



IN THE NAME OF THE PEOPLE

**In the proceedings
on the motion**

to issue the following judgment
by way of a temporary injunction:

1. Until a decision in the proceedings in the main action is issued, the participation of Bundeswehr (Federal Armed Forces) soldiers in the mission crews of the AWACS aircraft that are operating to protect Turkey from Iraqi attacks, implementing the North Atlantic Council's decision of 19 February 2003, may only be continued if and to the extent that the German Bundestag (the lower house of the German parliament) passes a resolution to this effect;
2. The respondent is ordered to immediately request the German Bundestag to pass such resolution to the extent that the respondent wishes the participation of Bundeswehr soldiers in the mission crews of the AWACS aircraft mentioned under 1. to be continued.

Applicant: FDP parliamentary group in the German Bundestag,
represented by its chairman
Dr. Wolfgang Gerhardt, Member of the German Bundestag,
Platz der Republik 1, 11011 Berlin

- authorised representative: Prof. Dr. Michael Bothe,
Theodor-Heuss-Straße 6, 64625 Bensheim -

Respondent: Federal government,
represented by the Federal Minister of Defence,
Stauffenbergstraße 18, 10785 Berlin

- authorised representative: Gregor-Mendel-Straße 13, 53115 Bonn -
the Second Senate of the Federal Constitutional Court, with the participation of
Judges

Hassemer (Vice-President),
Sommer,
Jentsch,

Broß,
Osterloh,
Di Fabio,
Mellinghoff,
Lübbe-Wolff

ordered on 25 March 2003:

The motion is denied.

Grounds:

A.

The motion relates to the question of whether the current operation of German soldiers in NATO AWACS aircraft in Turkey requires the German *Bundestag's* approval. 1

I.

1. In its letter of 10 February 2003, Turkey requested consultations of the members of the North Atlantic Treaty Organisation (NATO) pursuant to Article 4 of the NATO Treaty. On the basis of the subsequent consultations and planning, NATO's Defence Planning Committee authorised the Alliance's military authorities on 19 February 2003 to deploy NATO AWACS aircraft and systems for the defence against missile attacks and attacks with chemical and biological weapons in Turkey. Thereupon, two out of a total of 17 AWACS (Airborne Warning and Control System) aircraft of NATO's Airborne Early Warning and Control Force, and two more of them about three weeks later, were deployed from their home base in Geilenkirchen, Germany, to Konya Airbase in Turkey. Since 26 February 2003, and 18 March 2003, respectively, the aircraft have been operating in Turkish airspace. 2

2. The AWACS aircraft in this operation constitute an airborne warning and surveillance system for the early detection of aircraft and other flying objects. The system performs control and command functions and serves to give directions to fighter aircraft. The crews consist of members of the armed forces of several NATO members. About one third of the crew members are *Bundeswehr* soldiers. 3

3. In a letter of 14 March 2003, the applicant's chairman informed the Federal Chancellor that in the applicant's opinion, the federal government was obliged to request the German *Bundestag's* constitutive approval of the participation of German soldiers in the AWACS operations in Turkish airspace. According to the applicant, the federal government at least had to be prepared to immediately pass a resolution to this effect in the event of an armed conflict and to submit it as a motion to the German *Bundestag*. On account of the current political situation in Iraq, which had been the basis of the Turkish request, the operations at issue were no routine surveillance flights performed by the AWACS aircraft. 4

4. The federal government refused to obtain the German *Bundestag's* approval. In 5

his speech before the German *Bundestag* on 19 March 2003, the Federal Chancellor explained:

"The NATO AWACS aircraft are performing routine flights above the territory of Turkey. This happens on the basis of the decision of NATO's Defence Planning Committee of 19 February 2003. Their sole task is the strictly defensive surveillance of Turkish airspace. As can be seen from the Rules of Engagement, they do not provide any support whatsoever for operations in or against Iraq. The assignment of the AWACS aircraft to the command of NATO's Supreme Allied Commander Europe, that is, to SACEUR, draws a strict dividing line towards the tasks of the commander of the US Central Command, the American general Franks. By the way, as I have been informed by our experts, Mr. Franks has almost 100 own US AWACS aircraft at his disposal for military operations against Iraq.

This means that the NATO aircraft under the command of NATO's Supreme Allied Commander Europe survey and secure Turkish airspace, and in doing so, they operate in a different region from US AWACS aircraft and with a completely different mission. This is the reason why we are convinced that no resolution by the German *Bundestag* is required for them to do so."

5. After the armed conflict in Iraq had started in the early morning of 20 March 2003, members of the FDP parliamentary group and the applicant made a motion for a resolution in the 35th session of the German *Bundestag* on the same day. According to the motion, the German *Bundestag* was to call upon the federal government to comply with its obligation set forth in the Basic Law by immediately requesting the German *Bundestag's* constitutive approval of the participation of German soldiers in the AWACS operations in Turkish airspace.

In a vote by roll-call, with 274 votes for the motion, 303 against, and six abstentions, the motion did not obtain the necessary majority.

II.

1. a) The applicant argued that it had a legitimate need for legal protection. It had unsuccessfully endeavoured to achieve its aim of safeguarding Parliament's rights by political means before bringing the case before the Federal Constitutional Court.

According to the applicant, the issue of the requested temporary injunction would, admittedly, anticipate the decision in the main action in most points. This was, however, not contrary to the admissibility of the motion because it was not possible to prevent irreversible detriment to parliament's rights in any other way than by means of the requested temporary injunction.

b) The applicant further argued that the application in the main action was admissible. In its decision of 12 July 1994 (BVerfGE 90, p. 286 [at pp. 336-337]), the Federal Constitutional Court had stated that a parliamentary group in the German *Bundestag* was authorised to allege a violation of the *Bundestag's* rights when *Bundeswehr* sol-

diers participated in AWACS aircraft operations without the German *Bundestag's* approval. The fact that the motion for a resolution of 20 March 2003 had been rejected by the German *Bundestag* did not alter this. If the motion had been adopted, the result would have been an expression of Parliament's opinion which was not legally binding upon the federal government and which did not have a constitutive effect. Parliament could therefore not lose its right to deal with a *Bundeswehr* operation by forgoing such an expression of its opinion. The vote could therefore also not be regarded as an effective waiver of approval because parliament could not waive such right.

c) The applicant further argued that the application in the proceedings in the main action was also not patently unfounded. The operation at issue required approval. The operation of the AWACS aircraft in Turkey was on no account a pure routine measure, like the surveillance of a border in times of peace. On the contrary, Turkey's request for protective measures of NATO proved that this operation was of military importance in an armed conflict and was supposed to provide protection from a concrete military threat. The meaning of the operation was to detect threats to Turkish territory at an early point and to facilitate countermeasures, in particular the bringing down of attacking aircraft.

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Moreover, it was unrealistic to assume that the operation of AWACS aircraft for the protection of Turkey could be kept strictly separate from the operation of other aircraft in Iraqi airspace. The protection of Turkey and the events of the war in Iraq were interconnected, the more so because Turkish troops, in whichever way this could be assessed, were engaged in Northern Iraq. The operation of the AWACS aircraft were therefore concrete military measures in connection with an armed conflict. Admittedly, *Bundeswehr* missions below the threshold of an operation, which did not require the *Bundestag's* approval, existed, for instance the use in NATO Alliance territory for the protection of the region, for the surveillance of borders or in manoeuvres. However, to perform the function of a fire-control command post in the context of an international crisis, or even in the context of an armed conflict, was something different in quality.

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d) According to the applicant, the requested regulations were also urgently needed to avert serious detriment to the public good. If the temporary injunction were not issued, this would perpetuate a serious, and clearly unconstitutional, situation. A resolution after an armed conflict was constitutionally and politically worthless. If the *Bundestag* took its decision only after the end of the operation, it could practically not assume its responsibility. This risk was particularly serious because the situation went along with considerable legal uncertainty for the German soldiers. They had to be provided security by the German *Bundestag's* assuming the responsibility for the operation.

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In comparison, the detriment that would arise if the requested temporary injunction was granted but the applicant were unsuccessful later in the main action was not seri-

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ous. Should the *Bundestag* approve the participation in the operation, no detriment arose if it became apparent later that such approval had not been necessary. Should, however, the *Bundestag* refuse approval and were it to become apparent later that approval had not been necessary, the federal government had, with the withdrawal of the German soldiers, taken a step that at any rate had complied with the wish of a parliamentary majority. In a democratic system this could not be regarded as a detriment.

2. a) In the respondent's opinion, an application in the main action would be patently unfounded because the surveillance flights of the AWACS aircraft in Turkish airspace did not constitute an armed operation of armed forces. At present, the task of the AWACS aircraft consisted in the purely defensive protection of Turkey as a partner in the NATO Alliance. Pursuant to the Rules of Engagement, which had been extended once again on 19 March 2003, the AWACS unit's mission, was, now as before, to identify potential intentions of attacks at an early stage by surveying Turkish airspace, and to demonstrate thus the Alliance's political determination to preserve Turkey's territorial integrity

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The German *Bundestag* itself had decided on 20 March 2003 not to call upon the federal government to request its approval. By this decision, the German *Bundestag* had also indicated that it agreed with the mission of the German AWACS crew members under the circumstances, and had thus *de facto* anticipated its approval of the federal government's course of action.

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b) The respondent put forward that the detriment that the issue of a temporary injunction would cause prevailed in a weighing of consequences. In this context, it had to be taken into account that the applicant sought the anticipation of the decision in the main action, which was not yet pending. Moreover, the *Bundestag* had already dealt with the matter and had come to the conclusion that approval was not necessary. If the temporary injunction was issued and it were to become apparent in the proceedings in the main action that the *Bundestag's* approval had not been necessary, Germany would either have to deny an ally the support that it had requested in the framework of NATO and thus frustrate the help to safeguard Turkey's territorial integrity which had been agreed together with other NATO members because the AWACS aircraft could no longer fulfil their defensive mission after the withdrawal of the relatively large number of German crew members, or the federal government would have to obtain the *Bundestag's* approval of the participation in a military operation, which would mean that its executive room for manoeuvre to which it was entitled would be considerably restricted without sufficient cause.

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B.

Pursuant to the factual situation as it is known to date, the admissible motion for a temporary injunction is unsuccessful.

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I.

1. Recourse to the Federal Constitutional Court in the main action exists pursuant to Article 93.1 number 1 of the Basic Law (*Grundgesetz*) and § 13 number 5 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*). A motion for a temporary injunction is also permissible in *Organstreit* proceedings between highest federal bodies (cf. BVerfGE 23, p. 42 [at p. 48]; 82, p. 353 [at p. 363]; established case-law). The fact that proceedings in the main action have been announced by the applicant but are not yet pending does not conflict with the admissibility of the motion (cf. BVerfGE 3, p. 267 [at p. 277]; 71, p. 350 [at p. 352]; established case-law). 21

2. The motion is admissible although it is aimed at implementing of a measure that would, in essence, anticipate the decision in the main action. The withdrawal of the soldiers concerned and the obtaining of an approving *Bundestag* resolution would abolish the direct cause of the dispute. 22

Such an anticipation of the main action does not conflict with the admissibility of a temporary injunction if under the given circumstances a decision in the main action would possibly be too late and if the applicant then could no longer be provided sufficient legal protection in any other way (cf. BVerfGE 34, p. 160 [at pp. 162-163]; 67, p. 149 [at p. 151]; established case-law). In the *Organstreit* proceedings between the German *Bundestag* and the federal government, the applicant has brought a representative action in its own name, but on behalf of the *Bundestag*. The applicant wants to obtain, on behalf of the *Bundestag*, an answer to the question whether German soldiers may, in the concrete case of the AWACS aircraft that are deployed in Turkey, operate without a constitutive resolution by the *Bundestag*. If the motion for a temporary injunction was rejected because it anticipates the main action, there would be the risk of irreparable detriment to parliament's rights if it were to become evident in the main action that the applicant's request for legal protection is successful. Which of the constitutional bodies that are concerned parties is authorised to exercise the constitutional rights that they claim until the decision in the main action is issued can therefore only be decided according to the standard of review that is valid for the temporary safeguarding of rights (cf. in this context BVerfGE 89, p. 38 [at p. 44]). 23

II.

The motion for a temporary injunction is unfounded. 24

1. a) Pursuant to § 32.1 of the Federal Constitutional Court Act, the Federal Constitutional Court can deal with a matter provisionally by means of a temporary injunction. In such cases, the reasons that speak in favour of the unconstitutionality of the challenged measure must be left out of consideration unless the main action proves inadmissible from the outset or patently unfounded. However, the motion for a temporary injunction is only well-founded if is urgently needed to deal with a matter provisionally to avert serious detriment, prevent imminent violence or for any other important reason of the public good. 25

b) The issue of a temporary injunction in *Organstreit* proceedings constitutes an encroachment, by the Federal Constitutional Court, upon another constitutional body's autonomy. When reviewing whether the prerequisites of § 32.1 of the Federal Constitutional Court Act are met, the Federal Constitutional Court must therefore, in principle, apply a strict standard (cf. BVerfGE 104, p. 23 [at p. 27]; Order of the Second Senate of the Federal Constitutional Court of 10 October 2002 - 2 BvK 1/01 -, *Neue Zeitung für Verwaltungsrecht, Rechtsprechungs-Report* 2003, pp. 85-86). The issue of a temporary injunction can solely serve to provisionally safeguard the applicants' disputed right as a constitutional body so that the right will not be rendered ineffective by the creation of accomplished facts in the run-up to the decision in the main action (cf. BVerfGE 89, p. 38 [at p. 44]; 96, p. 223 [at p. 229]; 98, p. 139 [at p. 144]). The prerequisites are even stricter when, as in the present case, the measure concerned has implications in the fields of international law or foreign policy (cf. BVerfGE 33, p. 195 [at p. 197]; 83, p. 162 [at pp. 171-172]; 88, p. 173 [at p. 179]; 89, p. 38 [at p. 43]).

c) There is no room for a temporary injunction if the application that has been or will be made in the main action proves to be inadmissible from the outset or patently unfounded, or, which is not possible in the present case because no application in the main action has been made as yet, if the Federal Constitutional Court is able to decide the main action so speedily that the foreseeable serious detriment can thus be avoided.

If the application in the main action is neither inadmissible nor patently unfounded, the Federal Constitutional Court weighs the consequences that would arise in the event that the temporary injunction is not issued but the underlying measure were later on declared unconstitutional against the negative effects that would arise if the measure does not enter into force but proves constitutional in the main action (cf. BVerfGE 86, p. 390 [at p. 395]; 88, p. 173 [at pp. 179-180]; 99, p. 57 [at p. 66]; 104, p. 23 [at pp. 28-29]; established case-law).

2. The proceedings in the main action, which have not yet been instituted, would not be inadmissible from the outset (a) or patently unfounded (b).

a) Pursuant to Article 93.1 number 1 of the Basic Law and § 63 of the Federal Constitutional Court Act, not only the highest federal bodies, but also sections of these bodies can file applications to the extent that they have been vested with rights of their own by the Basic Law or the rules of procedure of a highest federal body. As a parliamentary group in the German *Bundestag*, the applicant is capable of being a party in *Organstreit* proceedings pursuant to § 13 number 5 and § 63 *et seq.* of the Federal Constitutional Court Act. It can, in its own name, claim rights that are due to the *Bundestag vis-à-vis* the federal government (cf. BVerfGE 1, p. 351 [at p. 359]; 2, p. 143 [at p. 165]; 90, p. 286 [at p. 336]; 104, p. 151 [at p. 193]; established case-law).

b) The application is also not patently unfounded. The Basic Law obliges the federal

government to obtain (in principle, previously) the German *Bundestag's* constitutive approval of the participation of German armed forces in armed operations (cf. BVerfGE 90, p. 286 [at pp. 381 *et seq.*]). The application is supposed to safeguard the *Bundestag's* right of participation in sovereign decisions relating to foreign affairs to the extent that the concrete operation of *Bundeswehr* soldiers is subject to the *Bundestag's* legally relevant influence (cf. BVerfGE 90, p. 286 [at p. 382]).

In the present geopolitical situation, it cannot be excluded that the deployment to Turkey of parts of NATO's AWACS unit, which is made up, *inter alia*, of a considerable number of German soldiers, constitutes an operation that requires the *Bundestag's* constitutive approval. 32

3. a) Proceedings in the main action will have to ascertain the extent of the requirement of parliament's constitutive approval, which is directly valid by virtue of the Constitution and is set forth in the part of constitutional law that concerns defence. The reasoning for the requirement of parliament's constitutive approval stems from the historical image of an entry into war (cf. BVerfGE 90, p. 286 [at p. 383]). Under the current political conditions in which wars are no longer formally declared, a gradual involvement in armed conflicts is equivalent to an official entry into war. Therefore, in principle, any participation of German armed forces in armed operations is subject to parliament's constitutive participation. 33

The proceedings in the main action must therefore ascertain at what point in time it can be assumed that a "participation of armed forces in armed operations" takes place, and in particular, at what point German soldiers are "involved in armed operations" (cf. BVerfGE 90, p. 286 [at pp. 387-388]). In the present case, for instance, the question must be answered from when on, and to what extent, the participation in operations in integrated NATO units becomes a participation in armed operations, which will trigger the requirement of parliamentary approval, if such units survey the airspace of an Alliance member whose state territory directly borders on a territory that is involved in war, or if surveillance, apart from this, extends to the territory of a state that is involved in the armed conflict. 34

Apart from this, the question whether also an indirect involvement in armed operations will trigger the requirement of parliamentary approval might require investigation. In the present case, this applies in particular if developments are possible that will lead to the partner in the Alliance whose territory is supposed to be secured becoming a belligerent power. Because the factual development of the situation, according to the Senate's present state of knowledge, and also according to the federal government's submissions, does not yet provide any evidence of a direct involvement in combat action, the application is also not patently well-founded. 35

b) The result of a weighing of consequences is a decision against the issue of a temporary injunction. 36

In a weighing of consequences, the negative consequences that would arise for the 37

Bundestag, whose rights are safeguarded by the applicant, in the event that the requested temporary injunction is not issued but the main action shows that the concrete operation of German soldiers, if it takes place without the *Bundestag's* approval, violates the requirement of parliamentary approval that is set forth in the part of constitutional law that concerns defence, are weighed against the negative effects that would arise if the requested temporary injunction is granted, the subsequent *Organstreit* proceedings show, however, that the operation was not subject to the requirement of parliament's constitutive approval.

aa) The requirement of parliament's constitutive approval carries much weight because the *Bundeswehr* is a so-called parliamentary army (*Parlamentssheer*). The *Bundeswehr* is thus integrated in the democratic constitutional system of a state under the rule of law (cf. BVerfGE 90, p. 286 [at p. 382]). Therefore the involvement of German soldiers in armed operations without the *Bundestag's* approval is, in principle, a serious encroachment upon parliament's rights.

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bb) On the other hand, there is, on the side of the executive, the responsibility for foreign policy, for which the executive has its own core area of discretion. To the extent that the requirement of parliament's approval does not apply, it is solely for the federal government to take to what extent the Federal Republic of Germany will participate in the implementation of the resolution of NATO's Defence Planning Committee of 19 February 2003. If the requested temporary injunction were issued, this would, for the federal government, result in the constraint of having to seek the *Bundestag's* political approval in a current emergency situation in foreign policy, or, if this is supposed to be avoided, of withdrawing the German soldiers from the integrated NATO units concerned; such constraint would constitute a considerable encroachment upon the core area of the federal government's responsibility in the fields of foreign and security policy.

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In a critical situation in security policy, the federal government would be facing the alternative of either obtaining parliament's approval, which would be uncertain from the political point of view and possibly involve a great expenditure of time, or putting up with risks in its policy within the Alliance that would arise due to the withdrawal of German Soldiers from NATO's integrated AWACS unit, which is explicitly mentioned in the motion as a possible course of action, and putting up with the decrease of the unit's capability of functioning that would result from the withdrawal (in this context, see the submissions in the oral hearing of the motion for a temporary injunction in the AWACS proceedings - 2 BvE 5/93 and 2 BvQ 11/93 - of 7 April 1993, a verbatim record that was drawn up from the tape recording of the oral hearing can be found in: Dau/Wöhrmann [editors], *Der Auslandseinsatz deutscher Streitkräfte*, 1996, pp. 145 *et seq.*).

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cc) When the strict standard of review required is applied, it cannot be established that there is a considerable predominance of the *Bundestag's* rights. The result of the weighing of the positions is not determined from the outset. The federal government's

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undiminished capacity to act in the field of foreign policy in the area of competencies that is assigned to it by the Constitution carries special weight also in the interest, on the side of the state as a whole, in Germany's reliability in the fields of foreign and security policy (cf. BVerfGE 33, p. 195 [at p. 197]; 83, p. 162 [at pp. 173-174]).

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**Bundesverfassungsgericht, Beschluss des Zweiten Senats vom 25. März 2003 -
2 BvQ 18/03**

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