**HEADNOTE**

**to the Judgment of the Second Senate of 3 July 2007**

– 2 BvE 2/07 –

**Participation in the expanded ISAF mandate resulting from the resolution of the *Bundestag* of 9 March 2007 does not infringe the rights of the German *Bundestag* under Article 59.2 sentence 1 of the Basic Law (*Grundgesetz – GG*).**

FEDERAL CONSTITUTIONAL COURT

– 2 BvE 2/07 –

Pronounced
on 3 July 2007
Herr
*Regierungsangestellte*
as Registrar of the
Court Registry

**IN THE NAME OF THE PEOPLE**

**In the proceedings**
**on**
**the application to declare that**

1. **the Federal Government has infringed the rights of the German *Bundestag* under Article 59.2 of the Basic Law in taking part in the consensual further development of the North Atlantic Treaty of 1955, which contravenes fundamental structural decisions of the Treaty, and in this way the Federal Government is acting outside the framework of authorisation defined by the Consent Act (*Zustimmungsgesetz*),**
2. **the Federal Government, by participation in the extended ISAF mandate in the meaning of the resolution of the German *Bundestag* of 9 March 2007, infringed the rights of the German *Bundestag* under Article 59.2 of the Basic Law**

Applicant: PDS/Die Linke parliamentary group in the German *Bundestag*,

represented by its Chairmans Gregor Gysi and Oskar Lafontaine,

German *Bundestag*, Platz der Republik 1, 11011 Berlin

– authorised representatives: Rechtsanwälte Wolfgang Kaleck und Sönke Hilbrans,
in Sozietät Rechtsanwälte Hummel, Kaleck,
Immanuelkirchstraße 3-4, 10405 Berlin –

Respondent: Federal Government,

represented by the Federal Chancellor Dr. Angela Merkel,

Federal Chancellery, Willy-Brandt-Straße 1, 10557 Berlin

– authorised representative: Prof. Dr. Georg Nolte,

Wissenschaftskolleg zu Berlin,

Wallotstraße 19, 14193 Berlin –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

Vice-President Hassemer,

Broß,

Osterloh,

Di Fabio,

Mellinghoff,

Lübbe-Wolff,

Gerhardt,

Landau

held on the basis of the oral hearing of 18 April 2007:

**JUDGMENT:**

**The applications are rejected as unfounded.**

**REASONS:**

The applications in the *Organstreit* proceedings (proceedings on a dispute between supreme federal bodies) relate to the participation of armed German forces in the deployment of an International Security Assistance Force in Afghanistan. The applicant submits that the respondent participated in a further development of the NATO Treaty 1

outside its statutory framework of authorisation and in doing so infringed rights of the German *Bundestag* under Article 59.2 of the Basic Law.

1. a) After the overthrow of the Taliban regime the largest ethnic groups in Afghanistan resolved, at the Petersberg Conference in November and December 2001, on the Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions of 5 December 2001, known as the Bonn Agreement. In this agreement, the conference participants requested the United Nations Security Council to consider the early deployment of a United Nations mandated force; this force, under the Agreement, would assist in the maintenance of security for Kabul and its surrounding areas, and it could, as appropriate, be progressively expanded to other urban centres and other areas. On 20 December 2001, the Security Council, in Resolution 1386 (2001), authorised the establishment of an International Security Assistance Force (ISAF), in order to support the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas. The Security Council later extended this authorisation, most recently in Resolution 1707 (2006) of 12 September 2006, by one further year until 13 October 2007. 2

b) On 21 December 2001, the Federal Government applied for the consent of the German *Bundestag* to the participation of German forces in an International Security Assistance Force in Afghanistan; the *Bundestag* gave this consent on 22 December 2001. In justification of its application, the Federal Government stated *inter alia* that the participation of armed German forces in the International Security Assistance Force was an essential contribution made by Germany to the implementation of the national process of reconciliation in Afghanistan that was set in motion at Petersberg. It stated that the international-law bases of this were the Bonn Agreement and the resolutions of the Security Council on Afghanistan. Under constitutional law, the German forces, in participating in the International Security Assistance Force in implementation of Resolution 1386 (2001) of the United Nations Security Council, were acting as part of a system of mutual collective security in the meaning of Article 24.2 of the Basic Law and in accordance with the rules of that system. The deployment, at first restricted to six months, was later extended on the basis of applications of the Federal Government to this effect, most recently until 13 October 2007. The status and rights of the International Security Assistance Force are governed by the agreements entered into between NATO and the government of Afghanistan. 3

2. a) In August 2003, NATO took over the leadership of the ISAF deployment. The ISAF mandate was at first restricted to the area of Kabul and its surroundings; by Resolution 1510 (2003) of the United Nations Security Council of 13 October 2003, it was extended to include the whole of Afghanistan. In June 2004, at its Istanbul summit, NATO decided to exercise the extended mandate. Until mid-2006, this applied first to the north and west of the country; then, on 31 July 2006, ISAF also took over the responsibility for the southern region of Afghanistan, and on 5 October 2006 for the eastern region. In these parts of the country, where the security situation was difficult, only the United States of America and other supporting states had previously 4

been deployed, in Operation Enduring Freedom. This operation to fight terrorism, by military means as well as in other ways, which was the response of the United States of America to the terrorist attacks of 11 September 2001, had begun in October 2001 with a military offensive against the Afghan Taliban regime.

b) As a result of the extension of ISAF, its operational area now overlaps with that of the Operation Enduring Freedom. The ISAF operational plan provides for "a restrictive transmission of the results of reconnaissance" to the Operation Enduring Freedom, "if this is necessary for the ISAF operation to be carried out successfully or for the security of the ISAF forces" (*Bundestag* document (*Bundestagsdrucksache – BTDrucks*) 16/4298, p. 3). When the ISAF mission was mandated on the basis of Chapter VII of the Charter of the United Nations, the Security Council repeatedly called on ISAF to work in close consultation with the Operation Enduring Freedom (see, for example, Resolutions 1510 (2003) of 13 October 2003 and 1707 (2006) of 12 September 2006), and in addition it expressly welcomed the closer operational synergy of the operations in the course of the extension of the ISAF mission (see Resolution 1659 (2006) of 15 February 2006). 5

c) At the NATO summit in Riga on 28/29 November 2006, the Heads of State and Government of the NATO member states made a declaration on the future challenges to NATO and endorsed a document entitled Comprehensive Political Guidance, which is intended to define a framework for the future political direction of the defensive alliance against the background of changing threats. This document discusses, in a general context, questions such as those relating to the cooperation between security organisations, for example, and to the development and reorganisation of military capabilities; in addition to this, the document deals with the political evaluation and future orientation of the present NATO deployments; the ISAF mission in Afghanistan, described as the "key priority" (no. 5 of the summit declaration), takes up a great deal of space. 6

3. a) On 8 February 2007, the Federal Government requested the consent of the German *Bundestag* to expanded German participation in the NATO-led International Security Assistance Force in Afghanistan, with capabilities for air reconnaissance and surveillance. In justification of this, the application stated *inter alia* that the extension of the mandate for the continuation of German participation in ISAF, resolved on 28 September 2006, was done in expectation that the deployment of ISAF would be extended to the whole of Afghanistan: this extension was completed on 5 October 2006 when NATO took over the responsibility for the eastern region. In doing this, the application stated, NATO was taking on new challenges, in particular a tenser security situation. From the point of view of NATO, it was therefore also necessary to have the capability of air reconnaissance. Reconnaissance was very important in the whole ISAF area of responsibility. The application of the Federal Government was intended to make it possible to provide these capabilities to supplement the existing German contribution to ISAF. It was intended to use Tornado RECCE reconnaissance aircraft for reconnaissance and surveillance from the air; these aircraft had daytime and 7

nighttime reconnaissance imaging capability. These reconnaissance aircraft had self-protection and self-defence equipment; they were not to be used for close air support (*Bundestag* document 16/4298, p. 3).

b) On 9 March 2007, the German *Bundestag* approved this application of the Federal Government. From 2 April 2007, the reconnaissance aircraft were moved to Afghanistan, and on 9 April 2007 they were put under NATO command. The reconnaissance flights began on 15 April 2007. 8

On 20 March 2007, the applicant filed the applications set out in the recitals in *Organstreit* proceedings; by order of 29 March 2007, this Senate rejected the motion for a temporary injunction to suspend the sending of troops to Afghanistan. 9

As grounds for its applications in the *Organstreit* proceedings, the applicant submits as follows: 10

1. The applications are admissible. As a parliamentary group in the German *Bundestag*, the applicant is capable of being a party to *Organstreit* proceedings under § 63 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*) and may assert in its own name rights that the *Bundestag* has against the Federal Government. The authority to make an application exists because the applicant is asserting that the rights of the *Bundestag* under Article 59.2 sentence 1 of the Basic Law have been infringed by the respondent further developing the NATO Treaty beyond the limits set by the Treaty's integration programme without involving the *Bundestag* once more by instigating a formal legislative process. The period for filing the application under § 64.3 of the Federal Constitutional Court Act has been complied with; for the first application challenges the respondent's collaboration in the further development of the NATO Treaty, and this is a process that began at the latest under NATO's new Strategic Concept of 1999 and that continues today, as is shown in particular in the declarations made at the NATO summit in Riga in November 2006. With regard to the participation of the *Bundestag*, the applicant submits that in this respect there was a continuing unconstitutional failure to act; this manifests itself in concrete acts of collaboration in the further development of the NATO Treaty and therefore there are repeated occasions to challenge it. 11

2. The applications are also well-founded. The right of the *Bundestag* to participate under Article 59.2 of the Basic Law has been infringed because the Federal Government participated in a further development of the NATO Treaty which exceeded the limits of the integration programme established by the Consent Act to the NATO Treaty. 12

a) This follows firstly from the fact that in conducting the ISAF mission, NATO is participating in a military operation that no longer has any connection to security in the Euro-Atlantic area, and it is this area that is the territory covered by the NATO Treaty, even in its further development up to NATO's new Strategic Concept of 1999. The alteration of the NATO Treaty, for which the Federal Government shares respon- 13

sibility, manifests itself in a large number of legally binding documents and comprises a number of measures that lead to a fundamental change of significance of essential structural decisions of the NATO Treaty. For example, the declaration of the NATO member states at the NATO summit in Riga from 28/29 November 2006 contains a reorientation of the alliance in the sense of a “global security provider”. In its judgment on NATO’s new Strategic Concept of 1999 (Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 104, 151), the Federal Constitutional Court regarded the connection of military security measures to the Euro-Atlantic region as an essential element of the Treaty’s integration programme, beyond which the NATO Treaty could not be further developed without a formal alteration of the Treaty. But this is what happens if NATO carries out crisis response operations all over the world, which, like the ISAF mission in Afghanistan, no longer have an immediate connection to the Euro-Atlantic area. ISAF is NATO’s first combat mission out of area, and it does not serve specifically Euro-Atlantic security, but Afghan security. For this reason, the right of the German *Bundestag* under Article 59.2 of the Basic Law has been infringed.

In addition, the applicant also sees a further development of the NATO Treaty beyond the Treaty’s integration programme in the fact that NATO member states, above all the United States of America, have undertaken a large number of measures in the recent past, for example the Iraq war, that are incompatible with current international law. In this way they attempt to set in motion a change of international law, including a change of the NATO Treaty; the respondent has not sufficiently opposed this. 14

b) Secondly, the integration programme is exceeded by the Federal Republic of Germany's participation in the expanded ISAF mission; this is part of an operation that is taking place in Afghanistan parallel to and with many connections to the Operation Enduring Freedom. This cooperation has the result that the unlawfulness of this operation under international law is to be attributed to the NATO states. The use of military force as part of the war on terror of the Operation Enduring Freedom in Afghanistan can be justified under international law only if there is either a mandate by the United Nations Security Council under Chapter VII of the Charter of the United Nations, or the operation can be classified as collective self-defence in the meaning of Article 51 of the Charter of the United Nations; but neither of these conditions is satisfied. Apart from this, although the Afghanistan government is in principle in agreement with the continuing use of force by the Operation Enduring Freedom, it is not in agreement with the concrete measures in the individual case, which have repeatedly violated humanitarian international law. The resulting unlawfulness under international law of the ISAF mission exceeds the integration programme of the NATO Treaty, since under Article 24.2 of the Basic Law this alliance must remain strictly committed to the maintenance of peace. In this respect too, the right of participation of the German *Bundestag* under Article 59.2 of the Basic Law is violated. 15

The respondent regards the applications as inadmissible, but at all events as unfounded. [The respondent submits as follows:] 16

1. a) The first application is inadmissible, because in this case the period for filing the application under § 64.3 of the Federal Constitutional Court Act was not complied with. The applicant bases its arguments on a process that began “at the latest” with NATO’s new Strategic Concept of 1999. But this assertion that there was a “creeping” development cannot mean that the period for filing the application is circumvented in the *Organstreit* proceedings. In addition, the application is worded so indefinitely that it does not reveal any concrete subject of the application. 17

b) In the oral hearing, the respondent supplemented its submissions on admissibility: it submitted that the second application was also inadmissible even for reasons of limitation because the deployment of the Tornado reconnaissance aircraft was only a dependent act of implementation, whereas the German participation in the ISAF mission, which was genuinely relevant, and the cooperation of the latter with the Operation Enduring Freedom, had been in existence for years. 18

In addition, NATO’s violation of the requirement of peace, which is asserted by the applicant, does not affect any rights of the *Bundestag* and cannot therefore be challenged in the *Organstreit* proceedings. 19

2. At all events, the applications are unfounded; the respondent did not infringe rights of the *Bundestag* under Article 59.2 sentence 1 of the Basic Law. The scope of the NATO Treaty’s integration programme has not been exceeded with the collaboration of the respondent, nor is there a departure from the intended purpose of NATO laid down in Article 24.2 of the Basic Law, the maintenance of peace. 20

a) Essentially, these *Organstreit* proceedings raise the same questions as the proceedings against NATO’s new Strategic Concept of 1999 which the respondent instituted at that time. In those proceedings, the Federal Constitutional Court did not hold that the possibility of out-of-area crisis response operations was a further development of the NATO Treaty beyond the limits of the integration programme; the ISAF mission is such a crisis response operation. The relationship of an operation to Euro-Atlantic security was therefore not to be seen strictly in territorial terms. 21

The Riga summit declaration and the Comprehensive Political Guidance of 29 November 2006 support the opposite of what the applicant infers from these documents. For the summit declaration merely reaffirmed what was determined as early as 1999: a security situation that was developing further. The Comprehensive Political Guidance records that the instability of failed states and regional crises and conflicts are substantial risks and challenges to NATO in the future. In this respect, neither did the Riga summit declarations create new international-law commitments of the NATO member states, nor do the statements on the ISAF mission have the function of retroactively legitimising it. Nor can the statements be relied on as an indication that the Treaty has been further developed or amended, for this always requires an intention to this effect of the parties and a concrete statement of law, which is lacking in the present case. 22

Finally, it is not discernible in what relationship the Tornado deployment challenged by the applicant stands to the Iraq war and further measures of the United States of America, for, if the accusations are correct in any way, all these actions are at all events taking place outside the context of NATO, and therefore they clearly cannot be relied on to show a change of the NATO Treaty. 23

b) Insofar as the applicant asserts that the Federal Government is participating in a transformation of the NATO system which no longer serves to maintain peace or which prepares wars of aggression, it fails to appreciate that the ISAF mission is based on a mandate of the United Nations Security Council, most recently on United Nations Security Council Resolution 1707 (2006) of 12 September 2006; in this resolution, the Security Council expressly requested ISAF to cooperate with the Operation Enduring Freedom. In addition, the Afghan government cooperates closely with both missions and has at no time requested that the operations are terminated. 24

If the applicant calls into question the conformity with international law of the Operation Enduring Freedom, it should be remembered that the United Nations Security Council, in its Resolution 1368 (2001) of 12 September 2001, expressly recognised the United States of America's right of individual and collective self-defence and has repeatedly reaffirmed this resolution, once more in Resolution 1707 (2006) of 12 September 2006 on the most recent ISAF mandate. 25

Irrespective of how individual aspects of the implementation of the Operation Enduring Freedom are to be judged under international law, there is no question of any acts that may be contrary to international law being generally attributed to each other by ISAF and the Operation Enduring Freedom, even against the background of the United Nations Security Council's mandating that these missions cooperate; and even outside this mandate there is no basis under international law for the reciprocal "attribution of responsibility" asserted by the applicant. ISAF is therefore in conformity with international law, and consequently it must also be held that there was no infringement of the right of the *Bundestag* under Article 59.2 sentence 1 of the Basic Law resulting from a NATO violation of the requirements to maintain peace. 26

The German *Bundestag* submitted no opinion on the proceedings. 27

In the oral hearing, the parties reinforced and supplemented the submissions made in the pleadings. The Chief of Staff (*Generalinspekteur*) of the Bundeswehr, General Wolfgang Schneiderhan, was heard on the details of the cooperation between ISAF and the Operation Enduring Freedom and on questions of the requesting and passing on of reconnaissance results obtained by the German Tornado reconnaissance aircraft. 28

The applications are admissible as set out in the following. 29

As a parliamentary group in the German *Bundestag*, the applicant is capable of being a party to *Organstreit* proceedings under §§ 13 nos. 5, 63 et seq. of the Federal Constitutional Court Act. It may assert in its own name rights that the *Bundestag* has 30

in relation to the Federal Government (BVerfGE 1, 351 (359); 2, 143 (165); 104, 151 (193); established case-law). The Federal Government, against which the applications are directed, is a possible respondent under § 63 of the Federal Constitutional Court Act.

The applicant is authorised to file an application. The applicant has sufficiently justified the position that the rights conferred on the German *Bundestag* by the Basic Law may have been infringed by the challenged measures (§ 64.1 of the Federal Constitutional Court Act). This applies both with regard to the submission that, with the participation of the Federal Government, the NATO Treaty has been further developed beyond its integration programme, with the result that Article 59.2 sentence 1 of the Basic Law has been infringed, and also with regard to the submission that the Federal Government participated in a further development of NATO in such a way that NATO no longer serves the maintenance of peace (Article 59.2 sentence 1 of the Basic Law in conjunction with Article 24.2 of the Basic Law). Both submissions are available in *Organstreit* proceedings and have been submitted sufficiently. 31

1. However, the applications made by the applicant must be interpreted in order to identify the concrete subject of challenge required by § 64.1 of the Federal Constitutional Court Act, an act or omission by the respondent (see BVerfGE 68, 1 (68-69)). 32

a) The subject matter of the first application, in which the applicant asserts a consensual further development of the North Atlantic Treaty of 4 April 1949 (Federal Law Gazette (*Bundesgesetzblatt – BGBl*) 1955 II p. 289) with the participation of the respondent, is not sufficiently designated; the declaration sought in it may be taken into account only in part, in connection with the second application. 33

As part of the first application, the applicant refers to a further development of the NATO Treaty that is manifested in a large number of legally binding documents and comprises a number of measures that lead to a fundamental change of significance of essential structural decisions of the NATO Treaty. However, the applicant identifies scarcely any concrete measures from which the change or the further development in content of the NATO Treaty might result, nor does it consider in more detail the content and effects of possible steps. It cites the resolution of the North Atlantic Council to change the ISAF organisation plan and the rules of operation of December 2005, the declaration of the Heads of State and Government on the occasion of the NATO summit in Riga of 28/29 November 2006 and the Comprehensive Political Guidance, which was passed at the same time, and finally the transfer of the Tornado reconnaissance aircraft to Afghanistan under NATO command. 34

In addition, the submissions of the applicant indicate that it sees NATO changing into a “global security provider”, which is demonstrated *inter alia* and above all by the NATO-led ISAF mission in Afghanistan itself; that is, the applicant is above all concerned with the fundamental decisions to assume the leadership of the ISAF mission in the year 2003 and later to extend the mission in the year 2004, decisions made within the NATO framework with the participation of the Federal Government. 35

However, the involvement of the respondent in the last-named resolutions cannot be a subject of review in the present case. These matters which are the subject of the application are barred by the period for filing the application in § 64.3 of the Federal Constitutional Court Act, since considerably more than six months has passed since the NATO measures that relate to ISAF in general and the change of the operational plan with regard to extending the ISAF mission to the whole of Afghanistan. The same applies to the respondent's alleged failure to make a legally relevant protest against the 2003 Iraq war and other measures of the United States of America. 36

Nor can the references to a continuing failure to act have any effect on the expiry of the period for filing: even legally relevant failures to act start the period for filing of § 64.3 of the Federal Constitutional Court Act running; this happens at the latest when the respondent discernibly refuses to act in the way in which it is expected to act and in which, in the relationship under constitutional law, it is required to act (see BVerfGE 4, 250 (269); 21, 312 (319); 92, 80 (89)). This concrete failure to act becomes discernible from a specific date on; an application in *Organstreit* proceedings must be directed against it and must observe the binding period for filing; it is not sufficient if the application is only directed against the general failure to act, which typically continues after the period for filing has ended. Insofar as the applicant, therefore, may in any way have satisfied the requirement of designating concrete subjects of challenge in its first application, it has at all events failed to challenge the specifically designated measures in good time, with the exception of the respondent's participation in the declarations at the NATO summit in Riga of 28/29 November 2006. 37

b) In its second application, the applicant, as can be inferred at all events from the context, challenges the resolution of the Federal Government of 7 February 2007 (see *Bundestag* document 16/4298), subject to the consent of the German *Bundestag*, to deploy Tornado reconnaissance aircraft in Afghanistan to support the ISAF mission, which in turn may be understood as a German contribution to implementing the joint declaration at the Riga summit. This is a concrete measure of the respondent which under § 64.1 of the Federal Constitutional Court Act is a possible subject of *Organstreit* proceedings. The transfer of the reconnaissance aircraft may also be understood as a German contribution to the practical realisation of the declarations at the NATO summit in Riga of 28/29 November 2006, as a result of which the transfer stands in a general context which is capable of being challenged. 38

2. a) The dispute between supreme federal bodies in these proceedings is directed to the interpretation of the Basic Law in the event of disputes on the rights and duties of constitutional bodies (Article 93.1 no. 1 of the Basic Law). The proceedings essentially serve to delimit the competences of constitutional bodies or parts of constitutional bodies in a relationship under constitutional law, rather than the separate supervision of constitutional bodies with regard to the objective constitutionality of their specific acts (see BVerfGE 68, 1 (69 et seq.); 104, 151 (193-194)); the dispute between supreme federal bodies does not give rise to a general supervision of mea- 39

sures of foreign or defence policy of the Federal Government. In the relationship between the *Bundestag* and the Federal Government, it is above all the legislative powers and other consultation rights of the *Bundestag* that are capable of being challenged. An encroachment upon the legislative competence of the *Bundestag* is possible not only in the form of an assumption of legislative competence, but also in the form of legally relevant acting without statutory authorisation, where this is constitutionally necessary. Parliament may therefore seek a decision on the constitutionality of such action by way of *Organstreit* proceedings (see BVerfGE 104, 151 (194-195)).

b) Under Article 24.2 of the Basic Law 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 consent of the legislature. This constitutional requirement of the specific enactment of a statute confers on the *Bundestag* as the legislative body a right of joint decision in the area of foreign affairs and in this respect it creates a right of the *Bundestag* in the meaning of § 64.1 of the Federal Constitutional Court Act (see BVerfGE 90, 286 (351); 104, 151 (194); see also BVerfGE 68, 1 (84-85)). 40

aa) The right of legislation under Article 59.2 sentence 1 of the Basic Law protects the competence of the *Bundestag* to decide jointly on the rights and duties of the Federal Republic of Germany created by international treaties, to the extent that the political relations of the Federal Government or matters of federal legislation are affected. The provision guarantees the legislative function of the legislative bodies in the area of foreign power; their consent in the form of the statute that ratifies a treaty under international law guarantees the domestic application of such treaties and covers the international action of the government within the framework of the treaty (see BVerfGE 58, 1 (37); 90, 286 (357); 104, 151 (194)). 41

The consent of the German *Bundestag* to a treaty is not exhausted in a single act of cooperation when the treaty is entered into; on the contrary, it means the long-term assumption of responsibility for the political programme laid down in the treaty and in the Consent Act. The Consent Act is the foundation not only for the validity and application of the treaty in domestic law, but also for the legally relevant actions of the Federal Government under international law in connection with and on the basis of the treaty (see Wolfrum, *Kontrolle der auswärtigen Gewalt*, in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer – VVDStRL* 56 (1997), p. 38 (54-55); Ress, *Verfassungsrechtliche Auswirkungen der Fortentwicklung völkerrechtlicher Verträge*, in: *Festschrift für Zeidler*, vol. 2, 1987, p. 1775 (1779-1780)). This applies in particular if the treaty is directed either towards integration or towards participation in a system of mutual collective security, as provided by Article 24.1 and 24.2 of the Basic Law in general and Article 23.1 of the Basic Law for the particularly integrated area of the European Union (see BVerfGE 104, 151 (195)). 42

In this connection, political actions on the basis of the treaty and its concretisation, that is the detailing and development in specific terms of the programme laid down in 43

it, is the task of the Federal Government. In the area of foreign policy, the Basic Law has left the Government a broad latitude to carry out its tasks on its own responsibility. Both the role of parliament as the legislative body and also that of the judiciary are restricted in this area, in order that Germany's capacity to act in foreign and security policy is not restricted in a manner that would amount to a functionally inappropriate separation of powers (see BVerfGE 68, 1 (87-88); 104, 151 (207)). The consent of parliament to a treaty therefore at the same time empowers the government to further develop this treaty in the forms of international law, and the Consent Act contains the order for domestic application of the international-law resolutions passed on the basis of the treaty (see BVerfGE 104, 151 (209)).

bb) However, there are constitutional limits to the competence of the Federal Government to participate in the concretisation and further development of the treaty basis in the forms of international law without further involvement of parliament. For the Consent Act to the treaty basis of a system of mutual collective security that has been passed in accordance with Article 59.2 sentence 1 and Article 24.2 of the Basic Law lays down the programme of this system, above all its purpose and its area of application. The legislative bodies have substantial responsibility for this integration programme and the accompanying political commitment of the Federal Republic of Germany. In approving a statute that ratifies a treaty under international law, the *Bundestag* and the *Bundesrat* determine the scope of the commitments of the Federal Republic of Germany on the basis of the treaty and have ongoing political responsibility for this towards the citizen in the meaning of Article 20.2 of the Basic Law. Material deviations from the treaty basis or amendments relating to the identity of the treaty are therefore no longer covered by the original Consent Act (see BVerfGE 58, 1 (37); 68, 1 (102); 77, 170 (231); 89, 155 (188); 104, 151 (195)). If the Federal Government pursues the further development of a system of mutual collective security beyond the authorisation that it has been granted – *ultra vires* –, the *Bundestag*'s right to participate in sovereign decisions relating to foreign affairs is infringed, because the *Bundestag* is no longer jointly responsible for the treaty as it is manifested in its actual implementation by the parties (see BVerfGE 104, 151 (209-210)). If the *Bundestag* initiates *Organstreit* proceedings, alleging that the treaty has been materially exceeded or amended, therefore, the *Bundestag* acts to enforce the right conferred on it to decide jointly on the rights and duties under international agreements of the Federal Republic of Germany. 44

cc) However, if there are violations of individual provisions of the treaty, it does not follow that the Federal Government is acting outside the framework of authorisation created by the Consent Act. Consequently, the Federal Constitutional Court, on the application of the *Bundestag*, may establish that there has been a violation of the constitution only if it can be shown that the framework of authorisation laid down by the original Consent Act has been exceeded far beyond the broad framing discretion of the Federal Government, that is, if the consensual further development of a system of mutual collective security contravenes essential structural decisions of the treaty 45

and in this way departs from the basis of the political programme laid down therein (see BVerfGE 104, 151 (210)). The Federal Constitutional Court merely reviews to this extent whether specific international-law actions by the government are covered by the statute that ratifies a treaty under international law and the constitutional framework of that statute (see BVerfGE 58, 1 (36-37); 68, 1 (102-103), 90, 286 (346 et seq., 351 et seq.); 104, 151 (196)).

c) As this Senate established in its judgment of 22 November 2001 on the new Strategic Concept of NATO of 1999 (BVerfGE 104, 151), the further development of a treaty that forms the basis of a system of mutual collective security in the meaning of Article 24.2 of the Basic Law is constitutionally subject to another limit which may also not be exceeded by the legislative bodies by passing a Consent Act, but the *Bundestag* may have an interest in the determination of the limits that is significant in *Organstreit* proceedings. 46

Under Article 24.2 of the Basic Law, “for the maintenance of peace”, the Federal Government may “join a system of mutual collective security”. The very wording of the elements of Article 24.2 of the Basic Law precludes the Federal Republic of Germany from joining a mutual collective system of military security that does not serve the maintenance of peace (see Randelzhofer, in: Maunz-Dürig, *Grundgesetz, Art. 24 Abs. II*, marginal no. 41; Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, vol. I, 2nd ed. 1984, pp. 547-548). From a constitutional point of view, the participation of the Federal Republic of Germany in such a system and the continuing participation in this system are in this way made subject to the maintenance of peace. The transformation of a system that originally satisfied the requirements of Article 24.2 of the Basic Law into a system that no longer serves to maintain peace or that even prepares wars of aggression is also constitutionally prohibited and can therefore not be covered by the content of the Consent Act to the NATO Treaty passed under Article 59.2 sentence 1 of the Basic Law in conjunction with Article 24.2 of the Basic Law (see BVerfGE 104, 151 (212-213)). In this way, the requirement of the maintenance of peace is always a mandatory component of the treaty basis of a system of mutual collective security; the objective of maintaining peace is not merely a requirement for joining the system on one occasion, but a continuing requirement for Germany to remain in the system of mutual collective security. If such a system, in its general orientation, no longer served to maintain peace in the meaning of Article 24.2 of the Basic Law, the constitutional authorisation to join such a military alliance system would be exceeded. 47

3. Pursuant to § 64.1 of the Federal Constitutional Court Act, the applicant asserted that the *Bundestag*’s right under Article 59.2 sentence 1 of the Basic Law in conjunction with Article 24.2 of the Basic Law has been infringed. Taking this submission by the applicant as a basis, it can at all events not be ruled out at the outset that the Federal Government, in undertaking the challenged measures, participated in a further development of the NATO Treaty that deviates from essential structural decisions of this Treaty. Its submissions therefore satisfy the requirements for admissibil- 48

ity in *Organstreit* proceedings.

The applicant in effect sees the integration programme as being essentially exceeded above all in the fact that there is a departure from the regional restriction of the NATO Treaty to the Euro-Atlantic area, as is shown in the leadership of the ISAF operation in Afghanistan, now enlarged geographically and in substance, and in the Riga summit declarations. Secondly, it asserts that in the ISAF mission and in particular in collaborating with the Operation Enduring Freedom NATO is departing from its restriction to the purpose of maintaining peace. 49

The applications are unfounded. When the Federal Government participated in the declarations of the Heads of State and Government at the NATO summit in Riga of 28/29 November 2006 and in the resolution to deploy Tornado reconnaissance aircraft in Afghanistan, it did not infringe any rights of the German *Bundestag* under Article 59.2 sentence 1 of the Basic Law in conjunction with Article 24.2 of the Basic Law. The actions of the respondent that have become the subject of the *Organstreit* proceedings do not exceed essential structural decisions of the NATO Treaty: neither has the connection of specific NATO military operations to the security of the Euro-Atlantic area been broken (I), nor has NATO departed from its objective of maintaining peace (II). 50

There has been no infringement of the rights of the German *Bundestag* under Article 59.2 sentence 1 of the Basic Law, for the ISAF mission in Afghanistan under the leadership of NATO serves the security of the Euro-Atlantic area and is therefore within the scope of the NATO Treaty integration programme for which the German *Bundestag* is jointly responsible by way of the Consent Act to this treaty. 51

1. a) The essence of the conception of the NATO Treaty is mutual support in the case of an armed attack, consultation with regard to this and a body equipped with far-reaching powers of implementation (see BVerfGE 104, 151 (152)). Article 5 of the NATO Treaty deals with an armed attack on one of the member states, which the other member states agree they will consider an attack against them all and which under international law gives rise to a duty to help and assist; the member states give substance to this duty on their own responsibility (see Ipsen, *Völkerrecht*, 5th ed. 2004, § 60 marginal no. 40). The NATO Treaty does not contain express provisions for other military operations; consequently, from its basic definition, NATO is a classical defensive alliance (see Ipsen, loc. cit., § 60 marginal nos. 39-40), whose fundamental purpose permits regional maintenance of peace, but also crisis response operations, without this calling into question its nature as a defensive alliance (see BVerfGE 90, 286 (349); 104, 151 (211)). 52

b) Even if NATO comprehensively serves the securing of peace in the European and North American area and in this connection does not merely regard itself as bound by the Charter of the United Nations, but also seeks political collaboration with the United Nations (see BVerfGE 104, 151 (211)), it nevertheless remains a regional defensive alliance. This regional connection as the core element of the NATO Treaty 53

integration programme has however from the outset not meant that NATO's military operations would have to be restricted to the territory of the member states. Thus, for example, the NATO operation in Bosnia and Herzegovina supervising the ban on flying imposed by the United Nations (see BVerfGE 90, 286 (309-310)) took place out of area, and in view of the civil war in former Yugoslavia there was no serious calling into question of the link between the operation and the security interests of the alliance and its regional duty to maintain peace.

In addition, it also follows from the idea of joint defence against an attack from outside that the attacker and its territory create a connection to the NATO area that is decisive in this respect. As a result of NATO's purpose as a system of a number of states for joint defence against military attacks from outside, defensive military operations out of area, that is, including those on the territory of an attacking state, were implied from the outset. If there is an attack, the defence need not end at the borders of the alliance territory, but may take place on the attacker's territory; the long-term and stable pacification of that area serves the permanent peace of the alliance. In this respect, in addition to the military defence against an attack, a complementary crisis response operation on the territory of the attacking state that is related in substance and time is still in accordance with the regional restriction of the NATO Treaty. 54

c) Crisis response operations may also comply with the purpose of the NATO Treaty independently of an external attack or supplementing the permanent pacification of an attacker. An essential step in the further development of NATO's tasks as agreed in the NATO Treaty beyond the concept of a defensive alliance in the narrow sense can be found in NATO's new Strategic Concept of 24 April 1999. The decisive innovation of this concept is the option for NATO, in reaction to new scenarios of threat to the security of the Euro-Atlantic area, in future to carry out crisis response operations not covered by Article 5 of the NATO Treaty (No. 31 of the Concept, see BVerfGE 104, 151 (160 et seq.)). 55

In its judgment of 22 November 2001 (BVerfGE 104, 151), the Senate established that the NATO Treaty was not further developed beyond its integration programme by the passing of the new Strategic Concept of 1999 by the Heads of State and Government of the NATO states. Both with regard to the provisions, worded in such a way that they are open to development, of the NATO Treaty, which in its overall concept, in accordance with the aims of the United Nations, is plainly directed towards comprehensive regional securing of peace in the European and North American area, and also with regard to the broad freedom allowed in giving substance to the scope of integration, crisis response operations are not a fundamentally new form of operation (see BVerfGE 90, 286 (349); 104, 151 (210-211)). 56

2. The ISAF mission in Afghanistan is a crisis response operation of NATO in the meaning of the new Strategic Concept of 1999. Admittedly, on 12 September 2001, in reaction to the terrorist attacks against the United States of America of the previous day, for the first time in the history of NATO the North Atlantic Council established 57

that an armed attack covered by Article 5 of the NATO Treaty had occurred. Legally, however, the ISAF mission must be regarded strictly separately from the Operation Enduring Freedom, which is also present in Afghanistan, which in terms of international law invokes the existence of an armed attack covered by Article 5 of the NATO Treaty and above all on the right of collective self-defence in the meaning of Article 51 of the Charter of the United Nations (see *Bundestag* document 14/7296, pp. 1-2).

The fact that NATO is conducting a crisis response operation in Afghanistan and therefore out of area is not a practice that goes beyond the scope of the 1999 Strategic Concept. For this concept clearly shows that from the very beginning crisis response operations out of area had been contemplated (see nos. 53e, 56 and 59 of the Concept). As the Senate has already established, this does not exceed the integration programme of the NATO Treaty insofar as and as long as the basic task of securing peace in the region is complied with (see BVerfGE 90, 286 (349); 104, 151 (210-211)). 58

3. The ISAF mission in Afghanistan cannot be seen as such a separation of NATO from its regional connections. For this mission is clearly directed not only to the security of Afghanistan but also and particularly to the security of the Euro-Atlantic area, from future as well as present attacks. 59

a) Essentially, the ISAF mission is to use military and police-style means to create and secure the basic conditions for the rebuilding of civil society in Afghanistan. Under Resolution 1386 (2001) of the United Nations Security Council of 20 December 2001, ISAF at first had the task “to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment”. By Resolution 1510 (2003) of the Security Council of 13 October 2003, this task was extended to the whole of Afghanistan, and in addition ISAF is to provide more extensive security-related aid; this extended task has been continued until today by subsequent resolutions, most recently by Resolution 1707 (2006) of 12 September 2006. 60

b) This mission of the International Security Assistance Force has more than an isolated connection to the security of the state of Afghanistan. The international engagement in Afghanistan arises substantially from the fact that the acting states, in agreement with the acting international organisations, regard their own security interests as affected by the situation in Afghanistan. 61

Thus, for example, the United Nations Security Council, from the time when the original ISAF mandate was issued in Resolution 1386 (2001) until Resolution 1707 (2006), which most recently extended the ISAF mandate until 13 October 2007, has continuously regarded the situation in Afghanistan as a threat to international peace and security in the meaning of Article 39 of the Charter of the United Nations. 62

In addition, the ISAF mission is directly connected to the only attack on a NATO 63

state that was ever deemed to be an armed attack pursuant to Article 5 of the NATO Treaty: the terrorist attacks on the United States of America of 11 September 2001. The military intervention of the Operation Enduring Freedom against the Afghan Taliban regime from October 2001 on was a reaction of the United States of America and allied states to these attacks, based on the assumption that the al-Qaeda terrorist network as the originator of the attacks had an important safe haven in Afghanistan, had in part operated from Afghan territory and had been supported by the Taliban regime. Consequently, under international law, the Operation Enduring Freedom has always invoked the right of collective self-defence in the meaning of Article 51 of the Charter of the United Nations to justify the use of military force in Afghanistan.

In contrast, the ISAF mission, which is based not on the right of self-defence, but on the above-named resolutions of the Security Council under Chapter VII of the Charter of the United Nations, is independent of the right of self-defence under international law, and yet it is also to be seen against this background. From the beginning it had the aim of enabling and securing the rebuilding of civil society in Afghanistan, in order in this way to prevent the Taliban, al-Qaeda and other groups endangering peace from regaining strength (see, for example, resolutions 1510 (2003), 1623 (2005) and 1707 (2006) of the United Nations Security Council). The security interests of the Euro-Atlantic alliance were intended to be safeguarded because no politics that are aggressive and disturb the peace are to be expected in future of a stable Afghan state, whether as the result of active steps on the part of this state, or whether as the result of passive tolerance with regard to terrorist activities on the state territory. 64

The earlier Afghan Interim Authority and also the government legitimised since October 2004 by free elections were unable without international help to ensure the security environment that is necessary for civil society to be rebuilt in a state. The community of states therefore saw it as necessary, independently from armed counterterrorism by the Operation Enduring Freedom, to ensure a stable security environment in Afghanistan (see nos. 2 and 6 of the Riga summit declaration and nos. 2 and 6 of the Comprehensive Political Guidance). 65

c) Yet in the constitutional review as to whether essential structural decisions of the NATO Treaty - in this case a connection to NATO´s regional purpose - have been exceeded, it cannot matter whether all assessments connected with the international presence in Afghanistan are shown to be correct in every respect, in fact and in law. Neither must the Federal Constitutional Court examine whether the attacks of 11 September 2001 can be attributed to the Afghan Taliban regime of the time under international law, nor must a decision be made as to whether the Operation Enduring Freedom was entitled and continues to be entitled to rely on the right of collective self-defence and what role attaches in this connection to resolutions 1368 (2001) and 1373 (2001) of the United Nations Security Council, in which the Security Council recognises or confirms the right of self-defence (on these questions, see, for example, Tomuschat, *Der 11. September 2001 und seine rechtlichen Konsequenzen*, in: *Europäische Grundrechte-Zeitschrift – EuGRZ* 2001, pp. 535 et seq.; Krajewski, 66

*Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen – Der 11. September 2001 und seine Folgen*, in: *Archiv des Völkerrechts – AVR* 40 (2002), pp. 183 et seq.).

For irrespective of these questions, no doubt can be cast on the fact that the security situation in Afghanistan is tense as a result of continuing armed actions against the its government and the population. It is above all failed or failing states that are regarded as dangerous, for these states represent potential safe havens for internationally operating terrorist groups. It is equally conceivable that there is a connection between security within Afghanistan and security in the Euro-Atlantic area. Those responsible in connection with NATO were and are entitled to assume that the securing of the rebuilding of Afghanistan's civil society also contributes directly to the Euro-Atlantic area's own security; in view of present-day threats from globally acting terrorist networks, as 11 September 2001 showed, threats to the security of the NATO area cannot any longer be territorially restricted. 67

Moreover, if, as in the case of Afghanistan, a relevant context is apparent, the Federal Constitutional Court's review of the connection between the NATO actions and the regional framework described may not lead to the Court effectively replacing the necessary security-policy assessments and evaluations by its own (see Hailbronner, *Kontrolle der auswärtigen Gewalt*, in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 56 (1997), p. 7 (19 et seq.)). 68

d) Finally, precisely the same result follows from the declarations of the Heads of State and Government of the NATO states at the NATO summit in Riga on 28/29 November 2006, which in the opinion of the applicant in particular with regard to the ISAF mission in Afghanistan confirm the actual development of the past few years in a manner relevant to the asserted further development of the NATO Treaty. 69

aa) Admittedly, such an interdependence between actual events and political documents is in principle capable of giving rise to a legally binding further development of a treaty (see Ipsen, loc. cit, 5th ed. 2004, § 19 marginal no. 20). But if, as set out above, even the course of events is incapable of showing that the NATO Treaty integration programme was exceeded, which is the sole relevant factor in the present case, then political statements that refer only to the status quo cannot be seen as exceeding the integration programme. The applicant was unable to show how far the Riga declarations, taken in themselves, are to be seen as crucially important for the development of the Treaty's concept of NATO's task, precisely because they exceeded the stage of development at that time; the applicant did not consider the details of the challenged declarations, even in response to requests to do so made by the Senate in the oral hearing of 18 April 2007. If these declarations are not to be seen as exceeding the integration programme of the NATO Treaty, then it is not necessary to consider in more detail the question as to whether and how far the Riga declarations are relevant under international law. 70

bb) Apart from this, it is also not apparent that as a result of the Riga declarations 71

NATO could have departed in a general sense from its connection to a specific region. These declarations with their comprehensive defence-policy agenda also repeatedly establish a connection to security in the Euro-Atlantic area (see for example nos. 11, 30, 34, 40 and 46 of the Riga summit declaration).

Nor has there been an infringement of the right of the German *Bundestag* under Article 59.2 sentence 1 of the Basic Law by a violation of the purpose of maintaining peace laid down in Article 24.2 of the Basic Law. The ISAF mission in Afghanistan, in the manner in which it is actually taking place and in which it is politically defined in the relevant passages of the Riga summit declarations, presents no evidence of the structural separation of NATO as asserted by the applicant from its objective laid down in Article 24.2 of the Basic Law. 72

1. a) The Basic Law does not define what is to be understood by the maintenance of peace, but in Article 24.2 of the Basic Law it defines participation in a system of collective security as a decisive means for the maintenance of peace, that is, for creating and securing a peaceful and lasting order in Europe and the world (see BVerfGE 90, 286 (349 et seq.); 104, 151 (212); Pernice, in: Dreier, *Grundgesetz*, vol. II, 2nd ed. 2006, *Art. 24*, marginal no. 50). This corresponds to the intention of the legislature that created the constitution (see *Entwurf eines Grundgesetzes, Darstellender Teil*, pp. 23-24, in: *Jahrbuch des öffentlichen Rechts der Gegenwart, Neue Folge – JöR N.F.* 1 (1951), pp. 222-223), which was that the Federal Republic of Germany, within collective security systems, complies with the prohibition of the use of military force under customary international law (see ICJ, Military and Paramilitary Activities in and Against Nicaragua, ICJ Reports 1986, p. 13 (paras. 187 et seq.)), the domestic application of which is laid down in Article 25 of the Basic Law (see BVerfGE 104, 151 (212-213)). 73

b) Consequently, the violation of international law by individual NATO military operations, as asserted by the applicant, in particular the violation of the prohibition of the use of military force, may be an indicator that NATO is structurally departing from its constitutionally mandatory orientation towards the maintenance of peace. However, in this connection it must be taken into account that even violations of international law of this nature do not automatically in themselves constitute an infringement of Article 24.2 of the Basic Law that are capable of being challenged in *Organstreit* proceedings. For in the constellation of *Organstreit* proceedings an infringement of the requirement to maintain peace is only significant as the constitutional limit of the integration programme of a system of mutual collective security. The exceeding of this integration programme may be reviewed by the Constitutional Court in *Organstreit* proceedings only because it removes the treaty basis of the alliance from the responsibility of the German *Bundestag* and in doing so infringes the German *Bundestag*'s right under Article 59.2 sentence 1 of the Basic Law in conjunction with Article 24.2 of the Basic Law. Consequently, this supervision does not open the way for a general review as to whether NATO military operations are in conformity with international law. For the *Organstreit* proceedings are not a general review of lawfulness, but con- 74

sider solely whether NATO's actions, in particular individual operations, show evidence that the alliance is departing from its founding treaty by giving up its orientation towards the maintenance of peace. It is therefore only to clarify this question that Article 24.2 of the Basic Law enables supervision by the standards of international law, and only as indications of such a change of NATO's structure are such violations of international law constitutionally relevant in *Organstreit* proceedings.

2. There are no such indications that NATO has structurally departed from its peace-maintaining orientation. The measures challenged reveal no change of NATO to an alliance that no longer serves peace and in which the Federal Republic of Germany would therefore constitutionally no longer be permitted to participate (see Doehring, *Systeme kollektiver Sicherheit*, in: *Handbuch des Staatsrechts*, vol. VII, 1992, § 177 marginal no. 12). 75

a) Nor did the applicant, in the oral hearing, doubt that the ISAF mission in Afghanistan, which has been consistently based on resolutions of the Security Council under Chapter VII of the Charter of the United Nations that legitimise the use of military force under international law, in itself complies with international law. Insofar as the applicant asserts that the Operation Enduring Freedom, as it is taking place in Afghanistan, is inconsistent with international law, this may not be reviewed in isolation by the Federal Constitutional Court in the present procedural constellation. The Operation Enduring Freedom is not a military operation in connection with NATO, and the only subject of these proceedings is the structural separation of NATO from its fundamental peace-maintaining orientation. 76

b) From the point of view of constitutional law, therefore, the only subject is the question as to whether NATO is violating international law in Afghanistan through its cooperation with the Operation Enduring Freedom, and whether this manifests a departure from the peace-maintaining objective of the alliance. This question must be answered in the negative. The character of the NATO Treaty has clearly not been changed by the ISAF mission in Afghanistan and the cooperation there with the Operation Enduring Freedom. 77

aa) ISAF and the Operation Enduring Freedom are guided by separate objectives, different legal bases and clearly delimited spheres of responsibility. 78

Whereas the Operation Enduring Freedom is primarily aimed at direct counterterrorism, ISAF serves the maintenance of security in Afghanistan, in order to create a basis for the rebuilding of civil society in the state. These tasks may overlap in practice, but this does not affect the fact that they have separate objectives. The two operations are also clearly separated from a legal point of view: whereas ISAF, under international law, can rely on a mandate of the Security Council under Chapter VII of the Charter of the United Nations, the Operation Enduring Freedom, for its deployment of armed power, invokes the right of collective self-defence as it is recognised in Article 51 of the Charter of the United Nations. 79

Cooperation between the operations is intended to increase security in Afghanistan and has repeatedly been called for and welcomed by the Security Council (see resolutions 1510 (2003), 1659 (2006) and 1707 (2006) of the Security Council); this cooperation has not removed these divisions, which exist in fact and in law. The accusations made by the applicant in this connection that the operations are institutionally largely integrated as the result of a "double hat" construction at a decisive point, that there is no recognisable limit to the passing on of reconnaissance findings of the German Tornado aircraft to the Operation Enduring Freedom and that the forces are so integrated from a military point of view that the reconnaissance aircraft virtually appear on both battlegrounds, and thus also carry out the reconnaissance work necessary for the Operation Enduring Freedom, are incorrect. In the oral hearing, General Schneiderhan, the Chief of Staff of the Bundeswehr, gave information on these questions which completes the information in this connection contained in the challenged resolution of the respondent on the deployment of the reconnaissance aircraft in Afghanistan, and which the applicant did not oppose. 80

It is apparent from the last-named resolution that there can be no question of integrated combat missions; this resolution provides that the Tornado aircraft are to carry out reconnaissance work, does not provide for the capability of close air support, and the aircraft are to be armed for purposes of self-protection and self-defence only (see *Bundestag* document 16/4298, pp. 3-4). 81

With regard to passing on reconnaissance results to the Operation Enduring Freedom, according to the above-named resolution this is only to occur on the basis of the ISAF operational plan of NATO "if this is required for the necessary implementation of the ISAF operation or for the security of the ISAF forces" (*Bundestag* document 16/4298, p. 3). General Schneiderhan stated in more detail how this restrictive treatment of the reconnaissance results is handled and secured in practice: only persons involved in ISAF are entitled to request reconnaissance flights, but not forces of the Operation Enduring Freedom. After the reconnaissance flight – in-flight transmission is not possible – the pictures are entered into a database, marked confidential and linked to a personal access code. In conclusion, ISAF decides on its own responsibility and with regard to the operational plan as to whether there are results which are required to be passed on to the Operation Enduring Freedom to promote mutual security. 82

If, finally, the applicant asserts that the deputy commander of security operations of ISAF is at the same time, as a member of the U.S. command structure, jointly responsible for the armed forces of the counterterrorism Operation Enduring Freedom (see also *Bundestag* document 16/2380, p. 12; *Bundestag* document 16/3894, pp. 43-44), General Schneiderhan explained in this connection that such a "double hat" does not at present exist in the ISAF headquarters, but in the Regional Command East, which is under U.S. leadership. As a result, he stated, there was decidedly no danger of unsupervised mixing of the operations. 83

Consequently, sufficient precautions have been taken, not only legally but also in terms of practical enforcement, to ensure that there is no mixing of the operations resulting in the termination of the previous separation of the areas of responsibility. 84

bb) This removes the factual basis from the applicant's international-law arguments. 85

Admittedly, insofar as the operations cooperate in the restricted manner described above, it may be quite possible that actions in contravention of international law are attributed to the other operation; if, for example, an action of the Operation Enduring Freedom was not in compliance with international law and could be followed back to reconnaissance results from the Tornados, this might possibly mean that NATO or its member states could be responsible under international law. 86

However, it is not necessary to consider these questions of international law in greater detail here. For even if one were to assume that individual violations of international law might be attributed to the other operation, if such an attribution is at all feasible under international law, grounds could at all events not be found for a departure of NATO from its objective of maintaining peace, and this alone is relevant in connection with Article 24.2 of the Basic Law. In order that the ISAF mission could be shown to demonstrate a system-relevant process of transformation of NATO away from the maintenance of peace, this mission would as a whole have to appear to be a violation of international law. In view of the fact that ISAF was mandated by the United Nations Security Council (see most recently Resolution 1707 (2006) of 12 September 2006), this would only be conceivable, if at all, if the Operation Enduring Freedom in Afghanistan violated international law in itself and this might spread to ISAF. 87

But the fact that the operations are largely separate in law and in fact, as set out above, is an obstacle even to this encroachment. In addition, not only the ISAF mission itself, but also the cooperation with the Operation Enduring Freedom has its basis in resolutions of the Security Council under Chapter VII of the Charter of the United Nations; this conformity with the efforts of the United Nations directed to securing peace – independently of a clarification of the question as to whether the Operation Enduring Freedom taking place in Afghanistan at present is in accordance with international law – does not support a departure of NATO from its objective of maintaining peace. 88

cc) Finally, the same follows from the declarations of the Heads of State and Government of the NATO states at the NATO summit in Riga of 28/29 November 2006. In the passage of the Riga summit declaration that refers to the ISAF mission in Afghanistan, no. 5 states: "In cooperation with Afghan National Security Forces and in coordination with other international actors, we will continue to support the Afghan authorities in meeting their responsibilities to provide security, stability and reconstruction across Afghanistan through the UN-mandated NATO-led International Security Assistance Force (ISAF), respecting international law and making every effort to avoid harm to the civilian population." 89

This manifests NATO’s will to orient its operation in Afghanistan towards the goal of maintaining and stabilising peace. The parts of the declarations that go beyond the engagement of NATO in Afghanistan also contain no indications that NATO is departing from its orientation towards maintaining peace, in particular since it is also emphasised there that NATO holds fast unshakeably to the goals and principles of the United Nations (see, for example, nos. 1 and 2 of the summit declaration and no. 5 of the Comprehensive Political Guidance). 90

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