Headnotes

to the Judgment of the Second Senate of 23 September 2015

– 2 BvE 6/11 –

1. **The requirement of a parliamentary decision under the provisions of the Basic Law that concern defence is not limited to deployments of armed military forces within systems of collective security but applies generally to all deployments of German armed military forces abroad. It does not depend on them having the character of actual wars or of being war-like.**

2. **In cases of imminent danger, the Federal Government may, by way of exception, preliminarily order on its own that armed military forces be deployed. In such a case, it has to immediately bring the continuing deployment to the attention of the *Bundestag*, and, upon request by the *Bundestag*, withdraw the armed forces deployed.**

3. **Whether the conditions triggering the emergency power were present is a question subject to full review by the Federal Constitutional Court.**

4. **If a deployment of armed forces ordered by the Federal Government under its emergency powers for cases of imminent danger is already over at the earliest possible moment in which a parliamentary decision could have been sought and if, therefore, Parliament cannot influence the specific use of armed forces in a legally relevant manner, the requirement of a parliamentary decision under the provisions of the Basic Law that concern defence does not result in the Federal Government being under an obligation to seek a decision by the German *Bundestag* on the deployment. However, the Federal Government must inform the *Bundestag* promptly and in a qualified manner about the deployment of armed forces.**

FEDERAL CONSTITUTIONAL COURT

- 2 BvE 6/11 -

Pronounced
on 23 September 2015
Kunert
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 the German *Bundestag*'s constitutional right to participate in shape of the constitutive parliamentary decision on the deployment of armed forces by not seeking parliamentary approval of the deployment of German soldiers to rescue German citizens from Libya on 26 February 2011

Applicant: Parliamentary Group ALLIANCE 90/THE GREENS (*BÜNDNIS 90/DIE GRÜNEN)*in the German *Bundestag,*
represented by the Chair of the Parliamentary Group Katrin Göring-Eckardt and Dr. Anton Hofreiter and the Managing Directorate,
Platz der Republik 1, 11011 Berlin

- authorised representative: Prof. Dr. Christoph Möllers,
Adalbertstraße 84, 10997 Berlin -

Respondent: Federal Government,
represented by the Federal Chancellor Dr. Angela Merkel,
Federal Chancellery, Willy-Brandt-Straße 1, 10557 Berlin,

- authorised representative: Prof. Dr. Matthias Herdegen,
Adenauer-Allee 24-42, 53113 Bonn -

the Federal Constitutional Court - Second Senate -

with the participation of Justices

President Voßkuhle,

Landau,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski

held on the basis of the oral hearing of 28 January 2015 by

Judgment

as follows:

The application is rejected.

Reasons:

A.

The *Organstreit* proceedings (dispute between constitutional organs) concern the issue of whether the respondent was obliged to seek the retrospective approval of the *Bundestag* for evacuating German citizens from Libya on 26 February 2011 by soldiers of the *Bundeswehr* (German Federal Armed Forces) by virtue of the constitutional requirement of a parliamentary decision concerning the deployment of armed military forces. 1

I.

[*Excerpt from press release no. 105/2014 of 25 November 2014*] 2

From mid-February 2011 and influenced by the turmoil in the neighbouring countries Tunisia and Egypt, the Libyan domestic political conflict between the government and its opponents escalated into an armed insurgence against the regime of Muammar al-Gaddafi. As of 20 February 2011, the crisis response cell [crisis management team] of the Federal Foreign Office dealt with the course of those events in daily inter-ministry meetings. At an early stage, the Federal Ministry of Defence and the Joint Operations Command of the *Bundeswehr* prepared for potential diplomatic and military evacuations of German citizens via air or sea. Within the scope of a so-called unsecured aerial rescue, which is not subject to the proceedings at hand, *Bundeswehr* soldiers flew a total of 103 German citizens out of Tripoli on 22 and 23 February 2011. About the same time, numerous Germans and other foreigners left the Libyan capital using civil aircraft of a German airline. Parallel to these measures, the army, air and

naval forces were consolidated to an operational unit for military evacuation operations. The “Pegasus” mission comprised up to 1,000 soldiers who should, if necessary, evacuate and rescue isolated or threatened German citizens from Libya.

On 24 February 2011, the Federal Foreign Office and the Federal Ministry of Defence decided that the *Bundeswehr* shall immediately fly the staff of German companies out of the east Libyan city of Nafurah, which is located in the desert near an oil field. On the evening of 25 February 2011, after having obtained the approval of the Federal Chancellor, the Federal Minister for Foreign Affairs informed the Chair persons of the parliamentary groups of the *Bundestag* by phone about the upcoming deployment. During the evacuation mission on the afternoon of 26 February 2011, it was the first time that armed soldiers were on board of the two deployed Transall C-160 ESS. The transporting aircrafts were equipped with supplements for passive self-protection against radar detection and with air defence missiles. In Nafurah, 132 persons - among them 22 Germans - were aboarded and flown out to Chania/Crete. The evacuation took course without incidents. There were no further *Bundeswehr* evacuation operations in Libya.

[…] In March 2011, the First Managing Director of the Parliamentary Group ALLIANCE 90/THE GREENS (*BÜNDNIS 90/DIE GRÜNEN*) repeatedly demanded from the Federal Minister for Foreign Affairs that the Federal Government seek for a retrospective parliamentary mandate for the deployment. The Federal Minister replied that the deployment aimed at humanitarian services and was therefore not subject to the requirement of the *Bundestag*’s approval. He later explicated that the evacuation was not a deployment of armed forces as defined by the Act on Participation of Parliament (*Parlamentsbeteiligungsgesetz* - ParlBG) as an involvement of German soldiers in armed action was not to be expected. According to the case-law of the Federal Constitutional Court, the sheer possibility that a deployment results in an armed conflict did not give rise to the requirement of a parliamentary decision of a deployment abroad.

[*End of excerpt*]

[…] 3-24

II.

The applicant filed its application in the dispute between constitutional organs on 11 August 2011 and argues that: 25

1. The application is admissible. […] 26

2. The application is further well-founded. The respondent violated the *Bundestag’s* rights deriving from the constitutional requirement of a parliamentary decision concerning the deployment of armed military forces. 27

[…] 28-34

III.

The respondent regards the application as admissible, but without merits. Parliamentary approval is not required as the evacuation from Nafurah does not constitute a “deployment of armed military forces” as defined by the case-law of the Federal Constitutional Court and by the Act on Participation of Parliament (*Parlamentsbeteiligungsgesetz* - ParlBG). 36-51

[…]

IV.

The Federal President, the *Bundestag* and the *Bundesrat* were notified of the initiation of proceedings [§ 65 sec. 2 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG)]. 52

V.

At the oral hearing on 28 January 2015, the parties amplified and supplemented their briefs. […] 53

VI.

With brief of the respondent’s authorised representative of 3 March 2015, the respondent complemented, as requested by the Senate, the previously submitted instructions, orders and other documents related to the “Pegasus” mission and to the evacuation from Nafurah by submitting further instructions of the *Bundeswehr* Operations Command (*Einsatzführungskommando der Bundeswehr*). Upon receipt by the Federal Constitutional Court, they were handed over to the applicant’s authorised representatives. 54

B.

The application is admissible. 55

I.

[…] 56

II.

The applicant has the legal ability to file an application. 57

1. The applicant has asserted in a substantiated manner that it is possible that the *Bundestag’*s rights were violated since the respondent declined seeking the *Bundestag*’s retrospective approval of the evacuation of German and other citizens from Libya by *Bundeswehr* soldiers on 26 February 2011 (§ 64 sec. 1 BVerfGG). In its judgment of 12 July 1994, the Federal Constitutional Court held that the deployment of armed military forces abroad generally requires, according to the Constitution, the prior constitutive decision of the *Bundestag.* In cases of imminent danger where the 58

Federal Government, by way of exception, decided upon the deployment alone, it must immediately involve the *Bundestag* after the deployment (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 90, 286 <383 et seq.>). The constitutional term “deployment of armed military forces”, and thereby the scope of the requirement of parliamentary decision were concretised by the Senate in a further judgment of 7 May 2008 (cf. BVerfGE 121, 135 <163 et seq.>). Both decisions are related to *Bundeswehr* deployments abroad within systems of collective security. To date it is not explicitly clarified whether and to what extent the current case-law applies to unilateral *Bundeswehr* evacuation missions that were ordered by the executive on its own and that were over before a parliamentary decision could be sought. Therefore, it is not *a priori* excluded that retrospective involvement of the *Bundestag* regarding the deployment of German soldiers in Libya was subject to the requirement of parliamentary decision as enshrined in the Constitution’s provisions on armed forces.

2. […] 59

III.

[…] 60-63

IV.

[…] 64

C.

The application is unfounded. The respondent did not violate the constitutional right of participation of the *Bundestag* in terms of the constitutive requirement of a parliamentary decision concerning the deployment of armed military forces by omitting to seek Parliament’s retrospective approval of the evacuation of German citizens from Nafurah by *Bundeswehr* soldiers on 26 February 2011. 65

I.

The constitutive requirement of parliamentary decision as enshrined in the Constitution’s provisions on armed forces is not limited to deployments of armed forces within systems of collective security but furthermore applies more generally to all deployments of German armed forces abroad (1.). To qualify as deployment of armed forces, it is not required that an activity abroad has the character of an actual war or a war-like character (2). In cases of imminent danger, the Federal Government may, by way of exception, preliminarily order on its own that armed forces be deployed. In such a case, it has to immediately bring the ordered deployment to the attention of the *Bundestag*, and, upon request by the *Bundestag*, withdraw the deployed forces accordingly (3.). Whether the German forces were involved in armed activities and whether there was imminent danger are questions that are subject to full review by the Federal Constitutional Court (4.). If a deployment of armed forces ordered by the 66

Federal Government due to imminent danger is already over at the earliest possible moment in which a parliamentary decision could be sought in retrospect and if, therefore, Parliament cannot influence the specific use of armed forces anymore, the Federal Government must inform the *Bundestag* promptly and in a qualified manner of the reasons for its decision on the deployment of armed forces and of the course of the mission (5.).

1. From the overall context of the constitutional provisions on armed forces and against the background of Germany's constitutional history since 1918, the Federal Constitutional Court has derived from the Constitution a general principle that every deployment of armed forces requires a constitutive decision of the *Bundestag*, which as a general rule should be obtained before the deployment commences(cf. BVerfGE 90, 286 <381 et seq.>; 100, 266 <269>; 104, 151 <208>; 108, 34 <43>; 121, 135 <154>; 126, 55 <69 and 70>; established case-law). The constitutional provisions on armed forces are designed to ensure that the *Bundeswehr* is not left to the executive alone as a potential source of power but to integrate it as an "parliamentary army" into the constitutional system of a democratic state under the rule of law (cf. BVerfGE 90, 286 <381 and 382>; 108, 34 <44>; 121, 135 <154>; 123, 267 <422>; 126, 55 <70>). The requirement of parliamentary decision on deployments of armed military forces enshrined in the Constitution's provisions on armed forces generally applies to the deployment of armed military forces (a)) and is to be interpreted with openness to Parliament (cf. BVerfGE 121, 135 <162>; b)). 67

a) The requirement of a parliamentary decision on deployments of armed military forces which applies immediately for constitutional reasons (BVerfGE 90, 286 <390>; 121, 135 <156>) establishes an effective right of participation of the *Bundestag* in matters of foreign policy. Parliamentary approval must generally be obtained before the deployment commences. The *Bundestag* cannot order a deployment of armed forces without the Federal Government as the requirement of a parliamentary decision constitutes a reservation of consent that does not confer a power of initiative (cf. BVerfGE 90, 286 <388 and 389>; 121, 135 <154>). 68

The requirement of parliamentary participation applies to armed deployments of German soldiers within systems of collective security in terms of Art. 24 sec. 2 of the Basic Law (*Grundgesetz* - GG) which have already been the subject of Senate decisions (cf. BVerfGE 90, 286 <351 et seq.>; 121, 135 <156 and 157>) as well as generally to the deployment of armed forces (cf. BVerfGE 90, 286 <381>; 121, 135 <153>) irrespective of its substantive legal basis (cf. § 2 sec. 1 and § 5 sec. 1 sentence 2 ParlBG). Therefore, every unilateral deployment of German armed forces abroad generally requires a prior parliamentary decision. The *Bundeswehr* would not be a parliamentary army if the scope of application of the Constitution's requirement of a parliamentary decision of a deployment of armed forces expressly excluded precisely the solely nationally conducted deployment of armed forces abroad that is not preceded by a consensual decision-making process within a system of alliances in which Germany has integrated itself already with the legislature's approval (cf. BVerfGE 90, 69

286 <351>; 104, 151 <194>; 118, 244 <258>). This applies irrespective of the question of an enabling provision for such deployments - which is not a question that is addressed in the *Organstreit* proceedings , at hand.

b) Considering its function and importance, the requirement of a parliamentary decision enshrined in the Constitution'a provisions on armed forces must be interpreted in favour of Parliament. In particular, the issue of whether parliamentary approval is necessary cannot depend on the political or military evaluations and prognoses of the Federal Government (cf. BVerfGE 121, 135 <162 and 163>). In that respect, it is irrelevant whether the deployment of armed forces is carried out within a system of mutual collective security or whether it is only nationally accounted for. In both cases, the decision-making process involving both Parliament and the Federal Government does not constitute an exception to the executive's sole responsibility in the field of foreign policy; instead, it constitutes a characteristic element of the constitutional separation of powers. Insofar as the Constitution assigns a competence to the *Bundestag* in the form of a right to participate in decision-making concerning the deployment of armed forces, the Federal Government does not have the right to take decisions independently (cf. BVerfGE 121, 135 <163>). In this context, it is of no relevance whether the Parliament participates in decision-making - as generally required - before the deployment commences or, by way of exception, only after the deployment has begun given that the Federal Government has already made the decision to deploy on its own for reasons of imminent danger (cf. BVerfGE 90, 286 <388>; 121, 135 <154>). The Federal Government's competence in cases of imminent danger only gives the right to order the deployment of armed forces; it does not, however, and unlike assumed by the respondent, grant any interpretative leeway as to whether there is such a deployment of armed forces and thus a parliamentary right to participate in the decision-making (cf. BVerfGE 121, 135 <168 and 169>). Otherwise there would be a risk that the executive's competence to decide, by way of exception (cf. BVerfGE 121, 135 <154 and 155>) and for the time being, upon deployments alone in cases of imminent danger is shifted so as to become a regular competence to ultimately decide alone by default, which would be incompatible with the system. 70

2. According to the case-law of the Federal Constitutional Court, Parliament must be involved in cases concerning "deployments of armed military forces" (BVerfGE 90, 286 <387 and 388>; 121, 135 <154>). "Deployments of armed military forces" is a constitutional term whose concretisation does not depend directly on the public international (cf. BVerfGE 90, 286 <387>) or constitutional law bases of the specific deployment, and it can also not be bindingly specified by an act that ranks lower than the Constitution (cf. § 2 ParlBG), although also the statutory formulation of the term may be capable of ging indications as to its immediate constitutional scope (cf. BVerfGE 121, 135 <156>; a)). The term "deployments of armed military forces" defines a uniform legal threshold of required parliamentary approval. Hence, there is no room for an additional threshold in the sence that there needs to be a particular military importance in the particular case (b)). 71

a) Deployments of armed forces fall within this definition if German soldiers are involved in armed activities (cf. BVerfGE 121, 135 <163>). For making this determination, it is irrelevant whether there already is armed combat; the decisive criterion is whether there is a specific expectation that German soldiers will become involved in armed hostilities (cf. BVerfGE 121, 135 <164 and 165>; aa)). The fact that the deployed soldiers are armed and authorised to use their weapons can serve as indicator for an impending involvement of German soldiers in armed hostilities (bb)). 72

aa) This form of qualified expectation that German soldiers will be involved in armed hostilities differs in two ways from the sheer possibility that armed hostilities might occur: 73

(1) Firstly, there must be sufficient tangible factual circumstances indicating that a deployment, taking into account its purpose, the particular political and military situation as well as the powers of the deployed forces, may lead to the use of armed force. For this to be the case, the circumstances of the case and the overall political situation must result in a concrete and dangerous military situation which is of sufficient factual proximity to the use of armed force and thus to the involvement of German forces in armed hostilities (BVerfGE 121, 135 <165>). 74

(2) Secondly, a particular proximity to the use of armed force is required; the involvement of *Bundeswehr* soldiers in armed hostilities must be expected immediately. If the use of armed force is imminent, this in itself already constitutes the specific expectation of involvement of German soldiers in armed hostilities; however, this will regularly be accompanied by the consolidation of factual circumstances that indicate upcoming military conflicts. Apart from that, however, also a consideration of the operational planning and the powers of the deployed forces can result in the finding that due to the overall situation involvement of German soldiers in armed hostilities is probable and in practice only depends on coincidences in the actual course of events (cf. BVerfGE 121, 135 <166>). 75

bb) The fact that the deployed soldiers are armed abroad and authorised to use their weapons can serve as indicator for an impending involvement of German soldiers in armed hostilities. For, armament can, depending on the actual course of events, result in the actual use of armed force. However, as long as the authorisation to use force is limited to cases of self-defence and the deployment itself is of a non-military nature, this authorisation alone does not yet reach the threshold beyond which the deployment requires a parliamentary decision (cf. BVerfGE 121, 135 <167 and 168>). 76

b) The term “deployment of armed military forces”, as an expression of a specific expectation for the involvement of German soldiers in armed hostilities, defines a uniform threshold for the requirement of a parliamentary decision for all deployments of the *Bundeswehr* abroad, no matter whether the deployments are conducted consensually in a system of mutual collective security or nationally accounted for. An additional particular military importance must not be given in the concrete case (aa)). In 77

principle, even deployments that are evidently of little importance and scope or of minor political importance may also require a parliamentary decision under the Constitution (cf. BVerfGE 90, 286 <389>; 121, 135 <166>; bb)).

aa) In principle, every deployment of German armed forces requires constitutive parliamentary participation. Even though the requirement of a parliamentary decision was conceived having in mind the historic image of entry into a war (cf. BVerfGE 108, 34 <42 and 43> referring to BVerfGE 90, 286 <383>), it is not limited to actual wars or war-like deployments abroad. A legally relevant influence of the *Bundestag* concerning the deployment of armed forces is - according to the constitutional principles of allocation of competences of the constitutional organs in matters of foreign policy - to be guaranteed also in cases that remain below this threshold - a threshold that cannot be defined precisely anyway. 78

Nowadays, under the current political conditions, wars are normally not formally declared anymore; for that reason, successive involvement in armed hostilities often amounts to an official entry into war (cf. BVerfGE 108, 34 <43>). Every deployment of armed forces is capable of developing from a limited individual action to larger and longer-lasting military hostilities, and may even lead to an extensive war (BVerfGE 121, 135 <161>). Besides, in politically and militarily unstable regions in particular, it often only takes a minor reason to spur an escalating dynamic of conflicts. All this is also true with regard to both *Bundeswehr* deployments abroad that are nationally accounted for and deployments within systems of mutual collective security on the basis of which the Federal Constitutional Court defined the factual elements of the term “deployment of armed forces” (cf. BVerfGE 121, 135 <161 et seq.>). 79

Contrary to the submissions of the respondent, the constitutive parliamentary responsibility warranted by the Constitution for each and every armed deployment of the *Bundeswehr* abroad does not require that deployments envisaged by the Federal Government fulfil the historic image of entry into a war. Apart from the specific expectation of involvement in armed conflicts, deployments of armed forces do not need to be of particular military importance or aim at the offensive use of armed force in order to require parliamentary approval; a humanitarian purpose does not *per se* suspend the requirement of a parliamentary decision. 80

bb) In its judgment of 12 July 1994, the Senate has already decided that a decision of the *Bundestag* is required prior to the deployment of armed forces under the mandate of resolutions by the Security Council irrespective of whether the armed forces are authorised to use force under Chapter VII of the Charter of the United Nations (Federal Law Gazette, *Bundesgesetzblatt* – BGBl 1973 II p. 430). For distinctions between traditional deployments of UN “blue helmet” soldiers and deployments of soldiers with the authorisation of armed safeguard action are hardly possible in reality, given that the boundaries have become fluid; the term “self-defence” - which every peacekeeping mission has a right to exercise - is already defined, in an active way, so as to include also resistance against violent attempts to prevent the UN forces from 81

carrying out their mission (cf. BVerfGE 90, 286 <387 and 388>). Also the deployment of *Bundeswehr* soldiers for mere relief services and the rendering of assistance abroad may require a parliamentary decision insofar as the soldiers are involved in armed operations (cf. BVerfGE 90, 286 <388>; 121, 135 <155>). In principle, even deployments that evidently are of little importance and scope or of minor political significance may require a parliamentary decision under the Constitution (cf. BVerfGE 90, 286 <389>; 121, 135 <166>).

The constitutive parliamentary decision guarantees the constitutionally governed allocation of competences between Parliament and Government with regard to decisions on the deployment of armed forces as a potential source of power and insofar, regardless of the importance of the deployment, the *Bundestag* must be able to influence that decision in a legally relevant way (cf. BVerfGE 90, 286 <381 and 382>; 108, 34 <42>; 121, 135 <161, 164>). Therefore, the constitutional term “deployment of armed forces” that requires approval and that must be defined in a uniform way may cover qualitatively different types of *Bundeswehr* deployments. It is for the legislature to further specify the nature and scope of parliamentary participation depending on the respective occasion and frame conditions of the deployment (cf. BVerfGE 90, 286 <389>; cf. also § 4 ParlBG). 82

3. As a rule, the Constitution prohibits deployments of armed military forces without a prior parliamentary decision. The decision-making process involving both Parliament and the Federal Government prior to the deployment preserves the competences of both constitutional organs (a)). In cases of imminent danger, the Federal Government may, by way of exception and for the time being, decide upon deployments alone, for example to ensure that the defence and alliance capacities of the Federal Republic of Germany are not called into question by the requirement of a parliamentary decision (b)). However, in such a case the Federal Government must immediately involve the *Bundestag* in the thus decided deployment and withdraw the armed forces upon the request of the *Bundestag* (c)). 83

a) If, on the ground of sufficient tangible factual evidence, a specific expectation indicating an imminent involvement of German soldiers in armed hostilities exists, the involvement of the *Bundestag* prior to the deployment is required already to avoid a situation in which the Parliament is forced to approve of a decision although the circumstances impede taking an independent decision. Compared to a retrospective withdrawal of German soldiers upon a parliamentary decision (cf. BVerfGE 90, 286 <388>), the prior parliamentary involvement is also the more balanced alternative in terms of the Federal Republic of Germany’s capacity to act in foreign affairs and form alliances (cf. BVerfGE 90, 286 <363 and 364, 388>; 108, 34 <44 and 45>; 121, 135 <167>). 84

Thus, the Federal Government and the *Bundestag* must ensure that, in general, a parliamentary decision is obtained before deciding to use armed force, and that no such decision to use armed force is taken before approval proceedings have been 85

completed (cf. BVerfGE 121, 135 <167>).

b) In cases of imminent danger, the Federal Government may, by way of exception, preliminarily order armed forces to be deployed without a prior parliamentary decision . The Federal Government's order does not require a retrospective parliamentary decision ; however, for a deployment to be continued, the *Bundestag* must approve the deployment as soon as possible (cf. BVerfGE 90, 286 <388>; 121, 135 <154>). 86

In cases of imminent danger, the Federal Government is competent to order the deployment of armed forces by emergency decision confined to the concrete case. Although the exercise of the executive competence to take an emergency decision is always an impairment of the constitutive requirement of a parliamentary decision concerning the deployment of armed forces, such an order does not require any retrospective legitimation by the *Bundestag* to be legally effective. The required immediate involvement of Parliament after a deployment has begun (cf. BVerfGE 90, 286 <388>; 121, 135 <154) does not have the legal effects of a retrospective decision, namely that if such retrospective approval were denied, the deployment would have been illegal from the beginning (cf. Baldus, written statement [pp. 37 and 38], Sten. Protocol of the 25th session of the Committee on the Verification of Credentials, Immunities and the Rules of Procedure of the German *Bundestag* on 17 June 2004, pp. 77 and 78). The Federal Government's emergency decision rather has the same legal effects as a decision taken in the usual order of things, with prior approval of the *Bundestag*. Therefore, in cases of deployment initiated by emergency decision of the Federal Government, a parliamentary decision is constitutive only for the future. If parliamentary approval is denied, the Federal government must terminate the deployment and withdraw the armed forces. Thereby, the capacity of the Federal Republic of Germany to defend itself militarily and to form alliances is ensured. At the same time, this considers the interest of the deployed German soldiers in being deployed in an armed deployment abroad only on the basis of a legally reliable order rather than one that is provisionally ineffective. 87

c) The Federal Government's exceptional competence to decide alone on the deployment in cases of imminent danger (cf. BVerfGE 90, 286 <388>; 121, 135 <154>) does not abandon the constitutional right and duty to parliamentary decision concerning the deployment of armed forces. As reflected in the requirement of immediate retrospective involvement of the *Bundestag* after the deployment has begun (cf. BVerfGE 90, 286 <388>; 121, 135 <154>), the executive's emergency decision shall only ensure the military capability of the Federal Republic of Germany in short-term exceptional circumstances. Thus, the executive's right to take a preliminary decision without prior parliamentary approval in cases of imminent danger does not have a rank that is equal to the constitutive requirement of a parliamentary decision as enshrined in the Constitution's provisions on armed forces. Instead, as a deviation from the originally provided parliamentary right to participate in decision-making, the competence of the Federal Government, as an organ that is always capable of acting, is subsidiary to the parliamentary right and its purpose is not to provide the executive 88

with its own leeway to design with regard to defence policy matters. Hence, retrospective parliamentary participation must be preceded by a notification of the *Bundestag* through the Federal Government prior to the commencement of and throughout the deployment (cf. § 5 sec. 2 ParlBG).

4. The conception of the emergency decision implies that the Federal Government itself has to verify the requirements of its (preliminary) competence to decide alone. However, in case of a dispute, the isssue of whether German soldiers were involved in armed activities (a)) as well as whether there was “imminent danger” (b)) are subject to full review by the Federal Constitutional Court. 89

a) The question whether German soldiers are involved in armed activities while deployed abroad - an issue that precedes the question of an emergency competence - is subject to full review. The Federal Government does not have a margin of appreciation or prognosis that is not subject to full or limited review by the Federal Constitutional Court (cf. BVerfGE 121, 135 <168 and 169>). 90

b) Furthermore, the Federal Government does not have any margin of appreciation or prognosis with regard to the interpretation and application of the legal requirements of “imminent danger”. Nonetheless, in urgent cases, the Federal Government is provided with margin of appreciation (cf. BVerfGE 121, 135 <163>) as to the political and military expedience of the armed deployment of military forces. 91

aa) The criterion “imminent danger” determines the conditions of an emergency competence of the Federal Government to order the deployment of armed forces. This term is an indeterminate legal concept that is not subject to a margin of assessment. Insofar, the prognostic elements of the term “danger” do not allow a different perception. They merely constitute elements of the indefiniteness of legal concepts, and - like other legal provisions empowering measures to provide protection against dangers, too - do not as such justify a limitation of judicial review (cf. with regard to Art. 13 sec. 2 GG BVerfGE 103, 142 <157> with further references). 92

The legislature may, within the constitutionally determined limits, allow exemptions from the principle of full judicial review of the executive’s decisions (cf. BVerfGE 129, 1 <21 et seq.>). However, the requirement of a parliamentary decision of the deployment of armed forces as enshrined directly in the Constitution does not provide the legislature with such leeway when regulating the emergency competence of the Federal Government. Generally, the requirement of a parliamentary decision guarantees the effective right of the *Bundestag* to participate in a decision on the deployment of armed forces before the military operation has begun and thus becomes a matter of military expedience (cf. BVerfGE 121, 135 <161>). In that regard, executive leeway that is no longer subject to judicial review in cases in which imminent danger is determined would extend the possibilities of exercising the emergency competence and thus weaken the constitutive requirement of a parliamentary decision to an extent exceeding what is inevitable (cf. BVerfGE 103, 142 <158>). Within a significant range of the deployment, this would mean that it is the Federal Government’s sole and final re- 93

sponsibility to determine whether the *Bundestag* must give its legally effective approval to the deployment of armed forces either before the deployment has begun or only afterwards when facts that are already accomplished or have at least already been decided preliminarily narrow down the Parliament's leeway of approval in the sense that it then constitutes a mere traceability decision. The allocation of competences in matters of foreign policy resulting from the constitutional requirement of a parliamentary decision of deployments of armed forces abroad does not authorise the executive to such a substantive devaluation of Parliament's competence to participate in such decisions (cf. BVerfGE 121, 135 <167>). The rights granted to the constitutional organs by the Basic Law are neither at their own disposal nor at the legislature's disposal (cf. E. Klein, in: Benda/Klein, *Verfassungsprozessrecht*, 3rd edition 2012, § 28 para. 990). In fact, the legislature is restricted to specifying the conditions of imminent danger that establish an emergency and to specifying the procedure that is to be observed in such a case (cf. BVerfGE 90, 286 <388 et seq.>). This is in line with the wording and reasoning of § 5 ParlBG (*Bundestag* document, *Bundestagsdrucksache* – BTDrucks 15/2742, p. 5 and 6) which governs the Federal Government's emergency competence and the procedure of retrospective parliamentary approval in cases of imminent danger.

bb) The review of "imminent danger" by the Federal Constitutional Court does not exceed the judiciary's functions (cf. BVerfGE 84, 34 <50>; 129, 1 <23>). Limitations of this kind are acknowledged (cf. BVerfG, Order of the First Chamber of the Second Senate of 13 August 2013 – 2 BvR 2660/06, 2 BvR 487/07 –, *Europäische Grundrechte-Zeitschrift* - EuGRZ 2013, pp. 563 <568>) when it comes to political discretion in the field of foreign policy (cf. BVerfGE 40, 141 <178>; 55, 349 <364 and 365>) as well as in defence matters (cf. BVerfGE 68, 1 <97>). However, the Federal Government's factual and legal evaluation in assuming imminent danger is not a political decision but a determination of whether a factual situation fulfils the legal requirements of an emergency competence (cf. BVerfGE 45, 1 <39>) that permits the Federal Government to take a preliminary (political) decision on an armed deployment of the *Bundeswehr* abroad. The legality of the decision depends on the facts known to the Federal Government at the time it took the decision. 94

5. If a deployment of armed forces ordered by the Federal Government because of imminent danger is already over before parliamentary approval could have been sought retrospectively at the earliest possible moment, the *Bundestag* cannot influence the specific deployment of the armed forces (cf. BVerfGE 89, 38 <46 and 47>; 90, 286 <382>; 108, 34 <42>; 121, 135 <161, 164>) in a constitutive manner (a)). In such a case, the Federal Government is obliged to inform the *Bundestag* promptly and in a qualified manner about the completed deployment of armed forces (b)).

a) In its previous decisions concerning the constitutive requirement of a parliamentary decision as enshrined in the Constitution's provisions on armed forces, the Senate did not have to rule on the question whether a deployment of armed forces that was rightfully ordered by the Federal Government due to imminent danger and al- 96

ready over before parliamentary approval could have been sought still requires the retrospective involvement of the *Bundestag*. Indeed, the Federal Government must prompty inform Parliament in any case of a deployment ordered under its emergency powers because of imminent danger, and has to withdraw the armed forces if the *Bundestag* so requests (cf. BVerfGE 90, 286 <388>; 121, 135 <154>). However, the question whether retrospective parliamentary participation is required even if there is no possibility for a parliamentarily requested withdrawal of the armed forces has so far not been the subject of proceedings of the Federal Constitutional Court.

aa) The legislature's intention concerning this issue cannot be derived unambiguously from the Act on Participation of Parliament. Pursuant to § 5 ParlBG, Parliament's subsequent approval of the deployment of armed forces ordered by the executive in cases of imminent danger is to be sought promptly, and if the *Bundestag* denies its approval, the deployment is to be terminated (sec. 3). In this respect, the legislature's reasoning demands a "mandatory retrospective parliamentary participation" (cf. BTDrucks 15/2742, p. 6) but does not address the question whether this also applies to deployments that are already over before parliamentary participation can be sought. 97

bb) Predominantly, legal literature on the Constitution's provisions on armed forces assumes that retrospective parliamentary approval does not have any legally binding effect in cases of an already completed deployment of armed forces; however, it nonetheless considers the participation of the *Bundestag* to be constitutionally necessary due to the constitutional requirement of a parliamentary decision (cf. Dau, *Neue Zeitschrift für Wehrrecht* – NZWehrr 1998, pp. 89 <99>; Hans H. Klein, in: *Festschrift für Walter Schmitt Glaeser*, 2003, pp. 245 <263>; Lutze, *Die Öffentliche Verwaltung* – DÖV 2003, pp. 972 <978>; Baldus, loc.cit., p. 78, fn. 115; F. Schröder, *Das parlamentarische Zustimmungsverfahren zum Auslandseinsatz der Bundeswehr in der Praxis*, 2005, pp. 280 and 281; Sigloch, *Auslandseinsätze der Bundeswehr*, 2006, p. 308; Tobias M. Wagner, *Parlamentsvorbehalt und Parlamentsbeteiligungsgesetz*, 2010, pp. 149 and 150; Payandeh, *Deutsches Verwaltungsblatt* – DVBl 2011, pp. 1325 <1329 and 1330>). 98

cc) In terms of competences, the function of the constitutional requirement of a parliamentary decision due to which the *Bundestag* is afforded the right to an essential, constitutive participatory decision on the deployment of armed forces and thus guaranteed a legally relevant influence on the specific deployment of armed forces (cf. BVerfGE 89, 38 <46 and 47>; 90, 286 <382>; 108, 34 <42>; 121, 135 <161, 164>) has no effect if the deployment is already over. In that case, there is no room for a constitutive parliamentary decision or shared responsibility or involvement in the decision. If the Federal Government has ordered a temporally limited deployment that is over before parliamentary approval can be sought, this decision, despite the subsidiary nature of the executive's emergency competence, does not require retrospective approval by the *Bundestag* in order to be effective and legal (cf. para. 87). In such cases of completed deployments, Parliament can neither decide about the continu- 99

ance of the deployment of armed forces nor about its completion and withdrawal of the deployed soldiers. Moreover, it does not pertain to the *Bundestag* to judge the legality of executive actions; such a judgment is - subject to an application to that end - reserved to the Federal Constitutional Court. Therefore, retrospective decisions by Parliament are of no legal value (differeing Wiefelspütz, *Der Auslandseinsatz der Bundeswehr und das Parlamentsbeteiligungsgesetz*, 2. ed. 2012, p. 498).

Thus, in such a case the constitutional requirement of a parliamentary decision does not oblige the Federal Government to seek a *Bundestag* decision upon the completed deployment (cf. Kreß, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* – ZaöRV 57 [1997], pp. 329 <355>; Schaefer, *Verfassungsrechtliche Grenzen des Parlamentsbeteiligungsgesetzes*, 2005, pp. 287 et. seq.; Scherrer, *Das Parlament und sein Heer*, 2010, pp. 288 et seq.). Insofar, the Federal Government's competence to take the decision modifies the principle of constitutive parliamentary participation underlying the Constitution's provisions on armed forces. As a formative part of the constitutional separation of powers (cf. BVerfGE 121, 135 <163>), the requirement of a constitutive parliamentary decision is determined by its function to establish competences and is not altered if the *Bundestag* is unable - for factual reasons - to exercise its competences. 100

b) In fact, the *Bundestag* as well as its committees are tasked with exercising parliamentary oversight over deployments of armed forces that were initiated by emergency decision of the Federal Government because of imminent danger and that were completed before Parliament could be involved. Also in these cases, the parliamentary system of government provides Parliament with suitable instruments to control the Federal Government politically. The *Bundestag* can exercise its right to put questions, its right to file a motion, its right to debate, and its right to adopt a resolution and thereby influence the Federal Government's future decisions, or it can elect a new Federal Chancellor and thereby oust the current Government, Art. 67 sec. 1 sentence 1 GG (cf. BVerfGE 131, 152 <196>). 101

However, it results from the constitutional requirement of a parliamentary decision that the Federal Government must inform the *Bundestag* promptly and in a qualified manner about completed deployments of armed forces in order to enable the *Bundestag* to exercise its right to unrestricted oversight over such deployments. 102

aa) This obligation of formal information concerns the relevant factual and legal considerations the Federal Government's decision to deploy armed forces is based on as well as the details and the outcome of this deployment. In order to be able to politically evaluate a completed deployment of the *Bundeswehr* abroad and exercise its right of parliamentary control effectively, also with a view to competence issues which always need to be addressed in this context, the *Bundestag* must be fully aware of all mentioned deployment-related information that is available only to the Federal Government. 103

bb) The information of the *Bundestag* must cover all factual matters, and the amount 104

of detail required depends on the deployment's military and political importance. The information must be provided as soon as possible as the earlier Parliament can exercise control the more effective it is. Moreover, the Federal Government must inform Parliament in an effective way. In principle, the information must be provided to the *Bundestag* as a whole in order to enable all of its members to have equal and indiscriminate access to the information. As a rule, information must be provided in writing. This requirement ensures that the information about the deployment of armed forces provided to the members of the *Bundestag* is clear, complete and can be easily reproduced (cf. BVerfGE 131, 152 <202 et seq.>).

II. 105

According to these standards, the evacuation of German citizens from the Libyan town of Nafurah conducted by *Bundeswehr* soldiers on 26 February 2011 constituted a deployment of armed forces within the meaning of the constitutional requirement of a parliamentary decision. However, the respondent was not obliged to retrospectively seek the *Bundestag*'s legally non-binding political approval of the completed operation. The *Organstreit* proceedings at hand do not concern a possible violation of the parliamentary right to promptly receive qualified information on the completed deployment of armed military forces.

1. The evacuation from Nafurah conducted by *Bundeswehr* soldiers was solely nationally accounted for and is subject to the constitutional requirement of a parliamentary decision as enshrined in the Constitution's provisions on armed forces. This is true regardless of whether - as it is debated in literature (cf. Wiefelspütz, loc.cit., pp. 448 and 449; Röben, ZaöRV 63 [2003], pp. 585 <586, fn. 4>), the evacuation or rescue mission of the forces has, in substantive and functional terms, the nature of a police operation pursuing humanitarian goals or whether it is in fact of a "military" nature in a narrower sense. Such differentiations neither bar a subsumption under the constitutional term "deployment of armed forces" nor the necessarily resulting application of the constitutional requirement of a parliamentary decision (cf. Epping, in: *Beck'scher Online-Kommentar* – BeckOK GG, edition 25, Art. 87a para. 32.4; Baldus, in: Mangoldt/Klein/Starck, GG, vol. 3, 6. ed. 2010, Art. 87a para. 82). 106

2. The operation at issue constituted a permissible deployment of armed forces that is, in principle, only permitted on the basis of a constitutive approval of the *Bundestag* as it was subject to the specific expectation that German soldiers participating in the evacuation from Nafurah could be involved in in armed hostilities. 107

a) At the time of the decision on the deployment, there was adequately specific factual information for an impending involvement of the deployed German soldiers in armed hostilities.

aa) When deciding whether an involvement of German soldiers in armed hostilities was to be expected it has to be considered that the evacuation from Nafurah on 26 February 2011 took place in a situation which was, in temporal and spatial terms, of a 109

warlike nature.

In the days before the evacuation, the domestic armed hostilities in Libya had escalated into a civil war that involved the collapse of the state order. The rapidly worsening security situation triggered the preparation of the large-scaled military operation “Pegasus” aiming at the evacuation, rescue and, if necessary, forceful liberation of German citizens throughout Libya. By 26 February 2011, the preparation of this operation was, however, not yet completed. […] 110

bb) The deployment of an armed safety troop of a total of twenty soldiers in addition to the crew of the transporting aircraft depicts the dangerous situation on ground which could have necessitated the use of military force. […] 111

Not only the general attention and precaution but especially the on-ground situation that could have changed towards an attack or a raid of the camp at any time specifically gave rise to engage not only the organisational structure of the *Bundeswehr* - as done on 22 and 23 February in Tripoli - but rather also make use of its specific threat and force potential for the purpose of performing the evacuation. […] 112

Correspondingly, the operational powers of the paratroopers were allotted in line with the possible involvement in armed hostilities. Their duty was to protect both the air transport assets after the landing or a potential emergency landing and the evacuated German citizens while boarding. The weapons were carried especially for the purpose of safeguarding the operation. According to the order and the arming, the soldiers were not restricted to self-defence in the narrow sense that is limited to defending themselves. Rather, they were authorised and tasked to ward off attacks on the life and limb of the citizens that were to be evacuated by use of military force, and to ward off attacks on the transporting aircrafts, too. […] 113

[…]

b) Furthermore, at the time of the executive’s decision on the deployment the likelihood of having to use armed force was particularly high. 115

When the decision on the deployment was taken, the potential use of armed force against as well as by German soldiers was already impending, given that there was concrete factual information to that effect. Indeed, it was not certain whether an attack against the aircraft inside the Libyan airspace was likely and whether a military response of the soldiers deployed on the ground would be necessary. Furthermore, a cancellation of the evacuation mission before approaching of the Libyan airspace would have been possible in case of conspicuous radar activities of the local, spacially not located anti-aircraft sites. The Transall C-160 ESS could have veered off before landing in Nafurah if motor vehicles had been parked on the landing runway to warn the crew. However, after entering the Libyan airspace and the Libyan territory, the involvement of German soldiers in armed conflicts essentially depended only on whether and when militarily armed Libyan players in this civil-war country would attack the citizens that were to be evacuated or the German transporting aircraft. In ac- 116

cordance with the deployment powers of the safety troop, such an attack would have immediately triggered defence measures, yet without the Federal Government being able to influence this in any way.

3. It is not disputed among the parties that the respondent was permitted to take an emergency decision on the deployment of armed forces in order to evacuate German citizens from Nafurah on 26 February 2011 because of imminent danger and without prior approval of the *Bundestag*. 117

4. The constitutional requirement of a parliamentary decision as enshrined in the Constitution's provisions on armed forces does not result in the Federal Government being under an obligation to seek a parliamentary decision if this decision no longer has - for factual reasons - any legal effect in terms of the concrete deployment of armed forces. Therefore, the respondent was not obliged to seek a retrospective involvement of the *Bundestag* on deployment of armed forces that was completed on 26 February 2011 already. 118

5. The applicant has not, by way of these *Organstreit* proceedings, claimed a violation of the parliamentary right deriving from the requirement of a parliamentary decision as enshrined in the Constitution's provisions on armed forces to promptly receive qualified information on an already completed deployment of armed forces ordered by the Federal Government due to imminent danger. 119

Generally, an application aimed at establishing a violation of competences may also include an application of smaller scope aimed at establishing a violation of a right to information that is linked to the competence in question (cf. BVerfGE 1, 14 <39>; 7, 99 <105 and106>; 68, 1 <68>). However, the applicant has neither in its application nor in the reasons provided expressly claimed a violation of the Federal Government's duty to inform. Nor does the applicant's true purpose, which must be determined by way of interpretation (cf. BVerfGE 68, 1 <68>), give reason to believe that the applicant desired such a violation to be established. 120

[…] 121-124

D. 125

[…]

Voßkuhle Landau Huber

Hermanns Müller Kessal-Wulf

König Maidowski

Bundesverfassungsgericht, Urteil des Zweiten Senats vom 23. September 2015 - 2 BvE 6/11

Zitiervorschlag BVerfG, Urteil des Zweiten Senats vom 23. September 2015 - 2 BvE 6/11 - Rn. (1 - 125), http://www.bverfg.de/e/es-20150923_2bve000611en.html

ECLI ECLI:DE:BVerfG:2015:es20150923.2bve000611