H e a d n o t e s:

1. **Under Article 24.2 in conjunction with Article 59.2 sentence 1 of the Basic Law, the participation of Germany in a system of mutual collective security requires the approval of the legislature.**

2. **The further development of a system of mutual collective security within the meaning of Article 24.2 of the Basic Law, which is not a Treaty amendment, does not require specific approval by the Bundestag.**

3. **The approval by the Federal Government of the further development of a system of mutual collective security may not exceed the authorisation existing under the Consent Act or its constitutional scope under Article 24.2 of the Basic Law.**

4. **The *Bundestag*'s right to participate in foreign affairs is violated if the Federal Government conducts further development of the system outside the authorisation granted it.**

5. **The further development may not depart from the intended purpose of the alliance, the preservation of peace, laid down in Article 24.2 of the Basic Law.**

6. **The new NATO Strategic Concept of 1999 is neither a treaty created formally nor a treaty created impliedly.**

FEDERAL CONSTITUTIONAL COURT

- 2 BvE 6/99 -

Pronounced
November 22, 2001
Herr
Government employee
Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the *Organstreit* proceedings

on

the application

to state that

the Federal Government, by approving the decisions on the new Strategic Concept of NATO at the summit meeting of the Heads of State and Government in Washington on April 23 and 24, 1999, without initiating the consent procedure in the German *Bundestag* that is prescribed by the Constitution, infringed Article 59.2(1) of the Basic Law and thereby violated rights of the German *Bundestag,*

applicant: PDS parliamentary group in the German *Bundestag*,
represented by its chairman
Roland Claus, German *Bundestag*,
Platz der Republik, 11011 Berlin

- authorised representative: Professor Dr. Norman Paech,
Neubertstraße 24, 22087 Hamburg -

respondent: Federal Government, represented by the
Federal Chancellor, Federal Chancellery,
Schloßplatz 1, 10178 Berlin

- authorised representative: Professor Dr. Jochen A. Frowein,
Im Neuenheimer Feld 535,

69120 Heidelberg -

the Second Senate of the Federal Constitutional Court, with

the participation of

Judges Limbach (President),

Sommer,

Jentsch,

Hassemer,

Broß,

Osterloh,

Di Fabio, and

Mellinghoff

issued the following

J u d g e m e n t

on account of the oral argument of June 19, 2001:

The application is rejected as unfounded.

Extract from grounds:

C.

The application is unfounded. By approving the decisions on the new 1999 Strategic Concept of NATO at the summit meeting of the Heads of State and Government in Washington on April 23 and 24, 1999, the Federal Government did not infringe Article 59.2(1) and Article 24.2 of the Basic Law. It was not obliged to initiate a consent procedure in the German *Bundestag* in order to safeguard the rights of the German *Bundestag*. The Washington decision did not amend the NATO Treaty as regards its content (I.). The further development of a system of mutual collective security that does not involve the amendment of the treaty does not require the consent of the *Bundestag* (II.). With its approval of the new 1999 Strategic Concept, the Federal Government also did not transgress the powers that had been granted to it by the *Zustimmungsgesetz* (Consent Act); by doing so, it would have acted outside the scope of the integration programme which had been established by the Consent Act to the NATO Treaty. Finally, the Federal Government, by its approval, also did not transgress the purpose of the Alliance, which is the maintenance of the peace, as laid down in Article 24.2 of the Basic Law (III.) 130

I.

The Federal Government was not obliged to initiate a consent procedure pursuant to Article 59.2(1) and Article 24.2 of the Basic Law with respect to the new 1999 Strategic Concept. The decision on NATO's new 1999 Strategic Concept is not a treaty that regulates the political relations of the Federal Republic of Germany on the Federal level. Rather, its legal basis is the NATO Treaty to which the bodies that are responsible for the enactment of Federal Law have already consented pursuant to the procedure laid down in Article 59.2(1) and Article 24.2 of the Basic Law. 131

The decision does not demonstrate a willingness, on the part of the member states, to formally amend the existing treaty (1.). The content of the decision also cannot be regarded as an objective amendment of the existing system of treaties (2.). 132

1. The decision on the new Strategic Concept was not intended as an amendment of the existing NATO Treaty. International treaties are agreements between two or more subjects of international law which are to alter the legal situation that exists between them. This includes agreements that amend existing treaties. International as well as national case law has acknowledged that acts of the organs of international organisations can, at the same time, constitute a treaty between two or more members of the organisation (cf. BVerfGE [Decisions of the Federal Constitutional Court] 68, p. 1 [at p. 82]; BVerfGE 90, p. 286 [at p. 359]). Whether an instrument in international relations constitutes a treaty under international law is to be deduced from the circumstances in the individual case (cf. BVerfGE 90, p. 286 [at pp. 360-361]). The name of the instrument and the form of its acceptance are irrelevant (BVerfGE 90, p. 286 [at p. 359]). A treaty that amends another treaty can also be inferred from acts of parties (cf. BVerfGE 90, p. 286 [at p. 361]; Verdross/Simma, Universelles Völkerrecht, 3rd ed., 1984, § 792). 133

a) The lack of a ratification clause is an indication that the document in question is not a treaty. The consent to be bound by the treaty can manifest itself in the text of the treaty if it has a ratification clause or if it provides its deposit with the Secretary General of the United Nations. This is not the case here. With a view to the highly political content of the new 1999 Strategic Concept, a reservation of the ratification on the part of the Federal Republic of Germany and probably also on the part of all other member states would have been constitutionally required if the document in question constituted a treaty. Based on nothing more than the fact that the document makes no reference to reservation of ratification, however, it cannot be cogently inferred that no treaty under international law has been concluded (cf. ICJ, Maritime Delimitation and Territorial Questions between Qatar and Bahrein, Jurisdiction and Admissibility, ICJ Reports 1994, p. 112 [paras. 23 *et seq.*]) Because under international law, a state can, pursuant to Article 7 of the Vienna Convention on the Law of Treaties, also enter into obligations that arise from treaties through the Minister for Foreign Affairs and other members of the executive who are typically competent for the external representation of a state. The states are, pursuant to Article 11 of the Vienna Convention on the Law of Treaties, free to choose the means of expressing their consent to be 134 bound by a treaty (cf. M. Fitzmaurice, Expression of Consent to be Bound by a Treaty as Developed in Certain Environmental Treaties, in: Essays Vierdag, 1998, p. 49). Ratification by the Parliament is, pursuant to Article 14 of the Vienna Convention on the Law of Treaties, only one of the forms of consent that are at the parties' disposal.

b) In this respect, however, stricter requirements, in particular requirements that refer to the content of the treaty, can result from national constitutional law, as is the case, *e.g.,* for the Federal Republic of Germany pursuant to Article 59.2(1) of the Basic Law. 135

The entire circumstances of the acceptance of the new 1999 Strategic Concept also do not indicate the consent of the parties to be legally bound by it. Certainly, the particular importance of the new Strategic Concept for NATO's long-term orientation, which has been widely emphasised, points to the existence of such a consent. The new 1999 Strategic Concept was approved in the framework of the celebrations on the occasion of the 50th anniversary of NATO, *i.e.,* at the end of a decade in which NATO successfully adapted to profound changes of the political situation. Before and after the approval, the involved states assigned the Concept fundamental importance. Moreover, the approval of the Concept was preceded by long, and, towards their end, intensive negotiations on the level of the Heads of State and Government. In the Concept, the parties express their will to explicitly expand NATO's aims by crisis response operations, which go beyond Article 5 of the NATO Treaty. From this circumstance, it is argued that the new 1999 Strategic Concept constitutes a treaty that amends the NATO Treaty (cf. E. Klein/Schmahl, Die neue NATO-Strategie und ihre völkerrechtlichen Implikationen, Recht und Politik 35 [1999], pp. 198 and 205). 136

It cannot be concluded, based exclusively on the highly political character of the 1999 Strategic Concept, that the new Strategic Concept demonstrates the consent to amend the existing treaty. The new Strategic Concept of April 23 and 24, 1999, is a consensus paper that describes NATO's new tasks and instruments only in general terms; thus, the new tasks and instruments are characterised by a high degree of flexibility and are open to a wide variety of interpretations (Wittmann, Gewandeltes Selbstverständnis und erweitertes Aufgabenspektrum. Der Weg zum Neuen Strategischen Konzept der NATO, in: Europäische Sicherheit 8/1999, pp. 12 *et. seq.*; Pradetto, Die NATO, humanitäre Intervention und Völkerrecht, in: Lutz [ed.], Der Kosovo-Konflikt, 2000, pp. 135 *et. seq.*; Rühle, Das Neue Strategische Konzept der NATO und die politische Realität, in: Jahrbuch für internationale Sicherheitspolitik, 2000, pp. 637 *et. seq.*). 137

In particular, the wording of the new 1999 Strategic Concept indicates that it is not a treaty. It is true that in particular, the central passages about the missions that do not fall under Article 5, and about the Security Council's mandate for such missions, contain legal concepts and legal terms. The text, however, mostly consists of descriptions and analyses of the present political situation in the Euro-Atlantic area and of the new threats that result from this situation, and of declarations of intention that are 138 too general to create, from the new Strategic Concept as such, obligations that would arise from a treaty.

2. The content of the new 1999 Strategic Concept also cannot be regarded as an amendment of the Treaty that can be inferred from acts of the parties. A treaty can be amended without an explicit manifestation of an intent to amend the treaty if objective circumstances that are sufficiently clear point to the existence of a consenting will to amend the treaty (cf. ICJ, Maritime Delimitation and Territorial Questions, *loc. cit.,* [paras. 25 *et seq.*]). If commitments that are made in the 1999 Strategic Concept are, in an insurmountable and clearly discernible manner, inconsistent with the area of operation that is defined in the Treaty, or if they contain an expansion of the Treaty beyond the scope that has been binding to this point, this indicates the parties' consent to amend the Treaty. If there are no indications of a corresponding subjective consent of the parties to be bound by the document and of a consent to amend the Treaty, the inconsistency with the existing Treaty must, however, be sufficiently clear in the new 1999 Strategic Concept in order to trigger the procedure pursuant to Article 59.2(1) of the Basic Law. This is not the case here. In particular, the issue that is at the centre of the *Organstreit* proceedings, *i.e.,* the expansion of the Alliance's security policy approach to crisis response operations, constitutes only a further development of the NATO Treaty, which cannot be interpreted, at any rate with the degree of certainty required for assuming the existence of a consent to amend the Treaty that can be inferred from acts of the parties, as an inconsistency with, or as an expansion of, the content of the existing Treaty. 139

The new 1999 Strategic Concept, on the contrary, leaves the Alliance's function of collective defence unaffected and continues the description of the security and peace mission set forth in the Preamble of the Treaty with a view to a fundamentally changed security situation. The aim and the purpose of NATO continue to be the defence against or deterrence of any aggression by a third state (Part I., No. 10). The reorganisation of military capabilities to act is to explicitly remain orientated towards this function of NATO (Part III., No. 28, Part IV., Nos. 41 *et seq.*). 140

The possibility of so-called crisis response operations, however, constitutes an important expansion of NATO's tasks, which has not been implied in the Treaty. The crisis response capabilities that the new 1999 Strategic Concept assigns to NATO constitute a function of regional security under the terms of Chapter VIII of the Charter of the United Nations, as they provide for operations out of the area of the Alliance (cf. Bericht zum Stand der Bemühungen um Abrüstung, Rüstungskontrolle und Nichtverbreitung sowie über die Entwicklung der Streitkräftepotenziale [*Jahresabrüstungsbericht*, Annual Disarmament Report], BTDrucks [Records of the *Bundestag*] 14/3233, p. 6, and the statement of Mr. Strobe Talbott, Deputy Secretary of State, published in: Simma, Die NATO, die UN und militärische Gewaltanwendung: Rechtliche Aspekte, in: Merkel [ed.], Der Kosovo-Krieg und das Völkerrecht, 2000, pp. 9 and 34). In this context, the central concept is the general idea of a "non-Article 5 crisis response operation", *i.e.,* an operation that that does not have an attack of the territory 141 of a Party to the Treaty as a prerequisite (see Part III., Nos. 29 and 31-32, and Part IV., Nos. 41 and 53, letter c; also cf. Part I., No. 10, Part II., No. 24 of the decision). Crisis response operations in this sense are military, not diplomatic or other non-military activities for crisis management. This corresponds to NATO's structure as a primarily military alliance. It also corresponds to the history of the negotiations in this context and to the explicit reference to the crisis response operations in the Balkans that are contained in the Concept (Part III., Nos. 31-32; cf. Klein/Schmahl, *loc. cit.,* p. 199; Zivier, Der Kosovo-Einsatz als Präzedenzfall?, Recht und Politik 35 [1999], pp. 210 and 212).

In comparison with the 1991 Concept, the new 1999 Strategic Concept has been considerably intensified especially in the passages that are relevant here (as concerns the Federal Government's point of view in this respect, cf. *Jahresabrüstungsbericht*, *loc. cit.,* p. 6). In particular, the relevant statements about the tasks that do not fall under Article 5 are no longer treated only as part of the analysis under the security policy perspective but also as part of the Alliance's security approach (Part III. of the Concept). 142

The structure and the choice of words of the Concept are in line with this change. In the 1991 Strategic Concept, declarations of intention prevailed. In No. 32 of the 1991 Strategic Concept, *e.g.,* it was stated that a coherent approach to crisis management was (still) to be determined; appropriate consultation and decision-making procedures (that did not yet exist) were mentioned as an essential prerequisite to this end. The 1991 Strategic Concept only expressed the member states' political will to advance in this direction in the future. In contrast to that, this approach was laid down in the 1999 Strategic Concept. The 1999 Strategic Concept consistently refers to "non-Article 5 crisis response operations", a new term that was not contained in the 1991 Concept. The new 1999 Strategic Concept defines the elements of the concept "crisis response operation" (Part III., Nos. 31-32 of the Washington decision). If a conflict has developed into a crisis that has become so critical that preventive action no longer seems promising, the Council can become active, in co-operation with the competent international organisations, if necessary; for this, it can make use of a series of instruments of action. These instruments include non-Article 5 crisis response operations, which are of a military nature. The operation is to be carried out in accordance with the international law that is applicable in the respective case. 143

This statement of facts generalises the procedures that have been developed since 1994. Accordingly, the Alliance, in its 1999 Concept, recalls the decisions concerning crisis response operations in the Balkans that followed the 1994 offer. The coherent Alliance response to all contingencies, *i.e.,* by collective effort in Alliance defence as well as by crisis response operations, is based on procedures for consultation, an integrated military structure, and on co-operation agreements (Part IV., No. 43 of the Washington decision). Finally, the 1999 Strategic Concept also assumes that the structure of the military forces that is required for a coherent crisis response now exists (Part IV., Nos. 51 *et seq.*). The Defence Initiative, which was also approved at the 144

Washington summit, serves the further development of this structure. Moreover, the definition of the Alliance's core functions is not, as was still the case in the 1991 Concept, followed by a clause with which the member states, in defining these core functions, confirm "that the scope of the Alliance, as well as their rights and obligations as provided for in the Washington Treaty remain unchanged" (No. 22 of the 1991 decision).

From all this, however, it cannot be inferred that an objective amendment of the NATO Treaty has taken place. The definitions of content that have been made can still be understood as a further development and a concretisation of the open wording of the NATO Treaty. The North Atlantic Council explicitly declares that the "purpose and nature" of the Alliance remain unchanged (Introduction, No. 5 of the Washington decision). The density of the obligations that arise from the Treaty is lower in the area of crisis response. The member states co-ordinate their measures on a "case-by-case" basis, through consultations pursuant to Article 4 of the NATO Treaty. Contrary to collective defence pursuant to Article 5 of the NATO Treaty, the new 1999 Strategic Concept does not establish an obligation to collective response. The priority of politics and the consensus-based mechanism by which the formation of the North Atlantic Council’s will is established, when it comes to stating whether the preconditions of a measure exist and to determining and enforcing the measure, in particular to NATO's new function, also still apply (Part I., No. 10). In this context, the member states act on the basis of the constitutional law of the respective member state (Part III., No. 31). The fact that the Federal Government approves Germany's participation in crisis response operations in the Council with the reservation that it first obtain a constitutive approval from the *Bundestag*, is in line with this approach. 145

The separation between NATO's functions in the fields of collective defence and regional security is also maintained to the extent that the Strategic Concept expands the concept of security to threats affecting the stability of the Euro-Atlantic area that result from: (1) internal crises of individual states in and around the Euro-Atlantic area; (2) the proliferation of weapons of mass destruction and of the technology for their production, and from (3) the Alliance's dependence on information systems (Part II., Nos. 20 *et seq.*); the Concept relates the basis of the Treaty to global risks from sabotage, from the disruption of the flow of vital resources, organised crime, terrorism and the movement of refugees as a consequence of armed conflicts (No. 24) and orients the Organisation's approach to action (Part III.) and its military integration (Part IV.) towards these threats. 146

The Alliance has already, on several occasions, reacted to profound changes of the political situation without formally amending the Treaty. In this respect, the NATO Treaty is open to further development. Such flexibility with a view to the further development of the Treaty, which is the basis of the system of collective security, is required to keep the Alliance efficient and adaptable in accordance with its aims. The interpretation of Article 59.2(1) of the Basic Law is to take the special requirements of a security system that is explicitly advocated in Article 24.2 of the Basic Law into con- 147 sideration; it may not, therefore, already presuppose, even in the case of a considerable further development of the Treaty by the organs of the security system, an inconsistency with the Treaty that is discernible to a sufficiently clear degree so as to indicate the kind of consent to amend the Treaty that can be inferred from acts of the parties.

II.

The further development of a system of mutual collective security under the terms of Article 24.2 of the Basic Law, which does not constitute an amendment of the Treaty, does not require the consent of the *Bundestag*. Article 59.2(1) of the Basic Law is not accessible to an expansive interpretation. The matter can be decided without having to resolve whether, and if so, which commitments under international law result from the consent to the new 1999 Strategic Concept for the Federal Republic of Germany below the level of the conclusion of the Treaty. If the new 1999 Strategic Concept is interpreted accordingly, such commitments under international law can take the shape of: (1) a binding concretisation of the content of the Treaty by the competent NATO organs; or (2) an authentic interpretation of the NATO Treaty by the parties to the Treaty; but also (3) a joint enhancement, outside the Treaty, of a practice under international law (Article 31.3, letters [a] and [b] of the Vienna Convention on the Law of Treaties, cf. ICJ, Case concerning Kasikili/Sedudu Island [Botswana/Namibia], Judgement, paras. 49 et seq.; Heathrow Airport User Charges Arbitration, in: American Journal of International Law 88 [1994], pp. 738 and 742). Notwithstanding the question whether such a further development of a treaty through the act of a competent organ or through other acts that are legally relevant under international law is covered by the integration program of the NATO Treaty and the Basic Law (III. below), there is, at any rate, no obligation on the side of the Federal Government, pursuant to Article 59.2(1) of the Basic Law, to initiate a legislative procedure or to obtain the consent of the *Bundestag*. 148

The concretisation of the Treaty, as well as the concretisation of the integration programme that was laid down together with the Treaty, is the task of the Federal Government. With reference to the traditional concept of the state in the sphere of foreign policy, the Basic Law has granted the Government a wide scope for performing its task in a directly responsible manner. If only for reasons of the adequate distribution of functions, the role of the Parliament as legislative body as well as the role of the judiciary in this field are restricted. Certainly, the authority concerning foreign affairs that is entrusted to the Federal Government in this respect is not beyond parliamentary control, and it is, like all exercise of public authority, subject to the obligations set forth in the Basic Law. However, an expansive interpretation of Article 59.2(1) of the Basic Law, which includes the participation of the Federal Government in non-formal further developments of the treaty basis of a system of mutual collective security, would not only result in legal uncertainty and would call the steering effect of the Consent Act into question; it would also reduce the Federal Government's capability of acting in the field of foreign and security policy in an unjustified manner; moreover, it 149 would result in a separation of state power that would not do justice to the functions of the executive and the legislative power (cf. BVerfGE 90, p. 286 [at p. 363]; 86, p. 1 [at p. 87]).

Certainly, the danger exists that legally relevant action below the level of a formal amendment of the Treaty brings about a gradual change of the content of the Treaty (cf. BVerfGE 90, p. 286 [at pp. 372 *et seq.*]). This applies in particular to cases in which the heads of the executive of the member states declare themselves in favour of a specific interpretation of the Treaty as concerns an important issue. Moreover, far-reaching consequences for the command and the structure of the armed forces of the partners in the Alliance result from this. The *Bundestag*, however, is not defenceless against a - reversible - amendment of the basis of the Treaty, which would also mean an amendment of the Consent Act. The parliamentary system of government established by the Basic Law equips the *Bundestag* with sufficient instruments for the political control of the Federal Government, also with respect to the further development of a system of mutual collective security. The parliament's general rights of control already oblige the Federal Government, pursuant to Article 43.1 of the Basic Law, to account for its activities within the NATO organs to the parliament. If the German Government enters into obligations concerning the German contribution to the composition of the Alliance's force posture, it will take into consideration the parliament's constitutional right to decide on the budget and will have to work towards achieving the parliament's political approval in this context. The incorporation of new states requires the conclusion of an accession protocol which, in turn, requires consent by the *Bundestag* pursuant to Article 59.2(1) and Article 24.2 of the Basic Law. Moreover, due to the fact that the Constitution requires prior approval by the parliament of any deployment of German troops, every operation of the *Bundeswehr* in the NATO framework, for collective defence as well as for crisis response, depends on the approval of the *Bundestag* (cf. BVerfGE 90, p. 286 [at pp. 363 *et seq*.]); this means that also with a view to the dependence on the parliament's approval, the Federal Government will, as a precaution, seek the political support of the *Bundestag* as concerns a further expansion of NATO's area of operation, and thus, the basis of treaties under international law for operations of the *Bundeswehr* abroad. If, for instance, in the present case, a majority of the members of the *Bundestag* decided, in the framework of the formation of the *Bundestag's* political will, that NATO's new 1999 Strategic Concept requires amendment, the parliament could, through a simple decision by vote, exert political influence on the Federal Government's behaviour in the institutional system of NATO. It is therefore the practice of state action in the Federal Republic of Germany that the Federal Government, before acting on the level of international law, explains its plans to the *Bundestag* and is prepared to answer the *Bundestag's* questions in the subsequent discussion. This has also happened in the case of the new Strategic Concept (cf. *Plenarprotokoll* [Records of the plenary sessions] 14/53). Finally, a parliamentary minority can also challenge the Federal Government's action by way of an *Organstreit* proceeding before the Federal Constitutional Court if the Federal Government, in an unconstitutional manner, oversteps its discretion - which is 150 very broad -, in particular if it transgresses the scope of the integration programme that is contained in the Consent Act to the NATO Treaty.

III.

By approving the new 1999 Strategic Concept, the Federal Government did not transgress the authorisation granted to it by the Consent Act to the NATO Treaty and the authorisation's constitutional framework pursuant to Article 24.2 of the Basic Law. 151

1. The Consent Act to the NATO Treaty, which was enacted in accordance with Article 59.1(2) and Article 24.2 of the Basic Law, defines the integration programme of a system of mutual collective security. The legislative bodies, to a considerable extent, assume responsibility as concerns the integration programme and the political commitment of the Federal Republic of Germany that goes with it. By approving an Act that is the basis of the ratification of a treaty, the *Bundestag* and the *Bundesrat,* pursuant to Article 20.2 of the Basic Law, determine the scope of the Federal Republic of Germany's commitment that is based on the treaty and assume political responsibility *vis-à-vis* the citizen for this. The parliament's legal and political responsibility is not limited to a single act of approval, it also extends to the further execution of the treaty. On the domestic level, the parliament's approval of the treaty empowers the government to further develop this treaty in the forms of action of international law. The Act that is the basis of the ratification of the treaty also contains the order to implement, on the domestic level, the decisions under international law that were taken on the basis of the treaty. Therefore, the *Bundestag's* right to participate in the exercise of foreign power is violated if the Federal Government pursues NATO's further development *ultra vires, i.e.,* beyond the authorisation that it has been granted. 152

The Constitution provides that the government and the legislative power co-operate in the sphere of foreign power. Precisely in the case of security systems under the terms of Article 24.2 of the Basic Law, and also in the case of integration systems pursuant to Article 23 and Article 24.1 of the Basic Law, it is the mission of the institutionally legitimised government to safeguard the rights of the Federal Republic of Germany that result from its engagements at the level of international law. This also includes the further development, by consensus, of the bases of the treaty themselves, subject to the respective regulations in the treaty. 153

The Federal Republic of Germany does not act beyond the framework of authorisation established by the Consent Act to the Nato Treaty merely because individual provisions of the NATO Treaty are violated. The Federal Constitutional Court can, upon application of the *Bundestag*, only state that the statutory framework of authorisation has been transgressed if the further development of the NATO Treaty that took place by consensus infringes essential structural decisions of the system of treaties. 154

2. Such a transgression of the scope of the integration programme of the NATO Treaty set forth in the Consent Act cannot be identified here. With a view to the provisions of the NATO Treaty, the wording of which shows flexibility as concerns future 155

developments, and with a view to the Federal Government's broad discretion as regards the concretisation of the integration framework, it cannot be discerned that the framework of authorisation has been transgressed.

This not only concerns the use of nuclear weapons, which is not regulated in the NATO Treaty and therefore requires concretisation in accordance with security policy requirements, but also the question whether military operations of NATO are also permitted in cases other than those specified in Article 5 of the NATO Treaty. As concerns its overall concept, the NATO Treaty is, in accordance with the United Nations' aims, obviously orientated towards comprehensive preservation of peace on a regional level in the European and North American area (Preamble, Articles 1, 2, 10, 12 and 6 of the NATO Treaty). If the manifestation of possible threats to peace changes, the Treaty leaves sufficient room for developments that adapt to these changes, also as regards the concrete area and purpose of operations, inasfar and inasmuch as there is compliance with the basic mission of preserving peace in the region (cf. BVerfGE 90, p. 286 [at p. 349]). The crisis response operations specified in Nos. 24 and 31-32 of the new 1999 Strategic Concept do not constitute, in this respect, a fundamentally new type of operation. 156

From the content of the new 1999 Strategic Concept, it cannot be inferred that the North Atlantic Alliance intends to abandon its commitment to the aims of the United Nations and the compliance with its Charter (Preamble, Articles 1, 5, 7 and 12 of the NATO Treaty). Pursuant to Article 7 of the NATO Treaty, to which reference is made in Article 10 of the Concept, the new 1999 Strategic Concept also cannot be used to support an interpretation of the NATO Treaty that affects the rights and obligations of the Federal Republic of Germany that arise out of the Charter of the United Nations. On the contrary, the new 1999 Strategic Concept explicitly confirms, with reference to the Washington Declaration (No. 4), the proximity of NATO to the United Nations. The description of the Alliance's present tasks opens with a confirmation of its commitment to the NATO Treaty and to the Charter of the United Nations (Part I., No. 10). From this, it follows that the primary responsibility of the United Nations Security Council for the maintenance of international peace continues to be the basis of the NATO Strategy (Part I., No. 15). It also intends to establish co-operation between NATO, the OSCE, the EU and the UN in a European security architecture (Part III., No. 25; cf. BVerfGE 90, p. 286 [at p. 350] already). The security approach, which relates to the existing security policy challenges, provides that NATO, in accordance with its own procedure, will support peacekeeping and other operations under the authority of the UN Security Council (Part III., No. 31 of the Strategic Concept; also cf. No. 38 of the Communiqué). The fact that the Summit Declaration on Kosovo strives for a solution of this crisis and an end to NATO's operation on the basis of a United Nations Security Council resolution (No. 6) is in line with this approach; before, when justifying the air strikes, the North Atlantic Council had already relied to a considerable extent on Security Council resolutions. The Federal Government's declarations concerning the Washington summit and its previous declarations on the air strikes emphasise the 157 responsibility of the United Nations Security Council.

Moreover, the new 1999 Strategic Concept provides for the enlargement of the Alliance by new members (Part III., No. 39) as a part of its security approach in the 21st century. In this context, the Concept is to be construed in the light of the Washington Declaration, which, by providing for the admission of new member states, seeks to guarantee peace in accordance with the values set forth in Chapter VIII of the Charter of the United Nations (No. 8 of the Declaration; also cf. Nos. 4 and 7 of the Communiqué). In this respect, NATO bases its activities on the different forms of institutionalised co-operation with states in Central and Eastern Europe that it has developed, especially after 1994. 158

3. Finally, the further development of the NATO Treaty that was initiated and confirmed by the approval of the new 1999 Strategic Concept does not move away from the Alliance's purpose of maintaining peace, as laid down in Article 24.2 of the Basic Law. The commitment of a system of mutual collective security to the specific objective of maintaining peace, which is essential as part of the constitutional precept of peace, also applies to a further development of such a system that does not take place by way of a treaty. The *Bundestag* can challenge an infringement of this determination of purpose, by way of an *Organstreit* proceeding, as a transgression of the integration programme for which the *Bundestag* is competent. 159

The Basic Law refrains from a more specific definition of what is to be understood by maintaining peace; Article 24.2 of the Basic Law shows, however, that the establishment of collective security is a decisive means for maintaining peace, namely for bringing about and securing a peaceful and lasting order in Europe and world-wide (cf. BVerfGE 90, p. 286 [at pp. 349 *et seq.*]). This also corresponds to the intention of the historic architects of the Constitution (cf. Entwurf eines Grundgesetzes, Darstellender Teil, pp. 23-24; in: JöR [Jahrbuch des öffentlichen Rechts der Gegenwart], N. F. 1 [1951], pp. 222-223]). The membership in a system of collective security provided in Article 24.2 of the Basic Law and the participation in operations in the framework of such a system that this Article facilitates is also not to be restricted by the regulations of Article 87a of the Basic Law on the establishment and purposes of the *Bundeswehr* (cf. BVerfGE 90, p. 286 [at pp. 353 *et seq.*]). In the framework of collective security systems, the Federal Republic of Germany complies with the prohibition on the threat or use of force under customary international law (cf. ICJ, Military and Paramilitary Activities in and Against Nicaragua, ICJ Reports, [at paras. 187 et seq.]), the domestic application of which is prescribed by Article 25 of the Basic Law. 160

The elements of the wording of Article 24.2 of the Basic Law preclude, however, the Federal Republic of Germany's participation in a mutual collective system of military security that does not serve to maintain peace. The transformation of a system that originally fulfils the requirements of Article 24.2 of the Basic Law into a system that no longer serves the maintenance of the peace, or even prepares wars of aggression, is constitutionally prohibited and can therefore not be covered by the content of the 161

Consent Act that was adopted on the basis of Article 59.2(1) and Article 24.2 of the Basic Law.

The new 1999 Strategic Concept, however, does not provide any indications of such a transformation of NATO. According to the wording of the Concept, which concretises prerequisites for operations of NATO's armed forces, the operations are to be carried out only if they are consistent with international law (Part III., No. 31). This means that the following is not called into question: the obligatory prohibition on the threat or use of force (Article 2, No. 4 of the Charter of the United Nations); the accepted prerequisites for the use of military force, which include the grant of a UN mandate to states (Article 42 in conjunction with Article 48 of the Charter of the United Nations) or to regional organisations (Article 53 of the Charter of the United Nations) by the United Nations; collective defence, also of third states; and intervention by request, and the proportionality of such action. 162

The concretisation of the operations pursuant to Article 5 for the defence of the Alliance's territory, and the concretisation of the non-Article 5 operations (crisis response operations) does not indicate any intention to disturb peace that is motivated by power politics or even by aggression. On the contrary, the new 1999 Strategic Concept deals with the preservation of peace with a view to the changes in the security policy situation after the end of the East-West conflict, but also with a view to new situations of threat to peace. Pursuant to the new 1999 Strategic Concept, the Alliance, based on common values of democracy, human rights and the rule of law, strives to secure a just and lasting peaceful order in Europe (Part I., No. 6). As the Alliance's first task, the Concept mentions its contribution to a stable Euro-Atlantic security environment, based on democratic institutions and on the commitment to the peaceful resolution of disputes (Part II., No. 10). In fulfilling its fundamental security tasks, the Alliance will respect the legitimate security interests of third states; it does not consider itself to be any country's adversary (No. 11). Its security approach includes the prevention of conflicts, co-operation and enlargement as well as crisis management (Part III. Nos. 26, 33 et seq.). When managing a specific crisis, the Alliance's political authorities are to choose the appropriate response from a range of political and military measures and to exercise close political control at all stages (Part III., No.32). 163

In the weighing of the different instruments of the security approach, as well as in its contribution to the process of development of international law, the Concept is a document that is open to further development that is to be concretised by the member states in the future. 164

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