FEDERAL CONSTITUTIONAL COURT

– 2 PBvU 1/11 –

IN THE NAME OF THE PEOPLE

In the proceedings
on
the referral from the Second Senate
of 19 May 2010 – 2 BvF 1/05 –

the Plenary of the Federal Constitutional Court (*Bundesverfassungsgericht*), pursuant to § 16 sec. 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG)

with the participation of Justices

President Vosskuhle,

Vice-President Kirchhof,

Lübbe-Wolff,

Gerhardt,

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Huber,

Hermanns,

Baer,

Britz,

Müller,

Kessal-Wulf

held on 3 July 2012:

1. **The legislative competence for §§ 13 to 15 of the Aviation Security Act (*Luftsicherheitsgesetz* – LuftSiG) in the version of Article 1 of the Act on the Reorganisation of Aviation Security Tasks (*Gesetz zur Neuregelung von Luftsicherheitsaufgaben*) of 11 January 2005 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl. I, page 78) based on Article 73 number 6 of the Basic Law (*Grundgesetz* – GG) in the version in force until the effective date of the Act Amending the Basic Law (*Gesetz zur Änderung des Grundgesetzes*) (Articles 22, 23, 33, 52, 72, 73, 74, 74a, 75, 84, 85, 87c, 91a, 91b, 93, 98, 104a, 104b, 105, 107, 109, 125a, 125b, 125c, 143c) of 28 August 2006 (Federal Law Gazette I page 2034).**

2. **Article 35 section 2 sentence 2 and section 3 of the Basic Law does not generally preclude the use of specifically military weapons in deployments of the armed forces pursuant to these provisions, but permits such use only under narrowly defined conditions that ensure compliance with the strict limitations that Article 87a section 4 of the Basic Law imposes on domestic armed deployments of the armed forces.**

3. **Even in the event of an emergency, deployments of the armed forces under Article 35 section 3 sentence 1 of the Basic Law are permissible only on the basis of a decision by the Federal Government as a collegial body.**

Reasons:

A.

I.

1. By way of the Order of 19 May 2010 (2 BvF 1/05), in compliance with § 48 sec. 2 of the Rules of Procedure of the Federal Constitutional Court (*Geschäftsordnung des Bundesverfassungsgerichts* – GOBVerfG), the Second Senate requested an answer from the First Senate on whether it maintains the legal views that 1

> 1. the legislative competence for § 13, § 14 secs. 1, 2 and 4, and § 15 of the Aviation Security Act in the version of Article 1 of the Act on the Reorganisation of Aviation Security Tasks of 11 January 2005 (BGBl. I, page 78) cannot be based on Art. 73 no. 1 or Art. 73 no. 6 GG, but solely on Art. 35 sec. 2 sentence 2 and sec. 3 GG (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 115, 118 <140 and 141>), 2
>
> 2. Art. 35 sec. 2 sentence 2 and sec. 3 GG does not permit deployments of the armed forces with specifically military weapons (BVerfGE 115, 118 <146 et seq., 150 and 151>), and 3

3. § 13 sec. 3 sentences 2 and 3 LuftSiG is incompatible with Art. 35 sec. 3 sentence 1 GG to the extent that it also grants the Federal Minister of Defence emergency powers in the cases mentioned in Art. 35 sec. 3 GG (BVerfGE 115, 118 <149 and 150>). 4

2. Underlying this request is the fact that the Second Senate, in abstract judicial review proceedings (2 BvF 1/05) filed by the *Land* governments of Bavaria and Hesse, must decide whether § 13, § 14 sec. 1, 2 and 4, and § 15 LuftSiG, which govern the prerequisites and modalities for deploying the armed forces to avert particularly grave accidents resulting from aircraft, are compatible with the Basic Law. The application for judicial review originally concerned §§ 13 to 15 LuftSiG. After § 14 sec. 3 LuftSiG, which authorised shooting down aircraft being used against human lives, was declared void by the Judgment of the First Senate of 15 February 2006 (BVerfGE 115, 118 <119>), the applicants declared their application settled in that regard. Consequently, in the initial proceedings, only § 13, § 14 sec. 1, 2 and 4, and § 15 LuftSiG remain on review. The Second Senate would like to deviate from the above legal views (§ 16 BVerfGG, § 48 sec. 2 GOBVerfG). 5

3. The First Senate declared that it maintains its views by way of its Order of 12 October 2010. 6

4. The Second Senate referred to the Plenary by way of the Order of 3 May 2011. 7

5. The applicants in the initial proceedings, the *Bundestag*, the *Bundesrat*, the Federal Government, the Federal Ministry of the Interior, and the governments of the (other) *Laender* were notified of the referral. No statements were submitted. 8

II.

The Plenary is entitled to decide on the referral. 9

1. The Plenary must be referred to (§ 16 BVerfGG) when one Senate intends to deviate from a legal view of the other Senate that was material to that Senate's decision (cf. BVerfGE 4, 27 <28>; 77, 84 <104>; 96, 375 <404>; 112, 1 <23>; 112, 50 <63>). The views on which the present request is based were material, within the meaning relevant for the application of § 16 BVerfGG, to the First Senate's judgment that ruled on the validity of the statutory authorisation under § 14 sec. 3 LuftSiG. 10

2. The legal view is no less material because the judgment annulling § 14 sec. 3 LuftSiG was based not only on it, but also on grounds of a violation of Art. 1 sec. 1 GG. A legal view is material at least in such cases in which it cannot be left out without altering the specific outcome of the decision according to the line of reasoning expressed in it (cf. BVerfGE 96, 375 <404>). The judgment of the First Senate on § 14 sec. 3 LuftSiG stated that the provision was incompatible with Art. 2 sec. 2 sentence 1 in conjunction with Art. 87a sec. 2 and Art. 35 secs. 2 and 3, as well as in conjunction with Art. 1 sec. 1 GG, and was void (BVerfGE 115, 118 <119>). This outcome of the decision, delivered in the operative part of the judgment, would not have taken the 11

same form if the First Senate, in addition to its interpretation of Art. 1 sec. 1 GG, had not also founded its opinion on interpretations of Art. 35 GG to which the present request relates.

However, the judgment would have been the same if the First Senate had based its decision solely on the legal views listed in items 1. and 2. of the request, but not on the assumption that § 13 sec. 3 sentences 2 and 3 LuftSiG is incompatible with Art. 35 sec. 3 sentence 1 GG, insofar as it also grants emergency powers to the Federal Minister of Defence for the cases mentioned in Art. 35 sec. 3 GG (item 3. of the request). The latter assumption, which concerns only the interpretation of Art. 35 sec. 3 GG, can be removed without consequence for the operative part of the judgment. This is because, as far as Art. 35 sec. 3 GG is concerned, the operative part is also based on the legal view that Art. 35 sec. 2 sentence 2 and sec. 3 GG does not permit deploying the armed forces with specifically military weapons (item 2. of the question). 12

Nevertheless, the third legal view mentioned above is also material to the judgment of the First Senate of 15 February 2006 in the sense that is relevant here. If the criterion according to which it is determined that those legal views which cannot be left out without altering the specific outcome of the decision according to the line of reasoning expressed in it are material is understood as being not only necessary but also as sufficient and conclusively definitive, then in cases where the specific outcome of the decision rests on multiple, mutually independent legal views, each of which is material in itself, none of these legal views will be material in and of themselves. There is no need here for a final clarification of whether and to what extent such an understanding does justice to the need for legal clarity and the special requirements for cooperation between the two Senates of the Federal Constitutional Court in general, as pursued by § 16 BVerfGG. At least in cases in which a specific outcome of one Senate's decision –in the present case: the operative part of the judgment of the First Senate of 15 February 2006 insofar as it concerns Art. 35 sec. 3 GG – rests on multiple independently material legal views, and the other Senate would like to deviate not just from one of those legal views, but from all of them, their material nature cannot be denied on the basis of their individual and isolated consideration under the aforementioned criterion (cf. on the deviation referral (*Divergenzvorlage*) in ordinary procedural law, Federal Finance Court, *Bundesfinanzhof*, Order of 22 July 1977 – III B 34/74 –, Decisions of the Federal Finance Court, *Entscheidungen des Bundesfinanzhofs*123, 112, headnote 4). The approach holding that no single one of the legal views in question is material in itself, because each of the other remaining legal views is material in itself, is tantamount to holding that the outcome of the decision has no material basis at all, and in such a constellation, if one Senate intended to deviate from legal views of the other Senate that are material at least in an overall consideration, that Senate would be able to deviate entirely without referring to the Plenary. This cannot be right, if only because divergences concerning not individual legal views, but complexes of legal views that are each material in themselves, would be removed from the possibility of 13

clarification by the Plenary despite their being material to a decision.

B.

I.

On the first referred question: 14

The legislative competence for § 13, § 14 secs. 1, 2 and 4 and § 15 LuftSiG is not based on Art. 35 sec. 2 sentence 2 and sec. 3 GG, but rather, as an annexed competence, on Art. 73 no. 6 GG in the version in force until the effective date of the Act Amending the Basic Law of 28 August 2006 (BGBl I p. 2034) (Art. 73 no. 6 GG former version – f.v.; Art. 73 sec. 1 no. 6 GG current version – c.v.), which assigns to the Federation the exclusive legislative competence for air transport. Whether and to what extent Art. 73 no. 1 GG f.v. (Art. 73 sec. 1 no. 1 GG c.v.) can also be considered as a basis of competence remains an open question. 15

1. Art. 35 sec. 2 and 3 GG offers no express basis of competence for federal law that governs deployments of the armed forces in emergency situations. According to their wording, these provisions – to the extent that they concern deployments of the armed forces – govern the substantive and procedural requirements for such deployments. It is also not a reasonable step, neither systematically nor according to the protective purpose of the federal system of competences – which is in principle defined not by the norms of substantive constitutional law, but by separate competence provisions which must be interpreted narrowly (cf. BVerfGE 12, 205 <228>; 15, 1 <17>) and whose reach is independent of the requirements of substantive law – to seek out unwritten legislative competences of the Federation in provisions of substantive law that fall outside Chapter Seven of the Basic Law (Art. 70 et seq.). A further argument against such an attribution of competences is that it would be difficult to derive from it any clarity about the legal nature – whether exclusive or concurrent – of the attributed competence. 16

2. a) A legislative competence of the Federation for §§ 13 et seq. LuftSiG is based on Art. 73 no. 6 GG f.v. (Art. 73 sec. 1 no. 6 GG c.v.), which assigns the Federation the legislative competence for air transport. By traditional interpretation, the principle of which is unchallenged, when the Federation has the legislative competence for a certain subject-matter, it also has the legislative competence, as an annexed competence, for the provisions necessarily connected thereto to maintain security and order with regard to that subject-matter (cf. BVerfGE 3, 407 <433>; 8, 143, <150>; 78, 374 <386 and387>; 109, 190 <215>). 17

b) This also applies to the subject-matter of air transport. Therefore, the legislative competence for air transport includes at least – as an annex – the competence to adopt laws and regulations to counter those threats that specifically derive from air transport (cf. with varying differentiations in the detail, yet as a minimum always including the regulatory competences just indicated, Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE 95, 188 18

<191>; Federal Administrative Court, *Bundesverwaltungsgericht*, Judgment of 10 December 1996 – 1 C 33/94 –, Neue Zeitschrift für Verwaltungsrecht, Rechtsprechungs-Report – NVwZ-RR 1997, p. 350 <351>; Laschewski, Der Einsatz der deutschen Streitkräfte im Inland, 2005, p. 130; Paulke, Die Abwehr von Terrorgefahren im Luftraum, 2005, p. 24; Burkiczak, Neue Zeitschrift für Wehrrecht – NZWehrr 2006, p. 89 <95>; Schenke, Neue Juristische Wochenschrift – NJW 2006, p. 736 <737>; Odendahl, Die Verwaltung 38 <2005>, p. 425 <438>; Baldus, Neue Zeitschrift für Verwaltungsrecht – NVwZ 2004, p. 1278 <1279-1280>; Gramm, NZWehrr 2003, p. 89 <96>).

However, the necessity of a connection between a legislative competence assigned to the Federation for a given subject-matter and the pertinent laws and regulations to maintain security and order must be subjected to rigorous examination, and all the more so, if the legislative competence in a given subject-matter is one of the Federation's exclusive legislative competences, and in particular also one of those listed in Art. 73 GG. In any event, the requisite necessary connection exists for countering threats that derive specifically from air transport and against which the provisions of the Aviation Security Act are directed. After all, if the legislative competences were decentralised, insufficient defensive provisions of one *Land* would have significant adverse consequences for security that probably would not be limited to that particular *Land*. 19

aa) Art. 73 no. 6 GG f.v. is not ruled out as a basis of competence for §§ 13 et seq. LuftSiG merely because its provisions did not constitute an autonomous federal body of public security law, but were rather solely provisions on procedure and on the provision of assets in case the Federation supports measures taken by the *Laender* to counter threats (cf. BVerfGE 115, 118 <141>). Irrespective of whether this would preclude the provisions from being ascribed to public security law (*Gefahrenabwehrrecht*), they are not limited to the phase that precedes interferences [with fundamental rights] with external effects. § 13 LuftSiG governs not only the requirements for providing support from the armed forces, but also directly the required elements in order for the armed forces to "be deployed", albeit in a support function (sec. 1), as well as the competences to decide on "deployments" (secs. 2 and 3) and the requisite legal conditions for those actions (sec. 4: "Further details shall be settled between the Federation and the *Laender*. The support by the armed forces shall be rendered in accordance with the provisions of this Act."). § 14 and § 15 LuftSiG are also worded as substantive provisions governing interferences (*materielle Eingriffsnormen*). They provide that the armed forces "may" force aircraft off their course, force them to land, threaten to use armed force, or fire warning shots (§ 14 sec. 1 LuftSiG); that at the request of the authority responsible for air traffic control, they may "check, divert or warn" aircraft in airspace (§ 15 sec. 1 sentence 2 LuftSiG); what "measures" are to be "chosen" (§ 14 sec. 2 sentence 1 LuftSiG); what other measures must be complied with in respect of necessity and proportionality in the narrower sense (§ 14 sec. 2 sentence 2, § 15 sec. 1 sentence 1 LuftSiG); and that the Federal Minister of Defence 20

may authorise the Inspector of the Air Force to “order” the “measures” in question (§ 15 sec. 2 sentence 1 LuftSiG). § 14 sec. 3 LuftSiG, which has now been voided, defined under what circumstances the direct use of armed force was “permissible”. § 21 LuftSiG, which expressly provides, with an eye to the specification requirement under Art. 19 sec. 1 sentence 2 GG, that – among other matters – the fundamental right to life and physical integrity is restricted “subject to the terms of this Act”, also supports the interpretation that the provisions on deploying the armed forces are supposed to directly authorise interferences.

bb) The legislative history offers no indications that would call this finding into question; rather, it confirms that the law was intended not merely to provide resources and equipment for public security tasks that are to be performed solely on the basis of *Land* law, but rather to provide a direct right of interference. For example, the explanatory memorandum to the government’s draft law indicates that when matters go beyond what can be managed by a *Land*’s public security authorities, the armed forces should take “their measures” (cf. *Bundestag* Document, *Bundestagsdrucksache* – BTDrucks 15/2361, p. 20). According to the government, § 14 LuftSiG covers “the means of coercion that are available to the armed forces to support the police”, and section 3 grants “the power to use direct armed force against aircraft” (loc. cit., p. 21). The *Bundesrat* and *Bundestag* accordingly understood the bill’s provisions about deploying the armed forces as “authorising provisions” intended to authorise measures to counter threats “in their own right” (cf., from the *Bundesrat*, the record of the 812th session of the *Bundesrat* Committee on Internal Affairs of 4 December 2003 – In 0141 (812) – no. 52/03 –, pp. 37 and 38; from the *Bundestag*, cf. the remarks of Members Bosbach, Record of Plenary Proceedings of the *Bundestag*, *Plenarprotokolle des Bundestags* – BTPlProt 15/89, p. 7884, and Binninger, loc. cit., p. 7891, which were not disputed with regard to the interpretation as provisions authorising interferences). In the words of then Federal Minister of the Interior Schily, the act was intended to ensure “aviation security from a single source” and therefore “legal certainty and legal clarity, especially for the soldiers of the Federal Armed Forces” (BTPlProt 15/89, pp. 7881 and 7882). This, too, presupposes that §§ 13 et seq. LuftSiG do not govern merely support processes within the federal ambit, but rather also contain authorisations for interferences with external effects. 21

3. Accordingly, as the Federation had the competence to legislate on such matters under Art. 73 no. 6 GG f.v., there is no need for a decision as to whether, in addition, Art. 73 no. 1 GG f.v., which was cited in the government’s draft Act on the Reorganisation of Aviation Security Tasks as the basis of competence for §§ 13 et seq. LuftSiG (BTDrucks 15/2361, p. 14), established a legislative competence for these provisionson the basis of the connection between their regulatory content and the subject-matter of defence. 22

II.

On the second referred question: 23

Art. 35 sec. 2 sentence 2 and sec. 3 GG does not in principle preclude the use of specifically military weapons in deployments of the armed forces under this provision, but permits deployments only under narrowly defined conditions that in particular ensure compliance with the strict limits that Art. 87a sec. 4 GG imposes on combat deployments of the armed forces in domestic conflicts. 24

1. Except for defence, Art. 87a sec. 2 GG allows deployments of the armed forces only to the extent expressly permitted by the Basic Law. This provision's restrictive function must be maintained by strictly adhering to the text when interpreting constitutional provisions on domestic deployments of the armed forces (cf. BVerfGE 90, 286 <356 and 357>; 115, 118 <142>; BVerwGE 127, 1 <12 and 13>). 25

The Constitution deliberately limits domestic deployments of the armed forces to very exceptional cases. Therefore, Art. 87a sec. 4 GG establishes strict conditions for deployments of the armed forces to protect against criminal offenders and enemies of the free basic order, which even in the event of domestic emergencies under Art. 91 GG are not automatically satisfied. In contrast, Art. 35 sec. 2 sentence 2 and sec. 3 GG permits deployments of the armed forces to support police forces in cases of natural disasters, or particularly grave accidents. Here too, the Constitution subjects deployments of the armed forces to conditions which are not satisfied every time the police alone are unable to achieve the general aim of maintaining and restoring public security and order; this is already evident from the fact that in cases of particular significance, Art. 35 sec. 2 sentence 1 GG generally only allows support in the form of personnel and facilities of the Federal Border Police to be requested. 26

Not least in order to take due account of these differentiated and restrictive constitutional requirements, the First Senate held that deployments of the armed forces under Art. 35 GG are confined to resources and equipment that are available or that can be made available to the police under the public security laws of the *Land* in which the deployment happens. The Plenary does not maintain this view (2.). The narrow limits set by the Constitution for domestic deployments of the armed forces derive from other criteria (3.). 27

2. The language of Art. 35 sec. 2 sentence 2 and sec. 3 GG and the systematic structure of the Basic Law do not necessarily limit deployments of the armed forces to those resources and equipment that are available or can be made available to the police under the public security laws of the *Land* in which the deployment takes place; indeed, the regulatory purpose argues against such a restriction (a). Moreover, a general consideration of the legislative history of the law does not compel the presumption that the legislature deciding on constitutional amendment intended such a limitation (b). 28

a) Under Art. 35 GG, subject to the requirements stated in more detail for each case, in case of a regional disaster emergency, a *Land* may request "personnel and facilities… of the Armed Forces" (sec. 2 sentence 2), and in case of an inter-regional disaster emergency the Federal Government may deploy "units … of the Armed Forces" 29

(sec. 3 sentence 1). It need not be deduced from the language of these provisions that the deployments thus permitted are limited to the resources and equipment available to the police. In particular, a restriction does not necessarily proceed from the fact that Art. 35 GG provides that the armed forces may be deployed only to "support the police" (sec. 3 sentence 1) or for "assistance" to support the police (sec. 2 sentence 2 in conjunction with sentence 1). This does not prescribe what resources or equipment may be used to furnish the assistance or support.

Systematic considerations indicate that no restriction on resources or equipment currently or potentially permissible under police law can be derived from the supporting function Art. 35 sec. 2 and 3 GG assigns the armed forces. After all, Art. 87a sec. 4 sentence 1 GG likewise permits, in the event of a domestic emergency as described there, deployments of the armed forces only "to support" the *Land* and federal police, yet is acknowledged not to automatically restrict those deployments it governs to the resources and equipment available to the supported police, at least so far as concerns combating organised insurgents that are armed with military weapons (cf. BVerfGE 115, 118 <148>; BTDrucks V/2873, p. 2, 14; Hase in Alternativkommentar zum Grundgesetz, vol. 3, 3rd ed., 2001, Art. 87a sec. 4 para. 5; Depenheuer in Maunz, Dürig, GG, Art. 87a para. 169, 177 (in the version of October 2008); Baldus in v. Mangoldt, Klein, Starck, GG, vol. 3, 6th ed., 2010, Art. 87a sec. 4 para. 165; Kokott in Sachs, GG, 6th ed., 2011, Art. 87a para. 68; Keidel, Polizei und Polizeigewalt im Notstandsfall, 1971, p. 195 and196, 197; Karpinski, Öffentlich-rechtliche Grundsätze für den Einsatz der Streitkräfte im Staatsnotstand, 1974, p. 76; Baldus, NVwZ 2004, p. 1278 <1280>; Linke, Archiv des öffentlichen Rechts – AöR 129 <2004>, p. 489>). The identical wording, despite the differences in the contexts in which it is used, indicates that its meaning is not intended to differ, especially because these provisions are the result of a legislative process in which an originally single provision was broken up; therefore it cannot be assumed that the legislature was not well aware of the matching language. 30

It must furthermore be taken into account that allowing deployments of the armed forces in the indicated disaster cases is intended to permit a threat to be countered effectively. Art. 35 sec. 3 sentence 1 GG emphasises this fact by referencing what is necessary for the "effective countering of threats". Consequently, the Plenary considers that the better reasons weigh in favour of an interpretation that does not flatly preclude the use of the armed forces' specific resources and equipment, subject to the narrowly defined conditions that Art. 35 GG generally imposes on deployments of the armed forces (see 3. below). 31

b) This interpretation is not refuted by the legislative history. The legislature deciding on constitutional amendment did not envisage a scenario like the one governed by § 13 sec. 1 in conjunction with § 14 sec. 1 LuftSiG as the typical field of application of the constitutional provisions on disaster emergencies, but rather the experience of the 1962 flooding disaster in Northern Germany (cf. BVerfGE 115, 118 <148, with further references>). But even if that event may have limited the concept the actors in- 32

volved in the legislative process had of the requirements for deployments of the armed forces, this neither precludes the possibility of applying Art. 35 sec. 2 and 3 GG to threat scenarios of a different nature that lie within the scope of the language and the systematic concept of the provision, nor does it require Art. 35 sec. 2 and 3 GG to be interpreted in a way that no longer serves the provision's intended purpose in view of today's threat scenarios.

The background materials to the legislation are not unambiguous on the question of permissible resources and equipment. It is true that it appears from the legislative history that the legislature deciding on constitutional amendment deliberately separated the rules governing disaster emergencies from the rules governing domestic emergencies, so as to distinguish sharply between the ways these types of emergencies are dealt with. There is also reason to believe that individual actors involved in the legislative process sought to have the permissible resources and equipment during deployments of the armed forces under Art. 35 GG, be it in general or merely for cases of regional disaster emergencies under section 2, limited by the police laws of the *Land* in which the deployment takes place. Nevertheless, there is no clear indication that might support the assumption that the legislature deciding on constitutional amendment had definite intent in this regard. 33

aa) According to the report of the Committee on Legal Affairs, to which the final version of the relevant constitutional provisions can be traced, the committee's proposals concerning domestic emergencies were intended to "raise the threshold for deploying the armed forces as an armed power", and armed deployments of the armed forces were to be permitted only "where necessary to combat insurgents that are armed with military weapons" (BTDrucks V/2873, p. 2 <Allgemeines, Abschnitt B., "Innerer Notstand">, 14 <Einzelerläuterungen zu Art. 87a sec. 4>; cf. also summary record of the 71st session of the Committee on Legal Affairs of 15 February 1968, p. 10; Lenz, Notstandsverfassung des Grundgesetzes, 1971, Art. 35 para. 2). This statement need not be understood as reaching beyond the constellation of a domestic emergency and also encompassing the situation of a disaster emergency, and therefore does not automatically lead to the assumption that armed deployments of the armed forces should generally be precluded in the event of disaster emergencies. 34

The explanations for the proposed Art. 35 GG do not address the question of which types of resources and equipment may be used. While it is noted, on the subject of Art. 35 sec. 2 GG, that personnel made available by other *Laender* and the Federation should be subject to the applicable police law of the *Land* in which they are deployed (cf. BTDrucks V/2873, p. 10), there is no equivalent explanation concerning Art. 35 sec. 3 GG. The reasons in the report on Art. 87a sec. 4 GG show that, following the hearings, the committee considered as too narrow the wording of the government's draft, according to which the armed forces were to be deployed "as police personnel", because, for example, restricting the armed forces to the use of non-military weapons would not serve the provision's purpose. The committee therefore proposed instead that the armed forces could be used only "to support the police" (loc. cit., p. 35

14). The legislature deciding on constitutional amendment followed that proposal. The same departure from the initial wording also occurred in Art. 35 secs. 2 and 3 GG. This legislative decision is not insignificant for interpreting Art. 35 GG simply because it was the Committee on Legal Affairs of the *Bundestag* (cf. BTDrucks V/2873) that was the first to suggest that the provisions on deploying the armed forces in cases of natural disasters and particularly grave accidents under Art. 91 GG be separated from the context of the rules concerning domestic emergencies, and be regulated in Art. 35 secs. 2 and 3 GG. Conversely, one could also argue that precisely this separation from the originally intended unitary context of the provisions would have provided an opportunity to use different wordings for the two provisions in order to express the intent, had there been any, to define the manner of permissible deployment more narrowly for cases of disaster emergencies now governed by Art. 35 GG than for cases of domestic emergencies.

36 The record of the hearing on domestic emergencies and disaster emergencies, on which, according to its report (cf. BTDrucks V/2873, p. 14), the Committee on Legal Affairs based its proposal to replace the words “as police personnel” with the wording that was eventually enacted as law, also shows that both the experts heard by the committee heard and the Members of Parliament who commented had divergent and often unclear views – including concerning the connection with the issue of the relevant legal bases for interference under statutory law – on the matter of the permissibility of the use of military weapons (cf. record of the Third Public Information-Gathering Session of the Committee on Legal Affairs and Committee on Internal Affairs of 30 November 1967, no. 59, no. 75).

37 For example, Schleswig-Holstein Minister of the Interior Dr. Schlegelberger and Hamburg Senator for the Interior Ruhnau pointed out, without being contradicted, that deployments of the armed forces have the function of providing resources and equipment that the police do not have (loc. cit., p. 3, 6, 12), but – in connection with deployments in domestic emergencies – also argued respectively that deployments must be conducted on the basis “of police law with police resources and equipment”, or, “in accordance with the principles and with the resources and equipment of the police” (loc. cit., p. 4, 6, 12). Moreover, it was not clear whether the legal basis was conceived to be the *Land* police law alone (cf. Ruhnau, loc. cit., p. 14), or federal law as well, which a number of contributors to the debate assumed (cf. concerning the Act on the Application of Direct Force in the Exercise of Public Power by Law Enforcement Officers of the Federation, *Gesetz über den unmittelbaren Zwang bei Ausübung öffentlicher Gewalt durch Vollzugsbeamte des Bundes* – UZwG des Bundes, Ruhnau et al., loc. cit., p. 7, 58; for the case of inter-regional deployments, p. 14 as well). Various comments indicate that deployments of the armed forces in disaster emergencies were primarily conceived to serve the aims of protecting property and preventing looting (loc. cit., p. 5, 27, 28, 57-58, 71). However, the case of blowing up a building or bridge was also mentioned (loc. cit., p. 63).

In the Second Debate on the draft law, which was based both on the Federal Government's draft and on the report of the Committee on Legal Affairs (BTDrucks V/2873), there was only occasional mention of the contents of the adopted provisions concerning the law applicable to deployments of the armed forces, or directly in the matter of the resources and equipment permissible during such deployments. These comments, too, are not free of ambiguity, and if they were at all intended to express certain views regarding the contents of the adopted provisions, they point in different directions (BTPlProt 5/174, p. 9313-9314; 5/175, p. 9437, 9452). 38

bb) Accordingly, the legislative history reveals neither an unequivocal intent of the legislature deciding on constitutional amendment with regard to the resources and equipment permissible in the cases under Art. 35 secs. 2 and 3 GG, nor a clear concept in the matter of applicable law. In view of that finding, it is not compelling, in the context of Art. 35 secs. 2 and 3 GG, that deployments of the armed forces with specifically military resources and equipment, which are not precluded according to a textual, systematic and teleological interpretation – and which, when it comes to countering threats posed by aircraft that are used as a means of attack, may only be based on a federal law authorisation to interference – should be considered impermissible solely because the specific threat scenarios that might make such deployments necessary did not occur to the historic legislature deciding on constitutional amendment. 39

3. However, deployments of the armed forces *per se*, as well as the use of specifically military munitions and equipment, are permissible only under narrowly defined conditions. 40

In interpreting and applying the conditions under which Art. 35 secs. 2 and 3 GG permits deployments of the armed forces, one must take into account the purpose of Art. 87a sec. 2 GG as well as the relationship between the provisions that govern disaster emergencies and the constitutional requirements for deploying armed forces in domestic emergencies (Art. 87a sec. 4 GG). Art. 87a sec. 2 GG is intended to limit the options for domestic deployments of the armed forces (cf. BVerfGE 115, 118 <142>). On the basis of historical experience (cf. Wieland in Fleck, Rechtsfragen der Terrorismusbekämpfung durch Streitkräfte, 2004, p. 167 <169 et seq.>, with further references), Art. 87a sec. 4 GG imposes particularly rigorous restrictions on deployments of the armed forces to subdue domestic conflicts. These restrictions must not be circumvented by basing deployments on Art. 35 sec. 2 or 3 GG rather than on Art. 87a sec. 4 GG. This applies even more to the use of specifically military munitions and equipment in the course of such deployments. 41

a) Against this background, narrow limits are set for deploying the armed forces in disaster emergencies by the required element of a "particularly grave accident" expressly mentioned in Art. 35 sec. 2 sentence 2 GG and referenced by Art. 35 sec. 3 sentence 1 GG. 42

aa) The provisions discussed above distinguish between natural disasters and particularly grave accidents. Both types of events were previously summarised in the 43

legislative process under the term “catastrophe” (cf. the hearing held by the Committee on Legal Affairs and the Committee on Internal Affairs on domestic emergencies and disaster emergencies, Record of the Third Public Information-Gathering Session of the Committee on Legal Affairs and the Committee on Internal Affairs on 30 November 1967, no. 59, no. 75). From this, and from the parallel treatment given to natural disasters and particularly grave accidents in Art. 35 secs. 2 and 3 GG, it becomes clear that the concept of a particularly grave accident employed here covers only events on a catastrophic scale (cf. BVerfGE 115, 118 <143>). In particular, not every threat scenario that a *Land* is incapable of managing with its own police will, by virtue of that reason alone, constitute a particularly grave accident within the meaning of Art. 35 sec. 2 sentence 2 and sec. 3 sentence 1 GG that would permit deploying the armed forces (cf. Krings, Burkiczak, Nordrhein-Westfälische Verwaltungsblätter – NWVBl 2004, p. 249 <252>). Rather, particularly grave accidents are unusual, exceptional situations. Tasking the armed forces with countering threats other than such particular situations therefore cannot be based on Art. 35 sec. 2 sentence 2 and sec. 3 sentence 1 GG.

bb) The requirements for particularly grave accidents under Art. 35 secs. 2 and 3 GG are also defined in contradistinction to the constitutional requirements for deployments of the armed forces in domestic emergencies (Art. 87a sec. 4 GG in conjunction with Art. 91 sec. 2 sentence 1 GG). 44

(1) Art. 87a sec. 4 in conjunction with Art. 91 sec. 2 sentence 1 GG governs deployments of the armed forces to counter threats to the existence or to the free and democratic basic order of the Federation or of a *Land,* if the *Land* that is thus threatened is itself unwilling or unable to counter the threat. In such cases, Art. 87a sec. 4 GG permits deployments of the armed forces in particular to support the police in combating organised insurgents that are armed with military weapons. The relevant provision on defending against domestic unrest caused by non-state aggressors is, therefore, Art. 87a sec. 4 in conjunction with Art. 91 GG (cf. Maunz in Maunz,Dürig, Art. 35, para. 15; Wolff, Thüringer Verwaltungsblätter – ThürVBl 2003, p. 176 <177>). To that extent, therefore, this provision generally exerts a blocking effect against deployments of the armed forces pursuant to other provisions (cf. also Fiebig, Der Einsatz der Bundeswehr im Innern, 2004, p. 326; Fischer, JuristenZeitung – JZ 2004, p. 376 <381>; Sattler, NVwZ 2004, p. 1286 <1290>). 45

(2) The fact that an event of catastrophic proportions was caused deliberately does not preclude the event from being classified as a particularly grave accident (cf. BVerfGE 115, 118 <143 and 144>). However, in view of the rules laid out in Art. 87a sec. 4 in conjunction with Art. 91 GG for combatting non-state adversaries with military means, deployments of the armed forces to combat aggressors may be based on Art. 35 sec. 2 and 3 GG only in exceptional situations that are not of the kind governed by Art. 87a sec. 4 GG. Thus, threats to persons or property arising in or from a demonstrating crowd do not constitute a particularly grave accident within the meaning of Art. 35 GG such as might justify deploying the armed forces on the basis of that provi- 46

sion. According to Art. 87a sec. 4 sentence 1 GG, even to combat organised insurgents that are armed with military weapons, the armed forces may be deployed only if there is a threat to the existence or to the free and democratic basic order of the Federation or of a *Land* – this applies even in cases in which the *Land* concerned is unwilling or unable to counter the threat (Art. 87a sec. 4 sentence 1 GG in conjunction with Art. 91 sec. 2 sentence 1 GG) (cf. Arndt, Deutsches Verwaltungsblatt – DVBl 1968, p. 729 <731 and 732>).

cc) As is clearly expressed by the language of Art. 35 sec. 2 sentence 2 and sec. 3 sentence 1, the accident must already have occurred in order for the armed forces to be deployed to counter the accident itself or its harmful consequences. This does not mean that harm must also necessarily have already occurred (cf. BVerfGE 115, 118 <144 and 145>). One may still speak of an accident if the expected harm has not yet occurred, but the process of the accident has already begun and catastrophic harm is imminent. If the catastrophe has already been set in course, and can now be averted only by deploying the armed forces, one must not wait until the harm has been done. Harm must, however, be imminent. This is the case if in all probability catastrophic harm will occur soon, unless it is counteracted in time (cf. BVerfGE 115, 118 <145>). Deploying the armed forces in advance of the catastrophic event is impermissible. 47

b) Even in such a threat scenario, deploying the armed forces and deploying specifically military means of defence is permissible only as a last resort. In the event of inter-regional disaster emergencies, Art. 35 sec. 3 sentence 1 GG expressly provides that the armed forces may be deployed only to the extent necessary to effectively counter the threat brought about by a natural disaster or a particularly grave accident. The necessity clause under Art. 35 sec. 3 sentence 1 GG is aimed at establishing the subsidiarity of federal intervention in relation to the *Laender* (cf. Magen in Umbach, Clemens, GG, vol. I, 1st ed., 2002, Art. 35 para. 37; Bauer in Dreier, GG, vol. II, 2nd ed., 2006, Art. 35 para. 32; v. Danwitz in v. Mangoldt, Klein, Starck, GG, 6th ed., 2010, vol. 2, Art. 35 para. 79; Sannwald in Schmidt-Bleibtreu, Hofmann, Hopfauf, GG, 12th ed., 2011, Art. 35 para. 53; Gubelt in v. Münch, Kunig, GG, vol. 1, 6th ed., 2012, Art. 35 para. 29). Moreover, the strict limitation to what is necessary – as regards the questions of both if and how the armed forces are deployed, including the specific resources and equipment deployed – that applies to deployments under section 2 sentence 2 and deployments under section 3 sentence 1 of Art. 35 GG corresponds to the intent of the legislature deciding on constitutional amendment, expressed in Art. 87a sec. 2 GG, to narrowly limit the scope of permissible domestic deployments of the armed forces (cf. Knödler, Bayerische Verwaltungsblätter – BayVBl 2002, p. 107 <108>). 48

c) As a result, Art. 35 GG provides differentiated options for the use of the armed forces to ensure aviation security. 49

aa) Art. 87a sec. 2 GG sets up limits for countering threats posed by aircraft used as a means of attack only when it comes to an actual deployment. Consequently, it does 50

not preclude measures by the armed forces that merely support the persons responsible for the threat or that prepare such support – such as assistance with spatial orientation problems caused by technical difficulties or by health problems on the part of the pilot, and to clarify whether such assistance is needed. Art. 87a sec. 2 GG does not require that every use of the armed forces' personnel and facilities be expressly constitutionally authorised, but rather restricts only their use as a means of enforcement in the context of an interference (cf. BTDrucks V/2873, p. 13; BVerwGE 132, 110 <119>; Brenneisen in id., Staack, Kischewski, 60 Jahre Grundgesetz, 2010, p. 485 <488>; Wolff in Weingärtner, Die Bundeswehr als Armee im Einsatz, 2010, p. 171 <177>). Accordingly, the armed forces may respond to air incidents in a purely technical support function. This remains within the bounds of Art. 35 sec. 1 GG and is therefore not affected by the restrictions that apply to deployments of the armed forces under Art. 35 secs. 2 and 3 GG. However, actions of the armed forces are not classified as occurring in the context of an interference only if they use force, but also if their personnel or facilities are used to threaten or intimidate (cf. BVerwGE 132, 110 <119 and 120>; Fehn, Brauns, Bundeswehr und innere Sicherheit, 2003, p. 38-39; Senger, Streitkräfte und materielles Polizeirecht, 2011, p. 79 et seq. <80>).

bb) Art. 35 sec. 2 and 3 GG is not a permissible legal basis for comprehensive airspace protection by the armed forces. In particular, not every air incident that cannot be adequately managed with technical support automatically justifies deploying the armed forces. Under the present Constitution, the armed forces may only be deployed in case of particularly grave air incidents that meet the qualified requirements under Art. 35 secs. 2 and 3 GG. 51

III.

On the third referred question: 52

Even in emergencies, under Art. 35 sec. 3 sentence 1 GG the armed forces may only be deployed on the basis of a decision by the Federal Government as a collegial body. 53

1. The Basic Law distinguishes systematically between powers and competences on the part of the Federal Government and those on the part of individual Federal Ministers (cf., for example, Art. 84 sec. 2, Art. 87a sec. 4 sentence 1, Art. 91 sec. 2 sentence 3, and Art. 108 sec. 7 GG, for the former, and Art. 65 sentence 2, Art. 65a, Art. 95 sec. 2, and Art. 112 sentence 1 GG for the latter). For cases of inter-regional disaster emergencies, Art. 35 sec. 3 sentence 1 GG assigns the authority to deploy units of the armed forces to the Federal Government. According to Art. 62 GG, the Federal Government consists of the Federal Chancellor and the Federal Ministers. Accordingly, deployments of the armed forces in inter-regional disaster emergencies require a decision by the Federal Government acting as a body (cf. BVerfGE 26, 338 <396>; 91, 148 <166>; 115, 118 <149>). The same rules apply to deployments of the armed forces in domestic emergencies, for which Art. 87a sec. 4 sentence 1 GG likewise assigns competence for a decision to the Federal Government, and which indis- 54

putably require a decision of the Cabinet (cf., in lieu of many others, Heun in Dreier, GG, vol. III, 2nd ed., 2008, Art. 87a para. 33; Baldus in v. Mangoldt, Klein, Starck, GG, vol. 3, 6th ed., 2010, Art. 87a para. 160; Ruge in Schmidt-Bleibtreu, Hofmann, Hopfauf, GG, 12th ed., 2011, Art. 87a para. 8; Hernekamp in v. Münch, Kunig, GG, vol. 2, 6th ed., 2012, Art. 87a para. 37; Denninger in Benda, Maihofer, Vogel, Handbuch des Verfassungsrechts – HdVerfR, 2nd ed., 1994, § 16 para. 60).

The Federal Government is not authorised to delegate its decision-making power to individual members (cf. Robbers in Öffentliche Anhörung des Innenausschusses des Deutschen Bundestages vom 26. April 2004, Protocol no. 15/35, p. 54). Powers assigned by the Constitution may in principle not be freely disposed of by their holders (cf. on the relationship between federal and *Land* authorities, BVerfGE 1, 14 <35>; 39, 96 <109>; 41, 291 <311>; 63, 1 <39>). Therefore, generally they can be neither waived nor delegated at will. This distinguishes them from individual rights, which generally are at the free disposal of those who hold them. 55

2. Other than various provisions of the Constitution (Art. 13 sec. 2, sec. 3 sentence 4, sec. 4 sentence 2, sec. 5 sentence 2, second half sentence GG; cf. also Art. 119 sentence 3 GG: change of addressee of instructions when time is of the essence), Art. 35 sec. 3 sentence 1 GG does not assign emergency powers to a subsidiary organ for cases of imminent threats; only the Federal Government is empowered. Accordingly, the Federal Government has no authority to delegate its powers, nor does the legislature have the power to re-define the government's competences even in case of emergency (cf. Bauer in Dreier, GG, 2nd ed., 2006, Art. 35 para. 32; v. Danwitz in v. Mangoldt, Klein, Starck, GG, 6th ed., 2010, vol. 2, Art. 35 para. 79; Hömig in id., GG, 9. ed., 2010, Art. 35 para. 10; Erbguth in Sachs, GG, 6th ed., 2011, Art. 35 para. 41; Pieroth in Jarass, Pieroth, GG, 11th ed., 2011, Art. 35 para. 8; Sannwald in Schmidt-Bleibtreu, Hofmann, Hopfauf, GG, 12th ed., 2011, Art. 35 para. 49; Gubelt in v. Münch, Kunig, GG, vol. 1, 6th ed., 2012, Art. 35 para. 29; Martínez Soria, DVBl 2004, p. 597 <603>; v. Danwitz, Rechtsfragen terroristischer Angriffe auf Kernkraftwerke, 2002, p. 56; Arndt, DVBl 1968, p. 729 <732>; Sattler, NVwZ 2004, p. 1286 <1289>; Lepsius in Festgabe für Dr. Burkhard Hirsch, 2006, p. 47 <57>). 56

Neither the departmental competences of the Federal Ministers (Art. 65 sentence 2 GG) nor the assignment of the command of the armed forces to the Federal Minister of Defence (Art. 65a GG) can serve as basis for divergent interpretations (cf. Epping, Schriftliche Stellungnahme im Rahmen der öffentlichen Sachverständigenanhörung des Innenausschusses des Deutschen Bundestages vom 26 April 2004, Committee Printed Paper, *Ausschussdrucksache* 15(4)102B, p. 8), because Art. 35 sec. 3 sentence 1 GG constitutes a more specific provision concerning the power to decide on deployments of the armed forces in inter-regional disaster emergencies. 57

This result is not altered by the fact that in individual areas, the Federal Constitutional Court has recognised emergency competences in derogation from parliamentary competences (cf. BVerfGE 90, 286 <388> and BVerfGE 130, 138, paras. 109 et seq., 58

113, 150). Those decisions concerned areas in which the Basic Law specifically does not expressly provide for decision-making competences. They do not answer the question whether and to what extent emergency powers might exist contrary to competence provisions expressly laid down in the Basic Law that do not provide for exceptions in case of emergency.

59 In view of the assignment of the exclusive competence to the Federal Government, which is unequivocal in language and systematic conception, a differing competence cannot be derived from the purpose of Art. 35 sec. 3 GG to effectively counter threats (cf. Franz, Der Staat 45 <2006>, p. 501 <530>; Franz, Günther, Verwaltungsblätter für Baden-Württemberg – VBlBW 2006, p. 340 <343>; Schenke, NJW 2006, p. 736 <737 and 738>; Palm, AöR 132 <2007>, p. 95 <104>; Ladiges, Die Bekämpfung nicht-staatlicher Angreifer im Luftraum, 2007, p. 252), or from the state's duties of protection (Epping, loc. cit., p. 8). The constitutional legislature intentionally permitted deployments of the armed forces only under narrowly defined conditions. The imperative of strict adherence to the letter of the law applies to the interpretation of the relevant provisions, which are the result of extensive, contentious debate (see under II. above) in a highly controversial political matter. In any case, for that reason a teleological constitutional interpretation directed to avoiding gaps in protection and deviating from the express language that was deliberately chosen and which conforms to the systematic concept is ruled out. For the same reason – irrespective of the more general question of the possible significance of emergency aspects that are specifically not addressed in positive provisions of the Constitution – one also cannot fall back on unwritten emergency powers (cf. Wieland in Fleck, Rechtsfragen der Terrorismusbekämpfung durch Streitkräfte, 2004, p. 167 <179>; Epping, Schriftliche Stellungnahme, loc. cit., p. 8), at least not in the case of Art. 35 sec. 3 sentence 1 GG.

Vosskuhle	Kirchhof	Lübbe-Wolff
Gerhardt	Gaier	Eichberger
Schluckebier	Masing	Paulus
Huber	Hermanns	Baer
Britz	Müller	Kessal-Wulf

Separate Opinion of Justice Gaier

on the Order of the Plenary of 3 July 2012

- 2 PBvU 1/11 -

I concur with the decision of the Plenary on the first and third referred questions, but do not concur with the answer to the second question. 60

The Federal Constitutional Court is not uncommonly called a surrogate legislature; with the present decision of the Plenary, the Court risks being attributed the role of a surrogate legislature deciding on constitutional amendment in the future. In its answer to the second referred question, the Plenary fails to give due consideration to its own Court's requirements concerning the interpretation of the Constitution. It does not take adequate account of the language of the relevant constitutional provisions in light of their legislative history (cf. BVerfGE 88, 40 <56>), nor does it conduct a systematic interpretation with a view to maintaining the unity of the Constitution (cf. BVerfGE 55, 274 <300>) which is the "most noble interpretive principle" (as it advocated in BVerfGE 19, 206 <220>). As a result, the way the Plenary interprets the provisions on disaster emergencies, and upon which it bases its answer to the second referred question, has the effect of amending the Constitution. For that reason I do not concur with the Plenary's decision in this regard. 61

I.

The Basic Law is among other things a renunciation of German militarism which was the cause of inconceivable horrors and millions of deaths in two World Wars. In 1949, the Federal Republic of Germany was established as a state without an army; even the incorporation of the provisions on the armed forces into the Basic Law in 1956 has rightly been called "a turning point in the development of the Federal Republic" (Hofmann in Isensee, Kirchhof, Handbuch des Staatsrechts, 3rd ed., 2003, vol. I, § 9 para. 51). At the time, Art. 143 GG in the version of 1956 made it clear that "rearmament" did not include any authorisation for domestic deployments of the armed forces – even in emergencies (cf. Meixner in Dolzer, Kahl, Waldhoff, Grasshof, Bonner Kommentar zum Grundgesetz – BK, Art. 143 para. 4 <in the version of: July 2004>). This first step was followed in 1968 by a second step when constitutional provisions on emergencies were incorporated into the Basic Law. This second step permitted domestic deployments of the armed forces, but only in very few, narrowly defined situations, which must be expressly provided for in the Constitution (Art. 87a sec. 2 GG). These exceptions are for regional and inter-regional disaster emergencies (Art. 35 sec. 2 and 3 GG), external emergencies (Art. 87a sec. 3 GG) and states of emergency, as qualified cases of domestic emergencies (Art. 87a sec. 4 GG). At the same time, the permissibility of deploying the armed forces domestically says nothing about the resources and equipment that may be used in such deployments. Rather – as the First Senate recognised in its Judgment of 15 February 2006 (BVerfGE 115, 118 <146 et seq., 150 and 151>) – the use of specifically military weapons in cases of dis- 62

aster emergencies is prohibited even if the armed forces may be brought in under Art. 35 sec. 2 sentence 2 or sec. 3 sentence 1 GG. Consequently, in both amendments to the Constitution, the legislature remained focused on the fact that domestic deployments of the armed forces are associated with particular threats to democracy and freedom, and must, therefore, be subject to limits that are as strict as they are clear.

It is also and indeed particularly because the legislation on emergencies no longer outright prohibits domestic deployments of the military that strict restrictions remain imperative. It must be ensured that the armed forces will never be used as an instrument of domestic political force. Apart from the extremely exceptional case of a state of emergency, in which the armed forces may be deployed domestically as a last resort to combat organised insurgents that are armed with military weapons (Art. 87a sec. 4 GG), the task of maintaining domestic security pertains to the police alone. Their task is to uphold public security, and the police may have only such weapons as are suitable and necessary for that purpose; by contrast, combat deployments of the armed forces aim to annihilate the adversary, necessitating specifically military armaments. These two tasks must be strictly separated. Our Constitution hereby draws the necessary consequences from historical experience, and establishes the general exclusion of the armed forces from domestic armed deployments as a fundamental principle of the state. In other words, the separation of the military and the police is part of the genetic code of this country (in the phrase of Heinrich Wefing in *Zeit-Online*, 14 January 2009, http://www.zeit.de/2008/42/Bundeswehr). 63

Anyone wishing to change this must not only face public political debate, but also convince the parliamentary majorities necessary for constitutional amendments (Art. 79 sec. 2 GG). Thus, following the Judgment of the First Senate, an amendment to the Basic Law was envisaged in order to effectively deal with the threats of international terrorism that became evident on 11 September 2001. That project failed, because – despite the “Grand Coalition” governing at the time – there was no qualified majority in the *Bundestag* for the Federal Government’s proposal to generally allow the use of “military resources and equipment” in cases of “particularly grave accidents” and the most that might have been achieved would have been to limit military combat deployments to averting attacks from the air or sea (cf. *Zeit-Online*, 14 January 2009, http://www.zeit.de/online/2008/42/bundeswehr-grundgesetz). This plenary decision provides now what the Federal Government was unable to push through three years ago, against the opposition of one of its coalition partners – and also against the majority of votes in the *Bundesrat*. Even if one feels it is intolerable that the armed forces must therefore stand aside as idle spectators in case of terrorist attacks, it is not the task nor within the power of the Federal Constitutional Court to intervene and make corrections. 64

II.

It is my opinion that the Basic Law, in its present version, precludes combat deploy- 65

ments of the armed forces with specifically military weapons in cases of both regional (Art. 35 sec. 2 sentence 2 GG) and inter-regional (Art. 35 sec. 3 sentence 1 GG) disaster emergencies; to that extent, the interpretation of the First Senate in its Judgment of 15 February 2006 (BVerfGE 115, 118 <146 et seq., 150 and 151>) should therefore be upheld. It is irrelevant in this regard whether the textual arguments that the Judgment of the First Senate placed in the foreground will withstand the arguments in the plenary decision and can maintain the fundamental significance attributed to them. After all, the fact that deployments of the armed forces with military weapons are not allowed in either case of disaster emergencies, and therefore are constitutionally prohibited under Art. 87a sec. 2 GG, can also be established by interpreting the Constitution historically, and even more so by interpreting the Basic Law systematically.

1. The plenary decision claims that the legislative materials as a whole do not yield a "clear overall picture" of a particular intent of the legislature deciding on constitutional amendment. However, after fully examining the available sources and assessing the explanations documented there in context, I cannot share that opinion. 66

a) Contrary to what the plenary decision states, no uncertainty can be deduced from the record of the joint information-gathering session of the *Bundestag* Committee on Legal Affairs and Committee on Internal Affairs of 30 November 1967 (BTDrucks V/1879 and V/2130). It is true that the recorded statements by the various experts that were heard reflect different opinions about the permissibility of deploying military weapons, and it is also true that this hearing became the basis for the report of the Committee on Legal Affairs, which in turn became the basis for the *Bundestag* resolution for an amendment to the Constitution. But there is no reason – indeed, it is farfetched in its very approach – to believe that the mixed opinions reflected in a hearing were incorporated unchanged into the decision of the Committee on Legal Affairs. The opposite is the case. The Committee on Legal Affairs had to come to a clear decision – at least by a majority vote of its members – and did so. 67

But the opinion of the Committee on Legal Affairs is contrary to the Plenary's assessment, and does not receive sufficient consideration in the Plenary's argumentation. After the experts Kluncker and Kuhlmann had suggested, at the joint information-gathering session of the Committees on Interior Affairs and on Legal Affairs, that the unarmed character of deployments of the armed forces in disasters and accidents (cf. Record of the Third Public Information-Gathering Session of the Committee on Legal Affairs and Committee on Interior Affairs of 30 November 1967, loc. cit., p. 42, 50) be emphasised, these suggestions were incorporated into the written report of the Committee on Legal Affairs, which therefore allows for deployments of militarily armed forces solely for situations as defined in Art. 87a sec. 4 GG while at the same time limiting such deployments to cases of states of emergency as particularly dangerous situations of domestic emergencies. The report of the Committee on Legal Affairs unequivocally states (BTDrucks V/2873, p. 2): 68

> "The principal difference to the government's draft act is that the threshold for deploying the armed forces as an armed power has been raised. The Committee on Legal Affairs suggests permitting armed deployments of the armed forces only if this is necessary to combat groups of insurgents that are armed with military weapons (Article 87a sec. 4)." 69

Contrary to the Plenary's opinion, which doubts the certainty of this statement's meaning ("… need not be understood as reaching …"), this precludes armed deployments even in cases of disaster emergencies; indeed, this passage appears under the heading of "Domestic Emergency" in the section of the report that addresses in detail the fact that the "cases of domestic emergency" formerly dealt with together in the government's draft act should now be governed by separate provisions of their own according to their "substantive content". Given that the combined provision in the government's draft employed the term "domestic emergency" to also include cases of disaster emergencies (cf. Lenz, Notstandsverfassung des Grundgesetzes – Kommentar, 1971, Art. 35 para. 2), the exclusion of specifically military weapons was obviously also intended precisely for deployments in cases of natural disasters and accidents that are now governed separately by Art. 35 sec. 2 and 3 GG. 70

b) Contrary to the Plenary's opinion, this is confirmed by further sources. Any other understanding is inconsistent with the historical circumstances surrounding the 1968 amendment of the Constitution. The Plenary entirely disregards that at the time of the legislation on emergencies, it would have been politically unviable to further allow domestic deployments of militarily armed units of the armed forces. From the time when a first draft was submitted to the *Bundestag* in 1960, there had been years of fundamental political debate among the public, which had been sensitised in view of the experience of German history, and these debates intensified even further in the course of the final deliberations (cf., for example, Scheuner in Lenz, loc. cit., Einleitung, p. 13). The resistance against the legislation on emergencies, put forward especially by the trade unions, particularly objected to the correctly recognised danger of the armed forces being used as an instrument of domestic political force against the population, particularly in labour disputes (cf. Hoffmann in Sterzel, Kritik der Notstandsgesetze, 1968, p. 87 and 88). As an example of the fears linked to the legislation on emergencies, one may cite the memorandum of the Association of German Scientists titled "Der permanente Notstand*"* [The Permanent State of Emergency]*,* authored by Ekkehart Stein and Helmut Ridder as early as 1963 (reprinted in Ridder, Gesammelte Schriften, 2010, p. 563 <566>), which states: 71

> "The law for times of peace must not be materially subverted by the law for times of war; i.e., no measures may be permitted in peacetime that were developed during war to manage this extremely threatening situation, and that are justifiable only in cases of war." 72

In this setting, during the concluding deliberations in the *Bundestag*, Member of Par- 73

liament Dr. Lenz (CDU/CSU), as the rapporteur of the Committee on Legal Affairs, clarified the restrictive goals in armed deployments of the armed forces (Plenary Record, *Plenarprotokoll* – PlProt 5/174, p. 9311 <9313>):

> "It is not true that this draft act prepares for civil war. Both in the language on the citizen's right to resist and in the Federal Government's ability to deploy troops in extreme emergencies against insurgents that are armed with military weapons, the Committee on Legal Affairs has endeavoured to clearly establish that this can be only the *ultima ratio,* the last resort, when all other means have failed." 74

2. This historically based initial premise of the legislature deciding on constitutional amendment is clearly reflected in the systematic conception that was applied to the Basic Law with the implementation of the "Emergency Constitution" in the 17th Act Amending the Basic Law (*17. Gesetz zur Ergänzung des Grundgesetzes*) of 24 June 1968 (BGBl I p. 709). The decision of the Plenary fails to examine this point. 75

Precisely because of the vehement public criticism sparked by the possibility of deploying the armed forces in case of domestic emergencies, the Committee on Legal Affairs rejected a combined provision such as had been proposed by the Government's prior draft. The provision for disaster emergencies – which was viewed as unproblematic – was separated from the provision on domestic emergencies so as to depoliticise the debate that had arisen, and to eliminate the suspicion that domestic emergencies might be countered under the guise of disaster emergencies (cf. summary record of the 71st session of the Committee on Legal Affairs of 15 February 1968, p. 10). This once again shows that these two cases of domestic deployments of the armed forces have entirely different scopes of application which do not overlap, and which cannot be allowed to merge through the permission of specifically military weapons for cases of disaster emergencies, too. Accordingly, the rapporteur of the Committee on Legal Affairs, Member of Parliament Dr. Lenz, states in his 1971 commentary on the "Emergency Constitution", concerning Art. 35 sec. 2 GG (loc. cit., Art. 35 para. 9): 76

> "The request is made 'for assistance'. This means – and this is especially significant with regard to the armed forces –unarmed technical-assistance deployments." 77

This is consistent with the indication in the final report of the Committee on Legal Affairs that the personnel of other *Laender* and of the Federation made available in the cases under Art. 35 sec. 2 sentence 2 GG are subject to "the terms of the police law applicable in the *Land* in which the deployment takes place" (BTDrucks V/2873, p. 10). Concerning Art. 35 sec. 3 GG, the report expressly refers to the comments on Art. 35 sec. 2 sentence 2 GG (BTDrucks V/2873, p. 10). For both types of disaster emergencies, therefore, the controlling nature of *Land* police law set the requirements for involving the armed forces in the protection of civilians during disasters, 78

and therefore permitted only police measures, but not the use of military weaponry (cf. also Cl. Arndt, DVBl 1968, p. 729 and 730). The examples specifically cited in the report of the Committee on Legal Affairs for deploying the armed forces in the cases under Art. 35 sec. 2 sentence 2 GG – specifically, “cordoning off endangered property and controlling traffic” (BTDrucks V/2873, p. 10) – also speak clearly in favour of deployments of the armed forces that, in terms of the resources and equipment that may be deployed, cannot go beyond what is provided in the individual police laws of the *Land* concerned. The reasons provided by the Committee on Legal Affairs for Art. 87a sec. 4 GG, by contrast, contain the statement that military resources and equipment should not automatically be ruled out for the type of deployment governed there, so that logically enough, there is no reference to the applicability of the police law of the *Land* concerned (BTDrucks V/2873, p. 14).

3. There is still more to be considered. In a systematic interpretation, one must also bear in mind that in the cases under Art. 35 sec. 3 sentence 1 GG, only the Federal Government has a power of initiative, and therefore – as the decision of the Plenary correctly finds in upholding the interpretation of the First Senate (BVerfGE 115, 118 <149 and 150>) on the third referred question – it can only decide on deployments of the armed forces in inter-regional cases of disasters or accidents as a collegial body. This decision of the legislature deciding on constitutional amendment to only establish a right of initiative for the Federal Government, as a collegial body, is also relevant for the permissibility of domestic armed deployments of the armed forces, because it also provides information on the resources and equipment that were considered permissible. 79

By their very nature, decisions by a body require a rather long lead-up time; the process moves more slowly than that leading to the decision of an individual minister, and therefore entails severe disadvantages with regard to effectiveness. In threat scenarios requiring immediate intervention, these disadvantages may go so far as to having a measure fail entirely because of the length of time elapsed. By contrast, the natural disasters and accidents for which Art. 35 sec. 2 and 3 GG permits deployments of the armed forces are typically characterised by a certain temporal latitude, albeit a narrowly limited one. Accidents generally, and natural disasters occasionally, occur so suddenly that it is possible to counter them only in terms of their consequences, a process which usually takes considerable time because of the need to bring in personnel and equipment. Otherwise, the consequences of natural disasters occur and develop over a length of time of at least some hours. All of these circumstances permit the engagement of a collegial body like the Federal Government without seriously jeopardising the efficacy of deploying the armed forces. 80

By contrast, an inescapable pressure to decide within a very short time is precisely typical of those threats that can be effectively countered only by deploying weapons whose destructive effect extends beyond that of weapons permitted under police law. The destructive force of specifically military weapons is designed to annihilate the adversary. If, outside an armed conflict, deploying such annihilating power is appropri- 81

ate, within the meaning of the maxims of proportionality, to counter a threat, and in particular is also necessary, then typically – as is precisely the case in aircraft hijackings used as attack weapons (“renegade” cases) – a series of events will already have begun which, if they proceed unhindered, will probably lead to the loss of many lives or immense damage within a very short time, and therefore can only be stopped completely by deploying the most extensive resources. Such threat scenarios are therefore characterised by the fact that any delay is detrimental to stopping them. But in that case, vesting the power to intervene in a collegial body that is comparatively slow in reaching its decisions is simply dysfunctional, and as a decision on the allocation of powers, is far from the “effective countering” that was sought by the legislature deciding on constitutional amendment. Therefore – as was done in the case of Art. 35 sec. 3 sentence 1 GG – if the legislature deciding on constitutional amendment vests the power to decide on deployments in the Federal Government, a collegial body, one can only conclude that it did not consider the use of specifically military weapons necessary, and thus did not intend to legitimate it.

III.

82 The described result of a historical and systematic interpretation of the Basic Law is consistent with the First Senate’s interpretation in the Judgment of 15 February 2006, according to which “deployments of the armed forces with typically military weapons are constitutionally not allowed even in the case of inter-regional disaster emergencies” (BVerfGE 115, 118 <150>). But this result could also be reached through strict compliance with what the plenary decision described as the “blocking effect” of Art. 87a sec. 4 GG, which is an insuperable barrier to domestic deployments of military weapons. This would justify using specifically military weapons in catastrophic cases directed against property in particular – such as in the commonly cited example of bombing dikes to effect controlled flooding. The Plenary does intend to take this path, and also apparently expresses that intent in the operative part of its decision, with the answer to the second referred question. However, because of the reasons of the decision that then follow, the operative part undergoes a crucial expansion, which, as fundamental reasoning, will ultimately be determinative for the understanding and effects of the Plenary’s decision (cf. BVerfGE 3, 261 <264>; 36, 342 <359 and 360>, both on Art. 100 sec. 3 GG). The Plenary thereby renders nonsensical the approach of a “strict limitation” by Art. 87a sec. 4 GG itself; for here the “blocking effect” is considered to apply only “in principle”, opening up the possibility of permitting domestic deployments of the armed forces with military weapons even when action is required against “catastrophic damage” that will occur “soon, in all probability”, and which may also be caused by a deliberate act.

83 1. There is much to suggest that when the legislature deciding on constitutional amendment addressed disaster emergencies under Art. 35 sec. 2 and 3 GG, apart from natural disasters like the Hamburg flood of 1962, it only had in mind particularly grave accidents in the sense of fortuitous calamities (cf. for instance the examples in Lenz, loc. cit., Art. 35 para. 6, “explosion accident” or “collision of oil tankers near the

coast”). But the First Senate broadened the concept of accidents to also include damaging events that “are deliberately caused by third parties” (BVerfGE 115, 118 <144>). Only this extension makes possible the overlaps with the provisions for (domestic) states of emergency under Art. 87a sec. 4 GG which permit using weapons of the armed forces only against organised insurgents that are armed in a military way, and under narrowly defined conditions.

Therefore, if one wants to join the First Senate in not demanding an outright prohibition of the use of military weapons in the cases under Art. 35 secs. 2 and 3 GG, then to preserve the strict constitutional separation between disaster emergencies on the one hand, and domestic emergencies on the other hand, one must find a suitable criterion that effectively precludes any circumvention of the firmly restrictive provision on combat deployments under Art. 87a sec. 4 GG. In order to do so, the purpose of the constitutional separation of the two types of deployments must be taken seriously. The aim was to improve protection in disasters by permitting support from the armed forces, but at the same time to close off the possibility, which *de facto* was opened up, of using the military as an instrument of domestic political force (cf. Summary Record of the 71st session of the Committee on Legal Affairs of 15 February 1968, p. 10). Even if violence or rioting threaten consequences similar in scope to particularly grave accidents, armed forces bearing arms must not be used domestically, for example, to intimidate the population by their mere presence, as for instance in street protests. To achieve this goal, Art. 87a sec. 4 GG must be given a blocking effect that will prevent armed forces bearing weapons from being deployed against persons who intentionally jeopardise public security, even if those persons are acting deliberately and aggressively against the state and thereby become liable to criminal prosecution. Countering such threats is of course permissible and neccessary, but under the constitutional law applicable in Germany it is purely a task for the police, not for the military. This is confirmed by the Constitution itself in Art. 91 GG. Even for such cases of domestic emergencies in which there is a threat to the existence or to the free and democratic basic order of the Federation or a *Land,* Art. 91 GG provides only for deployment of the police forces of other *Laender* or of the Federal Police, but not deployment of the armed forces. Rather, Art. 87a sec. 4 GG subjects any involvement of the armed forces, even if merely to protect property, to additional requirements, and permits the use of weapons only against organised insurgents that are armed with military weapons (cf. Lenz, loc. cit., Art. 87a para. 18). Consequently, the weapons of the military may be used only to combat groups of persons who themselves are militarily armed, have risen against the state, and have their own operations-leadership system (cf. Lenz, loc. cit., Art. 87a para. 19). 84

2. The plenary decision goes farther than that. No doubt it is driven by the honest and honourable intent to keep restraints on domestic armed deployments of the armed forces, but it ignores the blocking effect that it had itself recognised, and therefore, with the criteria it has developed, it cannot prevent the possibility that the narrow requirements of domestic emergencies under Art. 87a sec. 4 GG might be circum- 85

vented by application of the less stringent requirements for disaster emergencies. The attempt to further delimit Art. 35 sec. 2 and 3 GG by excluding the period “in advance” of an accident but including “imminent” damage “on a catastrophic scale” enriches the law with new concepts, but not with the requisite clarity and predictability. These are entirely indefinite categories, which are unlikely to be susceptible to effective review by the courts, and which in day-to-day practical application leave a great deal of latitude for subjective assessments, personal evaluation preferences, and uncertain – if not premature – prognoses. This is unacceptable for domestic deployments of armed forces bearing military arms. Free speech is unlikely to flourish in the shadow of an arsenal of military weapons. How is one to prevent, for example, that in connection with large demonstrations criticising the government – such as those in June 2007 on the occasion of the G8 Summit in Heiligendamm – the mere fear of aggressiveness on the part of individual participating groups might lead to the assumption of massive violence occurring “soon, in all probability”, with “catastrophic consequences”, and therefore to a deployment of armed units of the armed forces? In these case the mere indication by the Plenary that threats emanating “from or by a demonstrating crowd” should not suffice can hardly serve to effectively suspend the deployment requirements that the Plenary itself has defined.

3. It is furthermore the case that the solution developed by the Plenary’s decision lacks any convincing foundation in legal theory. It is not clear, nor are any reasons given in the decision, how it can nevertheless be permissible, in view of the blocking effect that the Plenary’s decision itself acknowledges, to set that effect aside – even if only in cases of specially qualified accidents – and to permit deployments of armed forces bearing weapons even if the requirements of Art. 87a sec. 4 GG are not met. Moreover, it would be hard to find any reasons at all; after all – to speak metaphorically – if it is forbidden to open a door, one cannot be permitted to open it even just a crack. 86

IV.

Finally, the Plenary’s decision also raises the question of how the newly expanded possibilities of domestically deploying armed forces bearing weapons improve the protection of the population – specifically, against terrorist attacks. The answer is: little or not at all. 87

1. In view of the proceedings for judicial review pending before the Second Senate, a finding will have to be reached as to what provisions of the Aviation Security Act for averting particularly grave accidents by deploying armed units of the armed forces can be constitutionally valid. On the basis of the Plenary’s decision, it may be permissible, by established law under the terms of § 14 sec. 1 LuftSiG, for combat aircraft “to forcibly divert aircraft, force them to land, threaten the use of arms, or fire warning shots”. Successfully countering a threat by such measures, however, will be unlikely, especially in “renegade” cases, because consequences in the form of shooting the aircraft down are not permissible, now that the provision of § 14 sec. 3 LuftSiG – 88

which permits “direct action with force of arms” – has been declared unconstitutional and void by the First Senate (BVerfGE 115, 118). In future law, a new legislative provision may be possible without an amendment to the Constitution, but it could permit direct military force of arms solely against unmanned aircraft, or solely against those persons who intend to use the aircraft as a weapon in a crime against human lives (cf. BVerfGE 115, 118 <160>). By contrast, the German legislature cannot permit such aircraft to be shot down in which – as in the terrorist attacks of 11 September 2001 – there are passengers and crew members who themselves have become victims of the air pirates. To that extent, the Plenary’s decision too has done nothing to change the fact that the probable killing of those persons is incompatible with the fundamental right to life (Art. 2 sec. 2 sentence 1 GG) in conjunction with the guarantee of human dignity (Art. 1 sec. 1 GG). Furthermore – even in the Plenary’s opinion – without an amendment to the Constitution, the Federal Government alone decides on the use of military weapons against aircraft, pursuant to Art. 35 sec. 3 sentence 1 GG, and in view of the comparatively small size of German airspace this is hardly ever likely to lead, in any timely way, to a measure under § 14 sec. 1 LuftSiG or – assuming a legislative revision – the downing of an aircraft under restrictive conditions. If the framework allowed by substantive constitutional law for effectively countering threats from airspace is nevertheless to be used, then despite the expanded permissibility of combat deployments deriving from to the Plenary’s decision, an amendment to the Constitution is unavoidable.

2. It cannot be denied, and must be viewed positively, that the Plenary’s answer falls well short of the Second Senate’s request evidenced in the referred question, which aimed at reconfiguring the rules governing disaster emergencies as a subsidiary and general means of countering threats with military weapons. Nevertheless, the Plenary has expanded the permissibility of domestic deployments of the armed forces for the sake of a minor gain in security that is hardly achievable in practice. It did so by using legal concepts that are so vague that military deployments for purposes of internal politics cannot be ruled out. Fundamental principles have been abandoned for a barely measurable benefit. For that reason, it would be a serious mistake to console oneself with the fact that the mountain laboured but only brought forth a mouse. 89

Gaier

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