HEADNOTE

to the Judgment of the Second Senate of 7 May 2008

–2 BvE 1/03 –

There is a requirement of parliamentary approval under the provisions of the Basic Law which concern defence if the context of a specific deployment and the individual legal and factual circumstances indicate that there is a concrete expectation that German soldiers will be involved in armed conflicts. This precondition is subject to full judicial review.

FEDERAL CONSTITUTIONAL COURT

– 2 BvE 1/03 –

Pronounced
on 7 May 2008
Wolf
Amtsinspektorin
as Registrar of the
Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the application to declare that

the Federal Government violated rights of the *Bundestag* by omitting to obtain the approval of the *Bundestag* for the deployment of German soldiers in measures of aerial surveillance for the protection of Turkey pursuant to the NATO decision of 19 February 2003.

Applicant: FDP parliamentary group in the German *Bundestag*,

represented by its Chairman,

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: Prof. Dr. Joachim Wieland,

Gregor-Mendel-Straße 13, 53115 Bonn–

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 12 February 2008:

JUDGMENT:

By omitting to obtain the approval of the *Bundestag* of the participation of German soldiers in NATO measures for the surveillance of Turkish airspace from 26 February to 17 April 2003, the respondent violated the German *Bundestag*'s right of participation under the provisions of the Basic Law which concern defence in the form of the mandatory requirement of parliamentary approval for the deployment of armed forces.

REASONS:

A.

The *Organstreit* proceedings (proceedings on a dispute between supreme federal bodies) relate to whether the deployment of German soldiers in NATO AWACS aircraft to monitor airspace above the sovereign territory of Turkey required the approval of the German *Bundestag*. 1

I.

1. a) At the beginning of the year 2003, the protracted international efforts to achieve a peaceful solution to the Iraq crisis were considered to have failed; there were increasing indications that a coalition of several states, led by the United States of America, would take military action against Iraq. In neighbouring Turkey, there was resistance to military intervention. Against the will of the government, on 1 March 2003 the Turkish parliament refused to station special forces of the USA in Turkey and thus prevented the U.S. troops from launching a ground offensive into northern Iraq from Turkey. However, Turkey opened its airspace to give overflight rights to military aircraft of the coalition of states. At this time there was uncertainty as to whether the Turkish military was considering marching into northern Iraq, which would have made it a direct party to the conflict. Before the beginning of the combat operations, Iraq declared that every ally of the USA in the region would be the target of Iraqi military operations. 2

b) In a letter of 10 February 2003, Turkey had already applied for consultations among the NATO member states because it felt threatened by the intensification of the Iraq crisis. Such consultations are provided for by Article 4 of the North Atlantic Treaty of 4 April 1949 (Federal Law Gazette (*Bundesgesetzblatt* - BGBl) 1955 II p. 289), which was relied on for the first time in the history of NATO in the lead-up to the Iraq crisis (see the press release of the then Secretary General of NATO, Lord Robertson, of 10 February 2003). The provision reads: 3

> The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened. 4

On the basis of the consultations between the NATO states, the NATO Defence Planning Committee on 19 February 2003 authorised the NATO military authorities to station AWACS aircraft and the PATRIOT Air Defence Missile System in Turkey as part of Operation Display Deterrence to protect against potential missile attacks and attacks with chemical and biological weapons. Thereupon, on 26 February 2003, first two and later a further two NATO AWACS aircraft were moved from their home base in Geilenkirchen to Konya Air Base in Turkey, and until 17 April 2003 they were deployed in Turkish airspace for surveillance purposes. There were a total of 105 deployments of AWACS aircraft, all of them conducted with German participation. On 30 April 2003, NATO declared Operation Display Deterrence officially ended. 5

c) The AWACS aircraft deployed constitute an Airborne Warning and Control System to give early warning of aircraft or other flying objects. The crews consist of members of the forces of various NATO member states; soldiers of the Bundeswehr (German Federal Armed Forces) make up approximately one-third of the crews. The system offers control and command functions and serves to direct fighter aircraft; the AWACS aircraft themselves do not carry weapons (see earlier, Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 88, 173 (174)). The radar surveillance range at a normal operating altitude of ten kilometres is approximately 400 to 450 kilometres, but in actual deployment it depends on the position and height of the orbit above the operational area that is allocated to the AWACS aircraft (see *Bundestag* document 15/504, pp. 20-21). The PATRIOT missiles are weapons systems that have their own radar systems and can both repel missile attacks and destroy enemy aircraft. It is possible to connect the antiballistic missiles with the AWACS aircraft by radio. In addition to the transfer of the reconnaissance aircraft and missile systems to Turkey, additional fighter aircraft were put under the command of the permanent NATO air base at Eskisehir, in particular by the Netherlands and by Turkey itself. This base had the command of possible air defence measures and was in radio contact with the AWACS reconnaissance aircraft. 6

All the NATO forces to reinforce aerial surveillance and air defence were first deployed under the general peacetime rules of engagement, which were taken from the deployment guide of the NATO Integrated Air Defence System and adapted to the specific situation. These rules of engagement also make reference to the exercise of military power in that, in addition to warnings addressed to aircraft that are attacking NATO aircraft, they also permit the taking of measures of “riding-off”. From the outset, the decision of the Defence Planning Committee of 19 February 2003 provided that if the situation deteriorated, the Supreme Allied Commander Europe (SACEUR) would submit additional rules of engagement for approval; this happened on 18 March 2003, shortly before the beginning of the military strikes by the US-led forces. The five additional rules of engagement approved by the Defence Planning Committee on the following day entered into force on 20 March 2003 and applied from then on for all forces led by NATO for aerial surveillance and the defence of airspace over Turkish territory. In particular, they permitted the use of minimum force to defend the Turkish people and Turkish national territory and an attack against every aircraft with recognisably hostile intent. In this connection, a statement of NATO’s Secretary General of the time, Lord Robertson, of 20 March 2003, was as follows: 7

> Last night, in response to the evolving situation, the NATO Defence Planning Committee approved changes to strengthen the rules of engagement for NATO forces in Turkey. These rules will ensure our forces can effectively carry out their mission, whatever the circumstances. NATO’s deployments are of course purely defensive measures, which remain strictly separated from other military oper- 8

ations in the region. If there is any attack on Turkey, NATO will fulfil its obligations under the Washington Treaty.

The NATO AWACS aircraft were not authorised to take action that would have affected Iraqi territory any more than they were authorised to support units which were involved in the armed action in Iraq. 9

2. a) The question as to whether a potential AWACS deployment in Turkish airspace with the participation of German soldiers needs parliamentary approval had already been discussed in the *Bundestag* since January 2003. Against this background, the then Chairman of the applicant, in a letter of 14 March 2003, informed the Federal Chancellor of the time that, in the opinion of the applicant, the Federal Government had an obligation to apply for the approval of the German *Bundestag* of the participation of German soldiers in the AWACS deployments over Turkey. At all events, he wrote, the Federal Government must, in the case of armed conflict, be prepared to pass without delay a resolution on such an application and submit it to the *Bundestag* for votes to be taken. By reason of the tense political situation in Iraq, which had formed the basis for the Turkish request, he stated that the deployment of the AWACS aircraft was not a matter of routine surveillance flights. It was true that the primary task of the NATO AWACS fleet was aerial surveillance; however, in addition to this it was an efficient instrument to ensure direction and telecommunications support for possible deployment in aerial combat. 10

The Federal Government refused to apply for the approval of the German *Bundestag*. In his speech before the *Bundestag* on 19 March 2003, the Federal Chancellor, Gerhard Schröder, stated (German *Bundestag*, Minutes of plenary proceedings 15/34, Stenographic record, p. 2727): 11

> The NATO AWACS aircraft make routine flights over the territory of Turkey. This is done on the basis of the decision of the NATO Defence Planning Committee of 19 February 2003. Their exclusive duty is strictly defensive aerial surveillance over Turkey. They do not provide any support whatsoever – this can be seen from the rules of engagement – for deployment in or against Iraq. Placing the AWACS aircraft under the command of the NATO Supreme Allied Commander Europe, the SACEUR, strictly separates them from the duties of the Commander in Chief of the U.S. Central Command, the American General Franks. Incidentally, I am informed by our experts that Mr. Franks has almost one hundred U.S. AWACS aircraft of his own at his disposal for military operations against Iraq. 12
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> The NATO aircraft, therefore, physically separated from these and with a completely different mission, monitor the airspace above Turkey and secure it, under the command of the NATO Supreme Allied Commander Europe. This is the reason why we are convinced that no resolution of the German *Bundestag* is needed for this. 13

b) On 20 March 2003, members of the German *Bundestag* who were members of the applicant and the applicant itself submitted a motion in the *Bundestag* for a resolution with the following wording (*Bundestag* document 15/711 of 20 March 2003): 14

> The German *Bundestag* calls upon the Federal Government to apply without delay for the approval of the German *Bundestag*, which is essential, of the participation of German soldiers in the AWACS deployments over Turkey. 15

In the grounds for the motion for a resolution, the *Bundestag* members stated that the AWACS radar undoubtedly made it possible to detect and pursue low-flying enemy aircraft above any terrain and to identify NATO aircraft operating in the same area and guide them to the target. Therefore, they stated, the AWACS aircraft could serve as a fire control centre for the deployment of fighter aircraft against attacking aircraft. There could be no talk of routine in the case of such a deployment, in particular in view of the application of Article 4 of the NATO Treaty. In order to obtain legal certainty for the German members of the AWACS aircraft crews, the approval of the German *Bundestag*, which was essential*,* had to be obtained without delay. In a roll-call vote, the motion failed to achieve the necessary majority, with 274 votes to 303 and six abstentions (German *Bundestag*, Minutes of plenary proceedings 15/35, Stenographic record, p. 2926). 16

3. In the early hours of 20 March 2003, the armed intervention in Iraq began; this immediately led to the fall of the regime of Saddam Hussein. In the course of the military conflict, there were no violations of Turkish airspace by Iraqi forces, nor were the AWACS aircraft used as fire control centres for deployments in aerial combat. Nor was there a Turkish land offensive into northern Iraq in the period of AWACS surveillance. In this connection, the Federal Government had declared several times that it would remove the German soldiers from the AWACS formation if Turkey became a party to the war in Iraq (see, for example, the speech of the then Federal Chancellor Mr. Schröder before the German *Bundestag* of 3 April 2003, German *Bundestag*, Minutes of plenary proceedings 15/37, Stenographic record, p. 2997). 17

4. On 22 March 2003, the applicant filed an application at the Federal Constitutional Court for a temporary injunction. It petitioned the court to order that until the decision in the main action, the participation of soldiers of the Bundeswehr in the AWACS formations deployed for the protection of Turkey might only be maintained if and insofar as the German *Bundestag* so decided. In addition, the applicant petitioned the court to order the Federal Government to request the German *Bundestag*, without delay, to pass a resolution to this effect, if it intended to allow Bundeswehr soldiers to remain in the AWACS aircraft. In an order of 25 March 2003 (BVerfGE 108, 34), the Senate rejected the application for a temporary injunction on the basis of a weighing of consequences. 18

5. Following the judgment of the Federal Constitutional Court of 12 July 1994, in which the court held that beyond the minimum conditions for and limits of the require- 19

ment of parliamentary approval, which could be inferred from this decision, the constitution did not contain detailed provisions on the procedure and the intensity of the involvement of the German *Bundestag*, and therefore it was a matter for the legislature to give more concrete shape to the form and the extent of parliamentary cooperation in deployments of the German army abroad (BVerfGE 90, 286 (389)), on 24 March 2005 the Act on Parliamentary Involvement in the Decision on the Deployment of Armed Forces Abroad (*Gesetz über die parlamentarische Beteiligung bei der Entscheidung über den Einsatz bewaffneter Streitkräfte im Ausland, Parlamentsbeteiligungsgesetz,* Act on the Involvement of Parliament – *ParlBG*, Federal Law Gazette 2005 I p. 775) entered into force; this Act contains more detailed provisions on the form and extent of parliamentary involvement. Pursuant to § 1.2 of the Act on the Involvement of Parliament, the deployment of armed German forces outside the area of application of the Basic Law (*Grundgesetz* – *GG*) requires the approval of the German *Bundestag*. The concept of deployment is defined by § 2 of the Act on the Involvement of Parliament as follows:

> (1) A deployment of armed forces exists if soldiers of the Bundeswehr are involved in armed operations or an involvement in an armed operation is to be expected. 20

> (2) Preparatory measures and planning are not a deployment in the meaning of this Act. They do not require the approval of the *Bundestag*. The same applies to humanitarian relief services and the rendering of assistance by the forces where arms are carried solely for the purpose of self-defence, if it is not to be expected that the soldiers will be involved in armed operations. 21

In addition, § 4.1 of the Act on the Involvement of Parliament provides that, in the case of “deployments of minor intensity and implications”, parliamentary approval may be granted in simplified proceedings. Under § 4.2 of the Act on the Involvement of Parliament, such deployments are those in which the number of soldiers deployed is small, the deployment is, by reason of the other attendant circumstances, discernibly of lesser importance, and the deployment does not constitute participation in a war. 22

II.

In its application in the main action, the applicant petitions the court to find that the respondent has violated the rights of the German *Bundestag* by failing to obtain its approval for the deployment of German soldiers in measures of aerial surveillance for the protection of Turkey pursuant to the NATO decision of 19 February 2003. The grounds it submits are essentially the following: 23

1. The application is admissible. As a parliamentary group in the German *Bundestag*, the applicant is capable of being a party to *Organstreit* proceedings under § 13 no. 5 and §§ 63 et seq. of the Federal Constitutional Court Act (*Bundesverfas-* 24

sungsgerichtsgesetz – BVerfGG). Its legitimate interest in legal action to establish the violation of rights did not cease as a result of the end of the specific deployment of the German soldiers. According to the case-law of the Federal Constitutional Court, it is not necessary for a violation of rights that occurred in the past to have effects in the present. In addition, the conduct of the respondent gives rise to fear that in future it will again invoke a restricted definition of deployment and therefore the rights of parliament will once more be reduced. For example, it is necessary to fundamentally clarify when the German *Bundestag* has to be involved for deployments of the Bundeswehr which may include the use of armed force. It has always been an important function of *Organstreit* proceedings to prospectively clarify cases of constitutional doubt.

Nor does the fact that the Act on the Involvement of Parliament has entered into force conflict with the legitimate interest in legal action, since the Act did not clarify the question at issue in the present proceedings as to the scope of the requirement of parliamentary approval under the provisions of the Basic Law which concern defence. 25

2. The application is also well-founded, for the deployment of German soldiers in NATO AWACS aircraft for the protection of Turkey required the approval of the German *Bundestag*. 26

a) The use of the AWACS aircraft in issue here passes the threshold beyond which a deployment requires approval as defined in the decision of the Federal Constitutional Court of 12 July 1994 (BVerfGE 90, 286). It is true that the Federal Constitutional Court has excluded particular uses of Bundeswehr staff from the requirement of approval. However, in this connection it only distinguished between military deployments and what are known as non-military secondary uses, whereas in the present case it is a question of the differentiation of military activities that have no concrete relation to armed operations, and therefore do not require the approval of the German *Bundestag,* from genuinely military activities. 27

This differentiation is to be established from the meaning of parliamentary approval and in particular from the judgment of the Senate of 12 July 1994 (BVerfGE 90, 286). The Federal Constitutional Court also enshrined the requirement of parliamentary approval of deployments of the German army abroad in the constitutional principles of the rule of law and of democracy. The question as to whether the threshold beyond which a deployment requires approval has been passed is therefore to be answered on the basis of the theory that material decisions must be made by the legislature rather than by the executive: a decision that is as fateful and essential as the display of military power by use of or threatening with armed force may not be entrusted to the executive alone. The result of this is that it is not only a traditional declaration of war or the establishment of a state of defence that requires the approval of parliament. On the contrary, new forms of deployment of the Bundeswehr in changed strategic circumstances, such as are expressed in NATO's new Strategic Concept of 28

24 April 1999 (on this, see BVerfGE 104, 151 (158 et seq.)), are essential for the democratic state. This also follows from the requirement to guarantee legal certainty for the German soldiers involved and give them political support. By reason of the far-reaching consequences that might in certain circumstances arise for the soldiers as a result of their participation in the reconnaissance flights, this can only be achieved by way of a mandate from the German *Bundestag*. In addition, the decision of the NATO Defence Planning Committee of 19 February 2003 was a matter of considerable controversy among the member states, since it was seen in connection with the question as to how the member states should conduct themselves with regard to the imminent military intervention in Iraq. Thus the decision related to an essential foreign-policy problem of the organisation of the international order. This circumstance alone requires the approval of the German *Bundestag* to the deployment in question.

b) According to the judgment of the Senate of 12 July 1994, whether parliamentary approval is required depends on whether German soldiers are “involved in armed operations” (see BVerfGE 90, 286 (388)). From this point of view, it must be asked in connection with every individual case whether the mandate permits such involvement; here, it is irrelevant whether military combat operations form the core of the deployment, for all that is relevant is whether the use of military force seems a concrete possibility. 29

Turkey's invocation of Article 4 of the NATO Treaty is unique in history and means that Turkey regarded the integrity of its national territory, its political independence or its security as threatened. If NATO undertakes measures in response to this, this implies that the other member states share the view of the state affected, assume that there is danger of an imminent attack and to this extent regard concrete defence measures as appropriate. For example, surveillance in Turkey was increased because NATO envisaged the concrete possibility of an attack at any time and was prepared to use the combat direction function of the AWACS aircraft; it was therefore by no means possible to describe the surveillance of Turkey as “everyday NATO work”. Contrary to the submissions of the respondent, measures of collective self-defence are not routine, unlike, for example, the surveillance of a border in peacetime, but are a deployment that requires approval. 30

The rules of engagement adopted by the Defence Planning Committee show that the deployments of the AWACS aircraft had concrete military significance. From the outset, involvement in the use of military force was part of the deployment. The extended rules of engagement authorise the NATO forces to use force against flying objects that enter Turkish airspace. Since the AWACS aircraft could take over military command functions and thus be integrated into the operational concepts, cooperation in the military use of force was a quite essential part of their mission; hope or expectation that this function will not be necessary does not alter this. 31

c) Finally, a comparison with the deployments that were the subject of the decision of the Senate of 12 July 1994 shows that the German soldiers were involved in armed 32

operations. For example, the Federal Constitutional Court always regarded deployments in connection with the United Nations, regardless of the organisation of the specific powers and command structures, as requiring approval, since the boundaries have become fluid and the extent of the powers of self-defence have become uncertain here. For this reason it also regarded the strictly defensive surveillance of the sea in the Adriatic (see BVerfGE 90, 286 (305 et seq.)) as requiring approval. This shows that in observation and deterrence it is of crucial importance whether an escalation in the form of the involvement of German soldiers in combat operations is to be reckoned with. The concrete military threat and the probability of an escalation were substantially greater against the background of the political situation and the specific rules of engagement for NATO's surveillance in Turkey than in the deployments on which the Senate decided in the decision of 12 July 1994.

III.

The respondent applies for the application to be rejected. The grounds it submits are essentially the following: 33

1. There are already doubts as to the admissibility of the application, because the applicant primarily pursued the political goal of furthering the enactment of what is known as a Deployment of Military Forces Act (*Entsendegesetz*), as was called for by the Federal Constitutional Court in its decision of 12 July 1994. 34

2. At all events, the application is unfounded, because the Federal Government was under no constitutional obligation to obtain the approval of the German *Bundestag* for the use of German soldiers in the AWACS surveillance of Turkey. 35

a) In its decision of 12 July 1994, the Federal Constitutional Court derived the requirement of parliamentary approval from the German constitutional tradition since 1918, and in this connection the court emphasised that since it could be seen that formal declarations of war were no longer being made, the de facto use of military force was to be treated as equivalent to officially engaging in war. In this way, the de facto use of military force embodies the fateful political decision as to peace or war, which has to be made by parliament. A “deployment of armed forces” in the meaning of a deployment subject to the mandatory requirement of parliamentary approval therefore only exists if German soldiers are involved in the use of military force. This was specifically not the case in the AWACS surveillance over Turkey. 36

This does not conflict with the fact that in its decision of 12 July 1994 the Federal Constitutional Court proceeded on the assumption that the AWACS surveillance of Bosnia and Herzegovina required parliamentary approval. For this deployment served to exercise the authority to use force under Chapter VII of the Charter of the United Nations, and therefore the possibility of the use of military force was inherent to it. If only because the troops deployed are normally armed for the purpose of self-defence, there is always the substantial danger that military force will be used in such deployments. Measures which NATO, as a system of mutual collective security, con- 37

ducts on or above territory that is not involved in conflict in one of its member states are not comparable to such deployments. Here, in contrast, mere routine measures are involved; these are covered by the parliamentary approval of the accession of the Federal Republic of Germany to NATO, insofar as German soldiers are not involved in specific armed conflicts. As long as no military force is used, the fateful political decision on peace or war has not yet been made.

In addition, in the decision on rearmament (BVerfGE 68, 1 (89, 108-109)) the Federal Constitutional Court already stated for clarification that the order of the distribution and balancing of state power laid down in the Basic Law may not be undermined by a monism of power, derived from the principle of democracy, in the form of an all-embracing requirement of parliamentary approval. The principle of democracy of the Basic Law is not based on the allocation to parliament of all actions and decisions that are politically of far-reaching or existential significance. The executive too is designed as a branch of political power and is not from the outset restricted to decisions that are of lesser political importance. The requirement of parliamentary approval is therefore not subject to the rule that every use of the Bundeswehr is in case of doubt dependent on the approval of parliament. Indeed, it may be understood from the Basic Law that in case of doubt it is the Federal Government that decides on the deployment of German soldiers. For it is not compatible with the principle of the separation of powers if every routine deployment of German soldiers in the lead-up to possible armed conflicts and without any contact with a military opponent is subjected to the approval of the *Bundestag*. 38

b) Nor can it be concluded from the application of Article 4 of the NATO Treaty that the involvement of German soldiers in the AWACS deployment required the approval of the German *Bundestag*. The Federal Constitutional Court has already decided that, in the case of an attack on a fellow member of NATO, only a concrete deployment of armed forces pursuant to Germany's NATO obligations requires parliamentary approval. In contrast, the integration of the German forces in the NATO integrated formations or a participation in military actions of this system under its military command, insofar as these are already laid down in the NATO Treaty, is covered by the Consent Act to the NATO Treaty (*Zustimmungsgesetz zum NATO-Vertrag*). For this reason, forms of routine deployment that are adapted to changed circumstances are also covered by the original parliamentary approval as long as they are not associated with the use of military force. 39

Even NATO measures that are taken as the result of an attack on a fellow NATO member under Article 5 of the NATO Treaty require parliamentary approval only when the threshold to the use of military force is passed. Thus, for example, surveillance flights along the border on the “Iron Curtain” in the “Cold War”, which were intended to demonstrate NATO's own military strength and at the same time deter the other side from attacks, were always part of Alliance routine; the deterrence of aggression by displaying military force and by precautionary measures has therefore always been part of NATO's routine, which requires no separate approval of the Ger- 40

man *Bundestag*.

c) Finally, the defensive character of the surveillance flights is confirmed by the NATO rules of engagement. The AWACS aircraft operated on the basis of NATO's standard Integrated Air Defence System. Nor did the extended rules of engagement of 19 March 2003 contain a more extensive authorisation to use armed force, but merely referred to the right of self-defence, recognised under general international law. Only if NATO had resolved to use military force would this have corresponded to the political decision as to war and peace in the form of a declaration of war under classical international law, which then would have required approval from the German *Bundestag*. 41

IV.

The German *Bundestag* submitted no opinion on the proceedings. 42

V.

In the oral hearing, the parties reinforced and supplemented the submissions made in the pleadings. The Deputy Chief of Staff of the Bundeswehr, Generalleutnant Johann-Georg Dora, who was the commander of the NATO AWACS unit from 2000 to 2003, testified on the details of the deployment and the rules of engagement and deployment powers. 43

B.

The application is admissible. 44

I.

As a parliamentary group in the German *Bundestag*, the applicant has standing to bring *Organstreit* proceedings under § 13 no. 5, §§ 63 et seq. of the Federal Constitutional Court Act. It may assert in its own name rights that the *Bundestag* has in relation to the Federal Government (see BVerfGE 1, 351 (359); 2, 143 (165); 104, 151 (193); 118, 244 (254-255); established case-law). The Federal Government, against which the application is directed, is a possible respondent under § 63 of the Federal Constitutional Court Act. Pursuant to § 64.1 of the Federal Constitutional Court Act, the failure of the respondent, which is challenged in the present case, to obtain the approval of the German *Bundestag* of the participation of German soldiers in the AWACS surveillance of Turkey is qualified to be the subject of *Organstreit* proceedings. 45

II.

The applicant is authorised to file an application. 46

The applicant has sufficiently justified the position that rights conferred on the German *Bundestag* by the Basic Law may have been infringed by the challenged omission of the respondent (§ 64.1 of the Federal Constitutional Court Act). In a substan- 47

tiated manner, the applicant has submitted that the German *Bundestag*'s rights were violated, since the respondent refused to obtain its approval for the participation of German soldiers in the surveillance of Turkish airspace by NATO. In its decision of 12 July 1994, the Federal Constitutional Court held that deployments of armed forces are constitutionally subject to the essential approval of the German *Bundestag*, which in principle must be obtained in advance (BVerfGE 90, 286 (383 et seq.)). However, the scope of this concept of deployment, and thus the scope of the requirement of parliamentary approval, has not yet been conclusively clarified with regard to situations in which German soldiers participate in deployments of integrated NATO formations in the aerial surveillance of a NATO member state whose national territory borders directly on a territory involved in war (see earlier, BVerfGE 108, 34 (43)). For this reason it is not precluded from the outset that the deployment of German soldiers in Turkey required the approval of the German *Bundestag*.

Finally, the authority for the application cannot be denied with the argument that in rejecting the motion for a resolution initiated to a significant degree by the applicant on 20 March 2003 the *Bundestag* waived the exercise of its rights. The meaning and purpose of the representative action provided for in § 64.1 of the Federal Constitutional Court Act lie specifically in preserving the power of the parliamentary minority to assert the rights of the German *Bundestag* even if the latter does not wish to exercise its rights, in particular in relation to the Federal Government, which it underpins. To this extent, the granting of the authority to pursue a representative action is both the expression of the supervisory function of parliament and also the instrument of the protection of minorities (see BVerfGE 45, 1 (29-30); 60, 319 (325-326); 68, 1 (77-78); Schlaich/Korioth, Das Bundesverfassungsgericht, 7th ed. 2007, marginal no. 94). 48

III.

The applicant has a legitimate interest in legal action. 49

1. There are no objections to the applicant's legitimate interest in legal action from the aspect of the absence of a possibility to apply to the Federal Constitutional Court for a legal opinion (on this, see, in the case of the AWACS deployment to monitor the no-fly zone above Bosnia and Herzegovina in the year 1993, BVerfGE 90, 286 (390 et seq.) – dissenting opinion of the judges Böckenförde and Kruis). The subject of the present *Organstreit* proceedings is not an abstract question of law, but a concrete omission, the constitutionality of which is to be examined in retrospect by the Federal Constitutional Court. 50

2. Nor does it conflict with the applicant's legitimate interest in legal action that the violation of rights asserted lies in the past and at present no longer has any effects, because the AWACS deployment in Turkey had already ended when the applicant commenced proceedings by filing its application in the main action. 51

a) As a general rule, an application in *Organstreit* proceedings is not inadmissible 52

merely because the violation of rights challenged lies in the past and has already come to an end (see BVerfGE 10, 4 (11); 49, 70 (77); for disputes between the Federation and the *Länder* BVerfGE 41, 291 (303)). In legal literature, in contrast, it is sometimes assumed that special circumstances, in the nature of an interest in a declaration that the violation remains unlawful (*Fortsetzungsfeststellungsinteresse*), must be present for a decision to be permitted on a violation of rights that lies in the past and has ended (see, for example, Umbach, in: idem/Clemens/Dollinger (eds.), *BVerfGG*, 2nd ed. 2005, *§§ 63, 64,* marginal no. 172; Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/idem, *BVerfGG*, date: July 2002, *§ 64*, marginal no. 99). Whether this view is to be followed need not be decided in the present proceedings, for such circumstances are present in this case. As the Senate has already emphasised, in its order of 25 March 2003 on the temporary injunction sought by the applicant (see BVerfGE 108, 34 (43)), in the present case there is an objective interest in clarifying the scope of the requirement of parliamentary approval under the provisions of the Basic Law which concern defence (on the interest in clarification, see also BVerfGE 1, 372 (379)), at minimum with regard to the danger that in a comparable situation in the future a foreign deployment of the Bundeswehr is not submitted to the German *Bundestag* for approval either (on the danger of recurrence, see also BVerfGE 91, 125 (133); 103, 44 (58-59)).

b) The danger of recurrence and interest in clarification have not ceased to apply as a result of the entry into force of the Act on the Involvement of Parliament, which has now taken place. The definition of the “deployment of armed forces” in § 2.1 of the Act on the Involvement of Parliament closely follows the definition in the decision of the Senate of 12 July 1994 (BVerfGE 90, 286 (387-388)), which does not give an exhaustive description of the area of application of the requirement of parliamentary approval under the provisions of the Basic Law which concern defence; the Act on the Involvement of Parliament, therefore, specifically does not clarify the exact scope of the requirement of parliamentary approval for the deployment of forces. At all events, the mandatory requirement of parliamentary approval under the provisions of the Basic Law which concern defence follows directly from the Basic Law (see, earlier, BVerfGE 90, 286 (383); 108, 34 (42)). 53

3. In submitting to the German *Bundestag* the motion for a resolution which was intended to obtain the approval of the *Bundestag* for the AWACS deployment in Turkey, the applicant also took the steps that were possible for it to induce the *Bundestag* to assert its rights (see BVerfGE 90, 286 (392-393)). 54

IV.

The period for filing the application under § 64.3 of the Federal Constitutional Court Act was complied with. On 19 February 2003, the Federal Government participated in the decision of the NATO Defence Planning Committee on the deployment of AWACS aircraft in Turkey. The measure that was omitted, in the form of involving the German *Bundestag* by obtaining its approval, should have taken place at the latest 55

on this date, or, if the deployment had required later parliamentary approval, at a later date. The six-month period for filing the application had therefore not yet expired on 5 August 2003, when the application was received by the Federal Constitutional Court.

C.

The application is well-founded. The respondent should have obtained the approval of the German *Bundestag* for the participation of German soldiers in measures of aerial surveillance of Turkey from 26 February to 17 April 2003 as part of the NATO Operation Display Deterrence, by reason of the requirement of parliamentary approval for the deployment of armed forces under the provisions of the Basic Law which concern defence. 56

I.

1. a) The Basic Law has entrusted the decision as to war or peace to the German *Bundestag* as the body representing the people. This is provided expressly for the determination of a state of defence and a state of tension (Article 115a.1, Article 80a.1 of the Basic Law) and in addition it applies in general to the deployment of armed forces, including deployments in systems of mutual collective security under the terms of Article 24.2 of the Basic Law. From the totality of the provisions of the Basic Law which concern defence and against the background of German constitutional tradition since 1918, the Federal Constitutional Court has derived from the Basic Law a general principle that every deployment of armed forces requires the mandatory approval of the German *Bundestag*, which as a general rule should be given in advance (BVerfGE 90, 286 (381 et seq.)). The provisions of the Basic Law that relate to the forces are designed not to leave the Bundeswehr as a potential source of power to the executive alone, but to integrate it as a “parliamentary army” into the constitutional system of a democratic state under the rule of law (see BVerfGE 90, 286 (381-382)). 57

The requirement of parliamentary approval under the provisions of the Basic Law which concern defence creates an effective right of participation for the German *Bundestag* in matters of sovereign decisions relating to foreign affairs. Without parliamentary approval, a deployment of armed forces is as a general rule not permissible under the Basic Law; only in exceptional cases is the Federal Government entitled – in the case of imminent danger – to provisionally resolve the deployment of armed forces in order that the defence and alliance capacities of the Federal Republic of Germany are not called into question by the requirement of parliamentary approval. In such an exceptional case, however, the Federal Government must without delay refer the deployment resolved in this way to parliament and at the request of the *Bundestag* recall the forces (BVerfGE 90, 286 (388)). On the other hand, nor may the German *Bundestag* order a deployment of forces without the Federal Government, because the requirement of parliamentary approval is a reservation of consent which confers no power to initiate deployments (see BVerfGE 90, 286 (389)). 58

b) Pursuant to the case-law of the Senate, the subject of the involvement of parliament is “deployments of armed forces” (BVerfGE 90, 286 (387-388); 104, 151 (208)). The Senate defined this concept more specifically in its decision of 12 July 1994 with a view to the deployments that were to be decided at the time, some of which were conducted in the institutional framework of NATO, but all of which, under international law, were based on resolutions of the United Nations Security Council (see BVerfGE 90, 286 (305 et seq., 309-310)). In this connection, the Senate stated that deployments of armed forces under Security Council resolutions always require parliamentary approval, irrespective of whether the forces are authorised to use force under Chapter VII of the Charter of the United Nations (BGBl 1973 II p. 430) and of how the command powers are structured. Such deployments may therefore not be treated differently, for the boundaries between deployments with power to undertake armed protective measures and those without such power have in reality become fluid, and because the power to use arms may follow, even without special authorisation to this effect, from the fact that self-defence is permitted (see BVerfGE 90, 286 (387-388)). It is not necessary to discuss further whether, when their function is considered, the deployments that were to be decided on at that time, as enforcement measures of the United Nations, are really the equivalent of acts of war, as the respondent submitted in the oral hearing of 12 February 2008, since the Senate did not rely on an argument of this kind. At all events, the use of Bundeswehr personnel for mere relief services and the rendering of assistance abroad where soldiers are not involved in armed operations does not require the approval of the German *Bundestag* (BVerfGE 90, 286 (387-388)). 59

These statements made in the previous case-law of the Senate do not exhaustively define the scope of the requirement of parliamentary approval under the provisions of the Basic Law which concern defence. The literature of constitutional law discusses the term “deployment of armed forces” and the question as to when German soldiers, in the meaning of the Senate's case-law, are “involved in armed operations” (see Nolte, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht – ZaöRV* 54 (1994), p. 652 (678-679); Röben, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 63 (2003), p. 585 (592 et seq.); Fischer-Lescano, *Neue Zeitschrift für Verwaltungsrecht – NVwZ* 2003, pp. 1474 et seq.; Schäfer, Verfassungsrechtliche Grenzen des Parlamentsbeteiligungsgesetzes, 2005, pp. 192 et seq.; Schmidt-Radefeldt, Parlamentarische Kontrolle der internationalen Streitkräfteintegration, 2005, p. 151 et seq.; Schröder, Das parlamentarische Zustimmungsverfahren zum Auslandseinsatz der Bundeswehr in der Praxis, 2005, pp. 166 et seq., 188 et seq.). The legislature, before enacting the Act on the Involvement of Parliament, also considered these questions in detail (see German *Bundestag*, 15th electoral period, Stenographic record of the 25th session of the Committee for the Scrutiny of Elections, Immunity and the Rules of Procedure on 17 June 2004). The Senate itself, in its decision of 25 March 2003, held that these questions need to be clarified in the main action in order that it can be determined how far the mandatory requirement of parliamentary approval in the provisions of the Basic Law which concern defence, which applies di- 60

rectly by virtue of the constitution, extends (see BVerfGE 108, 34 (42-43)).

2. “Deployment of armed forces” is a constitutional concept the concretisation of which does not depend directly on the international-law basis of the specific deployment (see BVerfGE 90, 286 (387)), and which can also not be bindingly concretised by a statute that is subordinate to the constitution (see § 2 of the Act on the Involvement of Parliament), although the statutory formulation of the concept may in the individual case give indications as to its scope as laid down in the constitution itself. 61

a) Article 24.2 of the Basic Law authorises the Federation to join a system of mutual collective security for the maintenance of peace. In addition to the United Nations, NATO, as a defensive alliance, constitutes such a system (see, earlier, BVerfGE 90, 286 (350-351); 104, 151 (209); 118, 244 (261-262)). The authorisation in Article 24.2 of the Basic Law to join a system of mutual collective security is at the same time the constitutional basis for the participation of the Bundeswehr in deployments outside the federal territory, insofar as these occur within and pursuant to the rules of such a system (see BVerfGE 90, 286 (345 et seq.)). For the alliances to which the Federal Republic of Germany belongs and the protection for Germany following from these are indissolubly linked (see, earlier, BVerfGE 90, 286 (345)) to the assumption of contractual duties within the alliance's purpose of maintenance of peace (see BVerfGE 118, 244 (261-262)). In this respect, therefore, the opening under constitutional law provided in Article 24.2 of the Basic Law is not restricted to the option of joining integrated international forces. On the contrary, as far as this provision extends, it also constitutionally legitimises the individual deployment of forces as a consequence of this integration, for otherwise “joining” in the meaning of Article 24.2 of the Basic Law would not be possible. The provision in Article 87a.2 of the Basic Law does not conflict with this, because it was not intended to restrict membership of a system of mutual collective security, which was already permitted in the original text of the Basic Law, or to restrict the participation of German forces in armed deployments under such a system that was thus enabled (see, earlier, BVerfGE 90, 286 (355 et seq.)). 62

b) However, the substantive basis of the legitimation contained in Article 24.2 of the Basic Law does not answer the question as to who on the domestic level is constitutionally to decide on such deployments. In the Basic Law, only Article 59.2 sentence 1 contains an express provision on the question hereby raised as to the competent body in the area of foreign affairs (on this, see for example Fastenrath, Kompetenzverteilung im Bereich der auswärtigen Gewalt, 1986, pp. 215 et seq.; Wolfrum, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer – VVDStRL* 56 (1997), pp. 39 et seq.). 63

Article 59.2 sentence 1 of the Basic Law provides that the German *Bundestag* must approve the treaty basis of a system of mutual collective security. The Consent Act to the NATO Treaty passed pursuant to Article 59.2 sentence 1 and Article 24.2 of the Basic Law lays down the integration programme of a system of mutual collective security (BVerfGE 104, 151 (209); see also BVerfGE 118, 244 (259-260)). The leg- 64

islative bodies have a substantial share in the responsibility for this integration programme and the concomitant political commitment of the Federal Republic of Germany. In approving a statute that ratifies a treaty under international law, *Bundestag* and *Bundesrat* determine the scope of the commitments based on the treaty and bear the political responsibility for this towards the citizen (see BVerfGE 104, 151 (209); 118, 244 (260)). The legal and political responsibility of parliament is therefore not exhausted in a once-only act of approval, but extends to the further enforcement of the treaty. Nevertheless, the Federal Government is empowered to further develop the treaty in the forms of international law (see BVerfGE 104, 151 (209); 118, 244 (258-259)). A further development of NATO with the cooperation of the Federal Government only infringes the German *Bundestag*'s right to participate in sovereign decisions relating to foreign affairs if it exceeds the authority granted by the Consent Act and is thus *ultra vires* (see BVerfGE 104, 151 (209-210); 118, 244 (260)).

65 This means at the same time that on the domestic level the adaptation of a system of mutual collective security to changing circumstances in world politics and concomitant changing risk situations is primarily the duty of the Federal Government. This adaptation, even where it relates to the treaty basis, proceeds as a general rule without the active involvement of the German *Bundestag*, as long as there is not an amendment treaty, which pursuant to Article 59.2 sentence 1 of the Basic Law would require new approval, and as long as the further development of the system does not depart from the integration programme of the treaty and may therefore also not proceed without a new involvement of parliament (see BVerfGE 104, 151 (199-200, 209-210); 118, 244 (259 et seq.)). The Senate has refused to extend the requirement of parliamentary approval under Article 59.2 sentence 1 of the Basic Law to treaty development processes that remain within these limits (see BVerfGE 68, 1 (84 et seq.); 90, 286 (359 et seq.); 104, 151 (206 et seq.)); such processes have occurred in particular in NATO since the change of direction of world politics since 1989 and are laid down in a large number of political strategy concepts (see BVerfGE 90, 286 (298 et seq.); 104, 151 (156 et seq.)). For the organisation of foreign relations, the Basic Law grants the Federal Government latitude that is in principle very broad to make its own decisions; an extension of the requirement of approval under Article 59.2 sentence 1 of the Basic Law might encroach upon this.

66 Even within the limits of the treaty integration programme, the German *Bundestag* is not defenceless against an amendment of the treaty basis with the involvement of the Federal Government. The system of parliamentary government established by the Basic Law gives the *Bundestag* sufficient instruments for the political supervision of the Federal Government, even with regard to the further development of a system of mutual collective security. On the basis of general parliamentary rights of control pursuant to Article 43.1 of the Basic Law, the Federal Government is already under an obligation to give account to parliament for its actions in the bodies of NATO. If it assumes obligations for the German contribution to the deployment of the forces at the disposal of NATO, it will have to take account of parliament's right to decide on

the budget and in this connection will have to try to obtain the political approval of the German *Bundestag*. Finally, admitting further states as members requires a protocol of accession to be entered into, which in turn must be approved by the *Bundestag* pursuant to Article 59.2 sentence 1 and Article 24.2 of the Basic Law (see BVerfGE 104, 151 (208)).

The exercise of parliamentary responsibility, which is constitutionally required, for the further development of a system of mutual collective security may, however, encounter practical difficulties because the Federal Government has the advantage of the entity acting directly, by reason of its superior knowledge and of its experience of the conditions of cooperation in the NATO system. In this connection, every system of mutual collective security, preserving the sovereignty of each member state, in practice follows its own rules in its solidarity with the alliance; the *Bundestag* will scarcely be able to exercise an effective influence on these. It is only the Federal Government that participates in the coordinated decision-making, for example in the United Nations Security Council or in the decision-making bodies of NATO. Parliament may not subsequently and unilaterally deviate from the decisions made there without causing political damage to NATO and thus to the Federal Republic of Germany (see BVerfGE 108, 34 (44-45)). For this reason, the German *Bundestag* is often forced to monitor the political actions in an alliance of systems which is shaped by the executives of the member states, within the bounds of the amendment of the treaty on the one hand and the integration programme of the treaty on the other hand, limiting itself to the indirect exercise of influence described. 67

c) The requirement of parliamentary approval under the provisions of the Basic Law which concern defence for the deployment of armed forces also preserves the rights of the *Bundestag* especially in this situation relating to the alliance. Not least by reason of the constitutional significance of the authorisation to join alliances in Article 24.2 of the Basic Law, the requirement of parliamentary approval under the provisions of the Basic Law which concern defence acquires considerable significance: since deployments of the Bundeswehr abroad under and subject to the rules of a system of mutual collective security may be based on this provision, such deployments, notwithstanding the substantive commitment contained in Article 24.2 and Article 26.1 sentence 1 of the Basic Law to the precept of maintaining peace (see BVerfGE 104, 151 (212-213); 118, 244 (261-262)), are constitutionally permissible in various constellations and beyond the limits largely assumed before 1994 by the literature of constitutional law (see Bähr, Verfassungsmäßigkeit des Einsatzes der Bundeswehr im Rahmen der Vereinten Nationen, 1994, pp. 175 et seq.; März, Bundeswehr in Somalia, 1993, pp. 13 et seq.). 68

German participation in the overall strategic direction of NATO and in decision-making as to specific deployments of the alliance is quite predominantly in the hands of the Federal Government: this does not fundamentally conflict with the allocations of competencies by the Basic Law, which in the area of foreign affairs leave particular areas of freedom for the government, if only because this satisfies the principle that 69

the allocation of functions should be appropriate to the bodies concerned (see BVerfGE 68, 1 (87); 104, 151 (207)). But the freedom of the Federal Government to structure its alliance policy does not include the decision as to who, on the domestic level, is to determine whether soldiers of the Bundeswehr will take part in a specific deployment that is decided in the alliance. By reason of the political dynamics of an alliance system, it is all the more important that the increased responsibility for the deployment of armed forces should lie in the hand of the body that represents the people.

As the Senate has already emphasised, the requirement of parliamentary approval under the provisions of the Basic Law which concern defence is in this connection an essential corrective to the limits of parliament's assumption of responsibility in the field of foreign security policy (see BVerfGE 104, 151 (208); see also Röben, loc. cit., p. 594). When military force is exercised, the executive's broad sphere of influence in foreign affairs ends. When armed forces are deployed, the German *Bundestag* does not have the mere role of a body that only indirectly steers and monitors the situation, but instead is called upon to make fundamental, essential decisions; it bears the responsibility for armed foreign deployments of the Bundeswehr. To this extent, the Bundeswehr is a “parliamentary army”, despite its command structure (see Article 65a and Article 115b of the Basic Law), which returns the military and operative leadership to the hands of the executive. The German *Bundestag* can preserve its legally relevant influence on the deployment of the forces only if it has an effective right of participation in the decision on the deployment of armed forces before the military operation commences and then becomes essentially a question of military expediency. 70

The use of armed force means not only a considerable risk for the life and health of German soldiers, but it also contains a potential for political escalation or possibly involvement: every deployment is capable of developing from a limited individual action into a larger and longer-lasting military conflict, up to an extensive war. The transition from diplomacy to force is accompanied by a corresponding change in the proportions of the internal division of powers. The requirement of parliamentary approval creates in this way a collaboration of parliament and government to decide on the deployment of armed forces; this does not fundamentally call into question the executive's own area of action and responsibility for foreign affairs allocated to it under constitutional law (see BVerfGE 68, 1 (87-88)). For when it comes to deciding on the concrete particulars and the extent of individual deployments, the Federal Government retains sole competence, as it does for the coordination of the integration of forces in and with the institutions of international organisations (see BVerfGE 90, 286 (389)). In this respect, the requirement of parliamentary approval under the provisions of the Basic Law which concern defence ensures that bodies have the appropriate competencies, particularly with regard to the participation of the opposition in free parliamentary debate, and in this way also makes it more easily possible for public opinion to decide on the political scope of the deployment in question. The appropriate division of state power in the field of foreign affairs (see BVerfGE 68, 1 (87); 104, 71

151 (207)), with regard to systems of mutual collective security, is thus structured in such a way that parliament, through its participation in the decision, assumes fundamental responsibility for the treaty basis of the system on the one hand, and for the decision on the concrete deployment of armed forces on the other hand, whereas in other respects the specific structure of alliance policy, as responsibility for the concept, and concrete planning of deployments are both the responsibility of the Federal Government.

d) This division of responsibility between parliament and government has repercussions on the question as to how borderline cases of a potential deployment of armed forces are to be judged. This question cannot be answered in the light of areas of freedom for the executive to structure its policy or by arguing on the basis of mechanisms of the alliance, such as “alliance routine”, which was referred to by the respondent. In view of the function and importance of the requirement of parliamentary approval under the provisions of the Basic Law which concern defence, its scope may not be defined restrictively. Instead, the requirement of parliamentary approval, contrary to the opinion of the respondent as stated in the present proceedings, must in case of doubt be interpreted by the Federal Constitutional Court in favour of parliament (on the relevant relationship between the exception and the rule, see also Epping, *Archiv des öffentlichen Rechts – AöR* 124 (1999), p. 423 (455-456); Schmidt-Radefeldt, loc. cit., pp. 166-167). In particular, when the requirement of parliamentary approval applies, it may not be made substantially dependent on the political and military evaluations and prognoses of the Federal Government, invoking areas of freedom for the executive to structure its policy; the executive may be granted a prerogative of assessment only in urgent cases and thus only temporarily (see BVerfGE 108, 34 (44-45)). 72

If and to the extent that competence of the German *Bundestag* in the form of a right of participation in decisions under the provisions of the Basic Law which concern defence can be derived from the Basic Law, there is necessarily no freedom for the Federal Government to decide on its own authority. Where there is an a priori doctrine of the separation of powers, it is impossible to derive from this autonomous areas of competence of the powers named in Article 20.2 sentence 2 of the Basic Law, i.e. areas of competence which are ultimately removed from review by a constitutional court (see BVerfGE 68, 1 (108-109); Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20th ed. 1995, marginal no. 481). Consequently, merely invoking the topos of an executive with its own authority is unsuited to argue in favour of a restrictive interpretation of the requirement of parliamentary approval, and still less for rejecting the requirement of parliamentary approval on principle (but see Roellecke, Der Staat, 1995, p. 415 (423 et seq.); Schultz, Die Auslandsentsendung von Bundeswehr und Bundesgrenzschutz zum Zwecke der Friedenswahrung und Verteidigung, 1998, pp. 440-441). The requirement of parliamentary approval is part of the structural principle of the separation of powers, not a mechanism to break down the barriers between them. 73

3. If German soldiers are involved in armed operations, this is a deployment of armed forces which under the Basic Law is permissible only on the basis of the essential approval of the German *Bundestag*. 74

a) The decisive criterion for the requirement of parliamentary approval of the deployment of armed forces under the Basic Law is their involvement in armed operations; this criterion is understood by the respondent to mean that involvement of parliament in the deployment of forces does not become necessary until, and only becomes necessary if, German soldiers actually use armed force. Such an interpretation does not follow from the decision of the Senate of 12 July 1994. If the requirement of parliamentary approval under the provisions of the Basic Law which concern defence were understood so narrowly, the German *Bundestag* could not adequately exercise its legally relevant influence on the use of the Bundeswehr (see BVerfGE 90, 286 (382)). Its participation in the decision would then no longer relate to the date of the decision to deploy, but routinely to a date later than the posting, at which the deployment of forces with all associated de facto necessities of action has already begun. Once the use of military force had exceeded the limits of what is subject to parliamentary approval, it would no long be possible to speak of a “normally prior” parliamentary involvement (BVerfGE 90, 286 (387)). 75

It is not relevant for the requirement of parliamentary approval under the provisions of the Basic Law which concern defence whether armed conflicts in the sense of combat have already taken place, but whether, in view of the specific context of the deployment and the individual legal and factual circumstances, the involvement of German soldiers in armed conflicts is concretely to be expected and German soldiers are therefore already involved in armed operations (see also Dreist, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 64 (2004), p. 1001 (1036); Nolte, loc. cit., p. 678; Röben, loc. cit., p. 594; Schröder, loc. cit., p. 203). The Senate based its conclusions in its decision of 12 July 1994 on this distinction, when it spoke of an involvement not in armed conflicts but in “armed operations” (BVerfGE 90, 286 (388)); the very meaning of the words in the latter case does not imply that the situation must actually develop into combat action. Instead, the Senate held that to determine whether there was involvement in armed operations in the individual case, the purpose of the deployment and the deployment powers must be considered in more detail. Thus, for example, already at the date when the decision on deployment is made, it must be assumed that there will be a deployment of armed forces if from the outset it is the intention of the deployment that German soldiers will use military force irrespective of the concrete course of the deployment. With regard to deployments on the basis of resolutions of the United Nations Security Council, the Senate stated that in view of the fluid transitions between the various forms of deployment and the possible scope of the right of self-defence there is always an involvement in armed operations (see BVerfGE 90, 286 (388)). 76

b) The mere possibility that there may be armed conflicts during a deployment is not sufficient for this. Such a criterion would shift the constitutionally defined weights in 77

the distribution of competencies among bodies in the area of foreign affairs, because the theoretical possibility of an armed conflict can scarcely ever be excluded in advance where forces are operating. The requirement of parliamentary approval under the provisions of the Basic Law which concern defence does not, therefore, extend to deployments where there are no indications of a specific proximity to the use of military force. For this reason, it is only the well-founded expectation of involvement in armed conflicts that subjects a foreign deployment of German soldiers to the requirement of parliamentary approval. This well-founded expectation differs in two ways from the mere possibility that there may be armed conflicts:

aa) Firstly, there must be sufficient tangible actual evidence that a deployment, by reason of its purpose, the concrete political and military circumstances and the deployment powers, may lead to the use of armed force. For this to be the case, there must be a concrete military situation of danger which has a sufficient factual proximity to the use of armed force and thus to the involvement of German forces in an armed conflict (see, earlier, BVerfGE 108, 34 (43)). In this respect, the assessment of the situation depends on the particular circumstances of the concrete deployment, and in the case of a deployment in a system of mutual collective security in particular also on the goals of the operation and the scope of the particular military powers with regard to a potential military conflict. Military terms such as the expression “alliance routine”, to which the respondent repeatedly referred, have no particular significance in this connection. They have no normative content of their own, and therefore they can at most label the results of the necessary overall consideration, but they cannot influence them. Above all, the constitutional relevance of a danger of escalation contained in a deployment by reason of the concrete circumstances may not be left out of account simply because the nature of the deployment is in other respects somewhat routine. Apart from this, deployments that are of subordinate political significance may also be subject to the requirement of parliamentary approval under the provisions of the Basic Law which concern defence (see also § 4 of the Act on the Involvement of Parliament). 78

bb) Secondly, for a well-founded expectation that Bundeswehr soldiers will be involved in armed conflicts, a particular proximity to the use of armed force is necessary. For this to apply, the involvement must be expected immediately. If the use of armed force is to occur in the near future, this in itself already constitutes the well-founded expectation of involvement in armed conflicts; however, it will normally coincide with an aggregation of factual circumstances that point to an imminent military conflict. But even a consideration of the planning of and the powers of the deployment may show that a participation of German soldiers in the use of armed force which effectively proceeds automatically is probable from the overall situation and in practice only depends on chance happenings in the actual course of events. This may be the case if integrated NATO procedures have already commenced that in practice can scarcely be reversed, or at all events are not open to political influence, before the use of armed force. Then the decisive threshold to a deployment of armed 79

forces has already been passed, which is constitutionally impermissible without the involvement of the German *Bundestag*. For the *Bundestag* can no longer react to the actual sequences of events that are crucial to the use of force in such combinations of circumstances, or as a general rule cannot react to them before they lead to a military reaction.

In its judgment of 12 July 1994, the Senate stated that the parliamentary resolution on a deployment of armed forces must be prepared in the competent committees and debated in the plenum (see BVerfGE 90, 286 (388)). For reasons of procedural safeguarding too, this requires that parliament should be involved at a time when the substantive decision as to the use of armed force has not yet been made and is not to be made before the end of the approval proceedings. Failing this, the requirement of parliamentary approval under the provisions of the Basic Law which concern defence might result in parliament only indirectly steering and monitoring the situation, or in a requirement of parliamentary approval without the standard approval procedure, which would lead to a substantive devaluation of parliament's competence to participate in decisions in connection with the deployment of forces and would sever individual deployments from the responsibility of parliament, contrary to the basic constitutional decisions. The normative power of the resolution of parliament may not be replaced by the “normative power” of facts that have already been created or that have been decided beforehand (see, earlier, BVerfGE 89, 38 (45)). If the expectation, sufficiently provable from the concrete circumstances, exists that German soldiers will be directly involved in armed conflicts, the prior involvement of the German *Bundestag* in the deployment decision puts less strain on the competence not only of the *Bundestag*, because parliament does not find itself in the exigencies of a situation comparable to ratification. Prior involvement, in contrast to a later withdrawal by parliament of German soldiers (see BVerfGE 90, 286 (388)), is at the same time the less damaging alternative for the capacity of the Federal Republic of Germany to act in foreign affairs and to form alliances (see BVerfGE 90, 286 (363-364, 388); 108, 34 (44-45); Rupp, *Juristenzeitung – JZ* 2003, p. 899). 80

cc) There is an indication that German soldiers may be involved in armed conflicts if they are carrying arms abroad and are authorised to use them. For, depending on the course of events in practice, this carrying of arms may result in the use of armed force. However, as long as the authorisation is in law only an authorisation for self-defence, and the deployment itself is non-military in nature, then, as the Senate has already established, the threshold beyond which a deployment requires approval is not reached merely through this authorisation (see, earlier, BVerfGE 90, 286 (388)). But if, in contrast, the deployment is genuinely military in nature, for example because it is intended to protect a territory or particular objects against attack, and if the particular circumstances indicate that involvement in combat operations is imminent, then the soldiers are involved in an armed operation even if the Bundeswehr soldiers involved are themselves unarmed but act as an essential part of the integrated military system conducting the armed deployment. For those who, in the course of an 81

armed operation, for example supply information that is important for the use of arms, carry out reconnaissance that immediately directs the armed operation, or even are entitled as part of their military function to give orders for the use of arms are involved in armed operations without it being necessary for them to carry arms themselves (see, earlier, BVerfGE 90, 286 (310, 390) on the AWACS surveillance of Bosnia and Herzegovina directed by NATO; BVerfGE 108, 34 (43)). It is impossible to assess military deployments in joint actions by integrated forces appropriately from a constitutional point of view if the question as to whether soldiers are involved in armed operations is considered separately for individual components of the system and for operational roles differentiated by person (see also Schmidt-Radefeldt, loc. cit., pp. 164-165; Schröder, loc. cit., pp. 191-192).

c) The question as to whether there is involvement of German soldiers in armed operations is subject to full judicial review; in this connection, the Federal Government is not granted latitude for assessment or prognosis that cannot be verified, or that can be verified only to a limited extent, by the Federal Constitutional Court. Such a latitude is normally presumed to exist in the area of sovereign decisions relating to foreign affairs, because only in this way can the fundamental priority in action of the executive be enforced (see BVerfGE 4, 157 (168-169); 66, 39 (60-61); 68, 1 (97); Hailbronner, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 56 (1997), p. 7 (11 et seq.); Schwarz, Die verfassungsgerichtliche Kontrolle der Außen- und Sicherheitspolitik, 1995, pp. 202 et seq.). Where there is no such latitude for decision under substantive constitutional law, however, the precondition for restraint in the intensity of the review by the Federal Constitutional Court is missing. Since the Basic Law gives the German *Bundestag* a primary right of participation in the area of sovereign decisions relating to foreign affairs, insofar as the requirement of parliamentary approval under the provisions of the Basic Law which concern defence extends, there is positively no latitude for the executive to make decisions apart from its competence in urgent matters (see, earlier, BVerfGE 108, 34 (44)). But such a latitude for decision, which would in essence be incompatible with the system, would be introduced if the Federal Government had latitude to make a prognosis as to whether an involvement of German soldiers in armed conflicts is to be immediately expected and this latitude could not be reviewed by the Federal Constitutional Court. This means at the same time that the Federal Government is under an obligation to provide the *Bundestag*, which participates in the decision, in a manner that, measured by its competence to decide, is adequate, with the necessary information on the context of the deployment and, if applicable, on planning that is currently underway in systems of mutual collective security (see BVerfGE 90, 286 (388-389)). 82

II.

By this standard, the involvement of German soldiers in the aerial surveillance of Turkey by NATO from 26 February to 17 April 2003 was a deployment of armed forces which under the requirement of parliamentary approval under the provisions of the Basic Law which concern defence required the approval of the German *Bun-* 83

destag. Although no combat operations took place, German forces, in participating in this deployment, were involved in armed operations.

1. By carrying out aerial surveillance of Turkey in NATO AWACS aircraft, German soldiers took part in a military deployment in which there was tangible actual evidence of imminent involvement in armed operations. 84

a) The AWACS aircraft deployed were part of a system of concrete military protective measures against a feared attack on the NATO area. For the first time in the history of the North Atlantic Alliance, Turkey had applied for consultations under Article 4 of the NATO Treaty, because it felt threatened by the imminent military conflict in Iraq and the threat of the Iraqi dictator Saddam Hussein that every ally of the USA in the region would be the target of Iraqi military operations. Thereupon NATO's Defence Planning Committee authorised Operation Display Deterrence; in the course of this, in addition to AWACS reconnaissance aircraft being moved to monitor Turkish airspace, the PATRIOT Air Defence Missile System was stationed on Turkish territory for protection in the event of possible missile attacks from Iraq, including attacks with chemical and biological weapons. Thus the operation did not only serve mere deterrence in a somewhat symbolic sense, but took concrete precautions against a military attack on Turkey which had become possible as a result of the security situation. In this respect, German soldiers did not merely take part in measures that are everyday practice in a system of mutual collective security such as NATO without a concrete connection to an armed conflict (“alliance routine”) and therefore do not pass the constitutional threshold to a deployment of armed forces. The area of everyday routine had already been left behind at the beginning of Operation Display Deterrence as a result of the unprecedented consultations under Article 4 of the NATO Treaty by reason of the threat to a member state and the alliance decision made in this context to conduct a special safeguarding operation. Because, in accordance with all knowledge at the time, the war in Iraq was imminent, and because of the threat by Iraq to all allies of the USA in the region, the military possibility of realising which could not be reliably assessed, the Senate cannot join the respondent in referring to measures of the NATO forces that are part of the everyday alliance programme of reconnaissance, safeguarding and deterrence, such as were already customary at the time of bloc confrontation on its geographical flanks. On the contrary, the monitoring of Turkish airspace from the outset had a specific connection to a military conflict with Iraq, which was considered possible by reason of concrete circumstances. 85

b) At the latest from 18 March 2003 on, NATO had seriously prepared for such a conflict, because the beginning of combat operations in Iraq was generally expected. On that date, the Supreme Allied Commander Europe therefore submitted extended rules of engagement to the Defence Planning Committee for approval; their necessity had from the outset been envisaged for the case that the situation would deteriorate. These rules of engagement contained in particular the authority to attack aircraft that entered Turkish airspace with recognisably hostile intent. In this way, NATO had not 86

only finally accepted that the use of armed force for defence might become necessary, but it had already prepared its deployment powers for this (see also Dreist, loc. cit., p. 1038). In addition, on the same date the aerial surveillance substantially intensified. In the oral hearing, Generalleutnant Dora stated that the intensity of surveillance of from eight to ten hours per day was increased to round the clock surveillance every day, which made it necessary to station two further AWACS aircraft. In this way it was clear now that there was more than a merely abstract possibility of armed conflicts such as cannot be excluded in advance in many deployments. On the contrary, there was tangible actual evidence that the involvement of NATO in a military conflict resulting from shooting down enemy flying objects was to be expected. Thus Generalleutnant Dora also stated in the oral hearing that as a result of the outbreak of war in Iraq the environment in which the NATO forces in Turkey operated had become "unpredictable".

c) German soldiers would have been involved in such an imminent military conflict. 87

In the oral hearing, Generalleutnant Dora gave the Senate information on how the AWACS aircraft would have been part of such violent defensive reactions: he stated that the reconnaissance aircraft takes over the function of a radar sensor (“eye”) at a particular flying altitude, which is connected with the ground command post by radio and can undertake particular reconnaissance duties on its instructions. In the case of an armed attack, the AWACS plane may and should pass on the results of the reconnaissance for the purpose of defensive reactions, both – in the case of a missile attack – to the PATRIOT ground-to-air missiles and also – in the case of approaching fighter aircraft – to the ground command post. In this case, the AWACS plane is in the position to assume fire control for ascending fighter aircraft, which then carry out the direct military defensive reaction; this, as Generalleutnant Dora emphasised, is also a purpose of the integrated NATO air defence. From the military point of view, a distinction must here be made between the standard command of the ground control station and special situations in which the command for the individual deployments and also a direct combat direction function are exercised from on board the AWACS aircraft themselves. 88

From the viewpoint of the requirement of parliamentary approval under the provisions of the Basic Law which concern defence, it is not decisive where in the integrated defence system the relevant command lies. From this point of view it is only important that in the integrated military system described the AWACS aircraft would have played an essential and also necessary role in military defensive reactions by passing on their reconnaissance information and by their fire control function (see also Schmidt-Radefeldt, loc. cit., p. 164; Fischer-Lescano, loc. cit., p. 1475). This means that if Iraq had attacked Turkey, the Federal Republic of Germany would also have become a party to direct combat in the automatic alliance procedures described. It is irrelevant that this would solely have been defence of Turkey against an attack and not, for example, German involvement in an offensive against Iraq, which the respondent had always rejected. For the requirement of parliamentary approval 89

under the provisions of the Basic Law which concern defence it is irrelevant whether the deployment is defensive (see also Schmidt-Radefeldt, loc. cit., p. 164; Fischer-Lescano, loc. cit., p. 1475). The German *Bundestag* must approve every deployment of armed forces without exception.

2. An involvement of German soldiers in armed operations was also immediately to be expected. There was such a particular proximity to such a conflict that it was impossible to postpone obtaining the approval of the German *Bundestag* without the approval losing its function. 90

At the latest when the rules of engagement that had been extended because of the deterioration of the situation were introduced, the involvement of German soldiers in armed operations depended only on whether and when Iraq would launch an attack on Turkey. For in this case, the probability of which had increased yet again from 20 March 2003 as a result of the commencement of the acts of war in Iraq, the actions of German soldiers would without a delay have been a substantial part of an immediate military defensive reaction, because the AWACS aircraft were available at all times with their fire direction function. In this way a situation had come about in which in both a legal and a factual respect all fundamental decisions with regard to the use of armed force by NATO with the involvement of German soldiers had already been made. It was uncertain whether a military reaction would be necessary, but nevertheless the sequence of events could not longer be planned in this connection, because everything depended on whether the Iraqi dictator Saddam Hussein would carry out his threat of military strikes as he had in the past. 91

An involvement of parliament which was postponed until the point where the threshold of the actual use of force was passed, as is suggested by the respondent, would have deprived the requirement of approval of its function: NATO did not want to wait until an attack by Iraq occurred before it decided how to proceed in future, in which case the respondent could have requested the German *Bundestag* to give its approval, for example before rules of engagement in this connection were approved in the Defence Planning Committee, particularly since an Iraqi attack would have demanded an immediate defensive reaction and this was also permitted by the rules of engagement. If armed force had been used with the involvement of German soldiers, parliament could only have decided in retrospect, and possibly ordered the German soldiers to withdraw. But as the Senate has already ruled, in its judgment of 12 July 1994, an involvement of the German *Bundestag* that is after the event is permissible only in the case of imminent danger (see BVerfGE 90, 286 (388)). But there can be no question of imminent danger if – as in the present case – evidence increases over a period of weeks of a defence policy scenario that might call for the use of armed force, and thereupon all legal and factual arrangements are taken for a military reaction. In addition, the present case shows particularly clearly that a subsequent involvement of parliament cannot compensate for the omission of prior approval of the German *Bundestag* (see also Rupp, loc. cit., p. 899). Thus Generalleutnant Dora stated in the oral hearing that it was de facto impossible to withdraw the German soldiers 92

from the NATO AWACS formation. In view of the numbers in which the Federal Republic of Germany participated and the fact that the command always alternated between Germany and the USA, a termination of German participation was a purely hypothetical option. He said that it was impossible to withdraw the German soldiers without casting doubt on the whole AWACS troop and its deployment and thus forcing NATO to terminate the whole procedure.

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