-members of the system. In this context the Court refers to Article 51 UN Charter as evidence that collective security and defence alliances are not mutually exclusive but supplement each other.

On the basis of this broad concept of 'mutual collective security', not only the United Nations but also NATO and WEU easily qualify as organizations which establish a collective security system. But Article 24(2) is not a blank cheque for participating in any activity of these organizations. Parliament's consent to the integration into a collective security system and Article 24(2) authorize a participation of the *Bundeswehr* only if two conditions are fulfilled: the specific operations must have some foundation in the constitution of the respective organization *and* it must be carried out within the framework and according to the rules of the security system. Considering the fundamental changes in the UN involvement in various forms of internal and international conflicts and also the metamorphosis of NATO and WEU, these criteria will predictably be particularly troublesome in the future.

9 BVerfGE, 1 (95).

III. UN Peace-keeping Operations

As regards German participation in UNOSOM II, the Court simply states that peace-keeping operations have become an integral part of the security system of the United Nations. No analysis of the possible legal basis for peace-keeping operations is attempted. The Court is satisfied with accepting UN peace-keeping as a result of the 'application of the UN Charter in practice'.[10] Even though modern peace-keeping operations more and more often include enforcement actions (as in the case of UNOSOM II) they may still, according to the Court, be regarded as somehow envisaged by the UN Charter, no matter whether they are based on Chapter VI or VII or a combination of the two.

Since *Bundeswehr* units had been assigned to UNOSOM II in accordance with the general procedure in which national contingents are recruited for UN peace-keeping operations, this operation was sufficiently authorized by Article 24(2) and Parliament's consent to the UN Charter.

IV. NATO and WEU Operations

The Court also finds a constitutional authorization for Germany's participation in AWACS surveillance flights and the sea blockade against the Federal Republic of Yugoslavia. The reasoning leading to this conclusion, however, is anything but clear as the Court does not attempt to analyse whether the NATO operations in question have been executed 'within the framework and according to the rules' of NATO as a collective security system. Instead the Court argues that NATO's operations implemented Security Council resolutions and were somehow integrated into the collective security scheme of the United Nations. Strongly emphasized is that the NATO member States used NATO as an institutional framework in order to fulfil their own obligations under Articles 41 and 48 UN Charter.[11] In the Court's view, Germany's participation in these operations is constitutionally authorized by Article 24(2) in combination with Parliament's consent not only to the NATO treaty but also (one should say predominantly) to the UN Charter.

Certainly, nobody would disagree that the implementation of Security Council resolutions forms part of the proper functioning of the collective security system of the United Nations. But when member States of the United Nations use NATO structures for the purposes of the United Nations, such instrumentalization is only permissible to the extent that the boundaries drawn by the constitution of NATO are observed. Unlike in the case of UN peace-keeping operations, the Court does not even pose the question whether the NATO treaty permits the implementation of

10 Judgment, sec. C.I.4.a.
11 Judgment, sec. C.I.5.

Security Council resolutions, i.e. whether these operations were carried out 'within the framework and according to the rules' of NATO's collective security system.

This is all the more puzzling since the complainants had explicitly argued that NATO and WEU had acted *ultra vires*. Indeed, neither the NATO nor the WEU treaty explicitly envisages such a cooperation with the United Nations as a proper NATO or WEU task. Both organizations were designed as classical defence alliances[12] which should grant mutual assistance whenever a member State is attacked by a non-member State. In the case where a member State is not attacked but its security is somehow threatened, the treaties merely provide for consultations among the member States and do not grant the organizations a competence to act (Article 4 NATO, similarly Article VIII(3) WEU).[13] Some have suggested that the *implied powers* doctrine should be applied to NATO and WEU so as to enable them to conduct any operation serving international peace and security.[14] According to the International Court of Justice, such powers are conferred upon an international organization only 'by necessary implication as being *essential* to the performance of its *duties*'.[15] Clearly, implied powers can only be deduced where clearly defined duties exist. But NATO and WEU are regional organizations and their treaties are silent about any dangers for international peace and security which do not affect territorial integrity, independence or security of the member States. Since the treaties do not assign any role to WEU or NATO outside the territorial application of the treaties, the assumption that WEU and NATO have a general mandate to get involved in any international security matter without territorial limitations seems rather doubtful.

In the end, one wonders why the Court took the trouble to develop such a broad conception of collective security and classify NATO as such a system.[16] Since so little attention was paid to NATO's own constitution, the Court might as well have based its argument entirely on the UN's collective security system. And the newly introduced requirement that operations must be carried out 'within the framework and according to the rules' of a collective security system will be of little significance as long as the Court adheres to such a reduced level of scrutiny.

12 In replies to a request by the UN Secretary-General, NATO presented itself as a 'collective defence organization', UN Doc. S/25996 (15 June 1993) 18, and the WEU as the 'defence component of the European Union', UN Doc. S/25996/Add.1 (14 July 1993) 2.

13 Wolfrum, 'Der Beitrag regionaler Abmachungen zur Friedenssicherung: Möglichkeit und Grenzen', 53 *ZaöRV* (1993) 576, at 591ff.

14 Nolte, 'Die "neuen Aufgaben" von NATO und WEU: Völker- und verfassungsrechtliche Fragen', 54 *ZaöRV* (1994) 94, at 108ff.

15 *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949) 182 (emphasis added). See also *Certain Expenses of the United Nations*, ICJ Reports (1962) 168.

16 Cf. Schroeder, 'Verfassungs- und völkerrechtliche Aspekte friedenssichernder Bundeswehreinsätze', *Juristische Schulung* (1995) 398.

V. Transfer of Sovereign Powers to Collective Security Systems?

Why did the Court exercise such judicial self-restraint when the limits of NATO and WEU competences were to be assessed in order to determine whether the operations in question were *ultra vires*? After all, in the *Maastricht* decision, the same Court has announced that it would closely scrutinize whether the European Community oversteps its limited competences.[17] The Court's approach towards the judicial review of competences of international organizations differs depending on whether sovereign powers have been transferred to an international organization or not.[18] Whereas the EC has been authorized to adopt decisions and regulations which have direct effect in Germany, the Court now declares that the transfer of operational control or operational command to NATO organs does not constitute such a transfer of sovereign powers.[19] On this point the Court corrects its *Pershing II* judgment in which the empowerment of the US President to decide about the use of nuclear-armed Pershing II rockets stationed in Germany was regarded as a transfer of sovereign rights.[20]

The main argument why the transfer of operational command or control does not constitute a transfer of sovereign powers could be seen in the retained right of the German Government to withdraw this authorization at any time. In practice, however, when military decisions are made under emergency conditions, this right to a withdrawal could easily become illusory. The factual inability to exercise the right to withdraw operational command and control might well lead to situations where a *de facto* transfer of sovereign rights occurs. Hence it seems conceivable that the Court might reconsider its interpretation in the future. In that case, the Court would be well advised to scrutinize more closely whether military operations are executed 'within the framework and according to the rules' of a collective security system.

VI. Parliament and Treaties on Rails

NATO and WEU are in the process of developing a new European security structure. Both organizations decided to broaden the spectrum of their activities. In their Petersberg Declaration,[21] for example, the Foreign and Defence Ministers of the WEU agreed to employ military units acting under WEU authority in various

17 Decision of 12 October 1993, BVerfG 89, 155, reprinted in *NJW* (1993) 3047. Cf. Wieland, 'Germany in the European Union – The Maastricht Decision of the Bundesverfassungsgericht', 5 *EJIL* (1994) 259. For a critical comment see Weiler, 'The State "über alles" – Demos Telos and the German Maastricht Decision', in *Festschrift für Everling* (forthcoming).

18 Art. 24(2) of the Basic Law: 'The Federation may by legislation transfer sovereign powers to inter-governmental institutions'.

19 Judgment, sec. C.I.2.

20 BVerfGE, 68, 1 at 91-95.

21 Petersberg Declaration of 19 June 1992, *Europa-Archiv* (1992) D 479.

new missions, including humanitarian and rescue tasks, peace-keeping and tasks of combat forces in crisis management, including peace-making. They declared their readiness to support, on a case-by-case basis, measures decided by the UN Security Council or the OSCE. Despite these fundamental changes in their security policy, neither NATO nor WEU see the need to amend their respective treaties in order to ground these new activities on a clear constitutional basis.

The question arose whether the German Government's participation in these developments had created (or was in the process of establishing) new obligations or had altered existing international obligations which required the Parliament's consent under Article 59(2) of the Basic Law.[22] All judges agreed on the definition of an international treaty, on the concept of a 'political treaty', and also that, in general, Article 59(2) covers alterations of existing obligations or creation of new obligations in 'political treaties'.[23] The judges disagreed, however, on the proper legal categorization of the recent developments in WEU and NATO and on the question whether Article 59(2) should also cover processes which lead to the creation of soft law. Since the Court was split 4 by 4, no violation of the constitution could be found.[24]

The four dissenting judges concede that, at present, the various consultations and declarations of NATO and WEU have not matured into an alteration of the respective treaties yet. But they warn of the danger that the elaboration of a new strategic concept for Europe will surreptitiously lead to soft law. At the end of this process, Germany might be bound by new international legal obligations which could not even be justified as a result of a dynamic treaty interpretation. In order to preserve the Parliament's responsibility for the conclusion and alteration of treaties, the dissenters advocate an extensive interpretation of Article 59(2) and demand Parliament's participation in all soft law processes which might eventually result in an alteration of accepted treaty obligations.

Of course, the analysis of the potential role of soft law in the process of international law-making is correct, a point which is readily accepted by the other four judges. If one followed the dissenter's argument, Article 59(2) would most likely become an unmanageable provision. Law-making through soft law is such a flexible, unpredictable and fuzzy process that governments, parliaments (and constitutional courts) will have great difficulties in determining whether such a process exists, when it begins or which specific acts will actually contribute to the formation of soft law. As a result of this uncertainty, the Government would be seriously hampered in its activities in the international arena. Apart from these practical considerations, the Basic Law, like most constitutions, limits Parliament's

22 Art. 59 of the Basic Law: 'Treaties which regulate the political relations of the Federation or relate to matters of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies competent in any specific case for such federal legislation...'.

23 Judgment, sec. C.III.1 and 2.

24 Cf. §15(3) Gesetz über das Bundesverfassungsgericht (Statute of the Federal Constitutional Court).

participation in the creation of international law to the area of treaty law. Parliament has no role to play when international law comes into existence as the result of international political processes, e.g. the evolution of customary international law, because international politics fall within the primary competence of the executive.

The four judges carrying the decision of the Court reject, with pragmatic arguments, the proposition that Article 59(2) should be extended to soft law developments which might result in a change of accepted treaty obligations. In their view, Parliament must approve only those changes of the content of a treaty which would result from a modifying treaty. Where the substance of a treaty changes due to dynamic interpretations, subsequent treaty practice or superseding customary law rules, however, no parliamentary consent is required. The decisive question for these four judges is whether the various declarations of WEU and NATO indicate a clear intention on part of the participating governments to formulate new legal obligations, new treaty norms which would modify the existing WEU and NATO treaties. In their opinion, the new European security strategy and structure is still in flux. Since WEU and NATO are still searching for new roles, declarations and communiqués pronounce merely political intentions and proposals for new strategic plans. Under no circumstances were the participating governments willing to accept the new strategies as binding obligations and hence lacked the necessary intention to conclude a modifying treaty. What remains puzzling, however, is that these non-binding resolutions provided the basis upon which WEU and NATO participated in the implementation of Security Council resolutions.

Neither the dissenting nor the carrying opinion directly address the question whether the WEU or NATO treaties actually allow such implementation of Security Council resolutions. The dissenters attribute these activities to a grey zone which appears hard to define. The others seem to be satisfied that the member States of NATO apparently believed that the Washington treaty already provides a sufficient legal basis.

In the end, collective security operations by NATO and WEU beyond their own competences will rarely be open for a direct review by the Court: Article 24(1) does not apply (at the moment), Article 24(2) is deliberately broad and vague, and Article 59(2) would only apply to an amending treaty. Instead of exercising a strict control over the proper application of the NATO and WEU treaties, the Court enabled the Parliament to decide on each German participation in UN, NATO or WEU operations.

VII. The *Bundeswehr:* An Army of the *Bundestag*

A. Requirement of Prior and Constitutive Parliamentary Consent

Article 24(2) of the Basic Law provides a general authorization for the participation of German armed forces in activities of collective security systems; the current

participation of NATO and WEU in the execution of UN Security Council resolutions does not require an amendment of their respective constituting treaties. So far the judgment sounds like an almost complete victory for the federal government. On the last issue, however, i.e. the question of who decides about sending German troops into collective security operations, the Court joined sides with the complainants. Under the Basic Law, the armed forces are not a power tool of the executive branch but a *Parlamentsheer*, that is, the *Bundestag* secures the integration of the armed forces into a democratic order under the rule of law by controlling both establishment *and* uses of the *Bundeswehr*. The Court pronounced a new constitutional principle which requires the prior and constitutive approval by the *Bundestag*. In other words, Article 24(2) and Parliament's consent to the accession to UN, WEU and NATO provide only the general legal basis for the participation of German armed forces in collective security operations but any concrete use of the *Bundeswehr* in armed operations must still be specifically approved by the *Bundestag*.

However innovatory the Court's reasoning may be regarded, the requirement of parliamentary approval has already been introduced in the Court's decision about the complainants' request for a preliminary injunction against the participation of the *Bundeswehr* in UNOSOM II.[25]

B. Derivation of the Consent Requirement

The Basic Law does not explicitly stipulate that all uses of the *Bundeswehr* in armed operations must be approved by the *Bundestag*. The constitutional Court develops the new constitutional principle from two sources, the legislative history of the constitution and the rationale underlying all provisions controlling the establishment and functioning of the *Bundeswehr*.

According to Article 59(a)(1), introduced into the Basic Law in 1956, the *Bundestag* had to determine whether a state of defence had occurred. In 1968, this provision was repealed and a new, similar Article 115(a)(1) now requires that the *Bundestag* with the consent of the *Bundesrat* shall make the determination 'that the federal territory is being attacked by armed force or that such an attack is directly imminent'. In the state of defence, control and command over the armed forces pass from the Minister of Defence to the Federal Chancellor (Article 115(b) of the Basic Law). With regard to Parliament's consent, the Basic Law continues a tradition going back to Article 11(1) of the constitution of the German Reich of 1871 and Article 45(2) of the Weimar constitution which required the prior approval of the legislative branch before any declaration of war could be made. In the Court's view,

25 Bundesverfassungsgericht Decision of 23 June 1993, docket No. 2 BvQ 17/93, BVerfGE 89, 38; reprinted in *EuGRZ* (1993) 326; cf. Riedel, 'Die Entscheidung über eine Beteiligung der Bundeswehr an militärischen Operationen der UNO – Anmerkungen zur Somalia-Entscheidung des Bundesverfassungsgerichts', *DÖV* (1993) 994.

the old Article 59(a) was intended to cover all uses of the armed forces conceivable at that time, and none of the later amendments was meant to abrogate the fundamental responsibility of the *Bundestag* to decide about sending the *Bundeswehr* into armed operations. This reasoning from the legislative history and a presumed intent of the drafters of constitutional amendments is not compelling, however, since the drafters never thought of any external uses of the *Bundeswehr* other than for defence purposes, neither in 1956 nor in 1968.

More reasonable and convincing is hence the second prong of the Court's argument. All constitutional provisions regulating the establishment, functioning and control of the armed forces (Articles 45(a), 45(b), 87(a)(1), 115(a) of the Basic Law) express the same underlying rationale: the Parliament retains the primary control and responsibility for the *Bundeswehr*. The Court presents this rationale as a consistent theme of the legislative history of the Basic Law and also the German constitutional tradition and derives from this rationale a new constitutional 'principle': all uses of the *Bundeswehr* are subject to the prior and constitutive approval of the *Bundestag*.

Of course, the Court's reasoning is delicately balanced on the border line between constitutional interpretation and law-making. Instead of developing a new constitutional principle, the Court could have drawn less reasonable conclusions from the various scattered and partly sketchy provisions of the Basic Law about the armed forces.[26] For example, the Court might have found that the constitution simply does not regulate who may decide about the participation in UN military activities and could have asked for a constitutional amendment to fill this constitutional lacuna. In this case, the authorization for the *Bundeswehr* to participate in collective security actions would have been put on hold. Or, the Court could have argued that such a decision falls within the exclusive competence of the executive branch because such deployments of the armed forces are closely linked to the executive's foreign affairs powers. Such a decision, however, would have created a severe discrepancy, making the Parliament responsible to decide about the state of defence but leaving it out completely when German troops participate in UN security operations which could be just as fateful. Compared to these alternatives, the Court managed to find a Solomonic solution in the principle of prior parliamentary consent. Above all, the Court's new principle has the backing of a widespread political consensus since an approval by Parliament formed an essential element of all drafts for constitutional amendments presented by the political parties in order to clarify the constitutional basis for a German participation in UN peace-keeping operations.[27]

26 Nolte, 'Bundeswehreinsätze in kollektiven Sicherheitssystemen', 54 *ZaöRV* (1194) 652, at 675.

27 For a discussion of these proposals see Preuß, 'Die Bundeswehr – Hausgut der Regierung', *Kritische Justiz* (1993) 263, at 271-276.

C. Scope and Contents of Parliament's Approval

The Parliament must give a specific consent to each deployment of 'armed' units of the *Bundeswehr* since the general consent once given for the ratification of the NATO treaty or the Charter of the UN does not cover sending troops into armed operations. This specific consent will not be required only when the Parliament has already determined that a state of defence exists (Article 115(a) of the Basic Law) or when units of the *Bundeswehr* are used for humanitarian assistance (as long as they are not integrated in armed operations).

The definition of and distinction between 'armed' and purely 'humanitarian' operations might still prove to be difficult in the future.[28] With regard to peace-keeping operations, however, the Court has given a definitive answer: Parliament must consent to all operations of *Bundeswehr* troops which execute Security Council resolutions, irrespective of whether these forces are authorized to use coercive measures under Chapter VII UN Charter or how the command structure is organized. The Court's refusal to draw distinctions between various forms of peace-keeping appears quite prudent. After all, even classical peace-keeping (or even purely humanitarian) operations might use force in self-defence, or, initially peaceful operations might escalate and quickly reach a level where outright military force is used. Still, serious questions remain without detailed resolution. Is a new parliamentary consent required when the Security Council changes the tasks of an ongoing peace-keeping operation or authorizes more severe measures? How do we determine what is simply a change within the same operation and what must be called a new operation which requires a new parliamentary approval?

The Parliament's decision about the deployment of the *Bundeswehr* requires a majority of the votes cast (Article 42(a) of the Basic Law). Some have argued such a simple majority contradicts the spirit of Article 115(a) of the Basic Law which requires a 2/3 majority in the *Bundestag* and the consent of the *Bundesrat* for the determination of a state of defence.[29] This critique overlooks, however, the fact that the determination of the state of defence triggers fundamental changes in the entire constitutional system. For example, under certain emergency conditions during a state of defence, the Joint Committee could acquire the status of both the *Bundestag* and the *Bundesrat* and may also exercise their rights as one body.[30]

In principle, the *Bundestag* must give its consent prior to any deployment of the *Bundeswehr*. Only in case of imminent danger may the executive alone decide and execute a preliminary deployment and immediately seek Parliament's subsequent approval. If the *Bundestag* refuses to approve the operation, the deployed troops must be called back.

28 Fastenrath, 'Was ist der Bundeswehr nach dem Karlsruher Spruch erlaubt?', *Frankfurter Allgemeine Zeitung*, No. 164 of 17 July 1994, 3.

29 Lohmann, 'German Participation in International Peace-keeping: Now Free of Constitutional Constraints?', 1 *International Peace-keeping* (1994) 78, at 80; Arndt, 'Verfassungsrechtliche Anfordungen an internationale Bundeswehreinsätze', *NJW* (1994) 2198.

30 Art. 115(e) of the Basic Law.

D. Concretization of Procedure for Consent

The Court is aware that its judgment establishes only a minimum standard for the requirement of prior and constitutive consent. The *Bundestag* is called upon to create a statute which should regulate more in detail the procedure in which a decision about the deployment of German troops is prepared and reached. This statute must both guarantee substantial parliamentary participation and respect the primary responsibility of the executive in the foreign affairs arena. The experience of the US congress with the War Powers Resolution will certainly provide instructive material for the struggle between the executive and legislative branches over the control of the armed forces.[31]

VIII. Open Questions

Of course, the *Bundesverfassungsgericht* could not present a handbook for German's future security policy. Many serious issues remain unresolved. The Court's broad concept of a collective security system, for example, raises the question whether Germany can participate in operations such as Desert Storm which merely relied on an authorization by the Security Council. Could Germany provide collective self-defence to a non-member State of NATO on the basis of Article 51 UN Charter? Could the OSCE which is not based on a formal treaty be regarded as a collective security organization in the sense of Article 24(2)? Since all the operations reviewed by the Court were based on Security Council resolutions, one wonders whether Article 24(2) would authorize NATO operations under the authority of the OSCE.

IX. The Future: Political Responsibility

By presenting a Solomonic judgment where both sides could claim a partial victory and did not have to lose face, the Court succeeded very well in fulfilling the integrational functions of constitutional adjudication. In particular, the demand for prior constitutive approvals of the *Bundestag* for all specific deployments of the *Bundeswehr* laid the foundations for the widespread approval of its judgment by the public at large. After all, Parliament's participation in the decision-making process for any deployment of German troops had been one of the core elements of all proposals for constitutional amendments. The Court's broad authorization for collective security operations forces politicians and the public at large to assume responsibility instead of hiding behind supposedly constitutional arguments. What kind of use of force and force used for which purposes should be supported by Germany? What should Germany's role be in the developing European and world security policy?

31 Cf. M. Glennon, *Constitutional Diplomacy* (1990) 71-122.