FEDERAL CONSTITUTIONAL COURT

- 2 BvE 2/16 -

In the proceedings
on
the application to declare that

by deploying German armed forces to participate in the military operation for preventing and suppressing terrorist acts committed by the ISIL terrorist group on the basis of Article 51 of the United Nations Charter in conjunction with Article 42(7) of the Treaty on European Union, pursuant to the Federal Government's decision of 1 December 2015 and the German *Bundestag*'s decision of 4 December 2015, the respondents violated the German *Bundestag*'s rights under Article 24(2) of the Basic Law in conjunction with Article 59(2) first sentence of the Basic Law.

Applicant: parliamentary group in the German *Bundestag* DIE LINKE,
represented by chairpersons Dr. Sahra Wagenknecht, Member of the *Bundestag*, and Dr. Dietmar Bartsch, Member of the *Bundestag*,
Platz der Republik 1, 11011 Berlin

– authorised representatives:

Rechtsanwälte Weissleder Ewer Partnerschaft mbB,
Walkerdamm 4-6, 24103 Kiel –

Respondent: 1. the F e d e r a l G o v e r n m e n t,

represented by Federal Chancellor
Dr. Angela Merkel,

Bundeskanzleramt,
Willy-Brandt-Straße 1, 10557 Berlin,

– authorised representative: Prof. Dr. Stefanie Schmahl,
Domerschulstraße 16, 97070 Würzburg –

2. the G e r m a n B u n d e s t a g

represented by its President
Prof. Dr. Wolfgang Schäuble,
Platz der Republik 1, 11011 Berlin

– authorised representative:

Prof. Dr. Heike Krieger,
Märkische Heide 41, 14532 Kleinmachnow -

the Federal Constitutional Court – Second Senate –with the participation of Justices

President Voßkuhle,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski,

Langenfeld

held, by unanimous order pursuant to § 24 of the Federal Constitutional Court Act, on 17 September 2019:

The application is dismissed.

R e a s o n s:

A.

The *Organstreit* proceedings (dispute between constitutional organs) concern the deployment of German armed forces (*Bundeswehr*) to prevent and suppress terrorist acts committed by the so-called “Islamic State” (hereinafter: ISIL). 1

I.

1. ISIL is a terrorist group that operates internationally, seeking to establish a global caliphate. In recent years, it carried out terrorist attacks all around the world in pursuit of this aim. As early as 2014, states have engaged in military action against ISIL on the territories of Syria and Iraq, from where the group had temporarily operated in a territorially consolidated manner; the states moving against ISIL primarily justified these measures by invoking the right of self-defence under international law. Syria has repeatedly claimed that the military action on its territory violates its sovereignty and amounts to an illegal expansion of the right of self-defence contrary to international law. 2

2. Following the terrorist attacks in Paris on 13 November 2015, the Member States of the European Union expressed solidarity with France. When France invoked the mutual defence clause of Art. 42(7) of the Treaty on European Union (hereinafter: TEU) at a meeting of the Council of the European Union on 17 November 2015, the EU Member States unanimously pledged their aid and assistance to France by all the means in their power. 3

3. In Resolution 2249 (2015) of 20 November 2015, the United Nations Security Council (hereinafter: Security Council) condemned the terrorist attacks and categorised ISIL as “a global and unprecedented threat to international peace and security”. It called upon UN Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts and to eradicate the safe haven ISIL has established over significant parts of Iraq and Syria. 4

4. The Federal Government initially declared that it would lend support to France in other international military missions to lessen the burden on French troops (especially in the Republic of Mali); later, the Federal Government declared its willingness to participate in a mission in Syria and Iraq on condition that Germany did not participate in direct combat action. 5

5. On 1 December 2015, the Federal Government authorised the deployment of up to 1,200 soldiers of the German armed forces to prevent and suppress terrorist acts committed by the terrorist group ISIL, initially until 31 December 2016. As regards the relevant legal bases, the Federal Government contended that the deployment of German armed forces was carried out within the framework and in accordance with the rules of a system of mutual collective security pursuant to Art. 24(2) of the Basic Law (*Grundgesetz* – GG), and that the Federal Republic of Germany supported France, Iraq and the international coalition in combatting ISIL on the basis of the right of collective self-defence pursuant to Art. 51 of the UN Charter. [...] According to the Federal Government, Iraq had requested third-party assistance from other states on the basis of Art. 51 of the UN Charter. The Federal Government further stated that the military action against ISIL, in exercise of the right of collective self-defence, was covered by Security Council Resolution 2249 (2015); to the extent that the right of collective self-defence was exercised in support of France, Germany’s contribution to the military mission would in addition fulfil the commitment to provide aid and assistance under the mutual defence clause in Art. 42(7) TEU. 6

6. The German *Bundestag* approved the deployment on 4 December 2015 with 445 votes in favour to 145 votes against (including the votes from the members of the applicant parliamentary group present at the session) and seven abstentions. 7

7. The *Bundeswehr* deployment, named “Operation Counter Daesh”, began on 6 December 2015 with the German Navy providing protection for the French aircraft carrier Charles de Gaulle. In addition, the *Bundeswehr* provided Tornado reconnaissance aircraft, air-to-air refuelling for fighter jets of the international coalition “Operation Inherent Resolve” and personnel in command posts and headquarters as well as on board NATO’s AWACS surveillance aircraft. The mission has been extended to include the training of high-ranking officers in the central Iraqi army by *Bundeswehr* soldiers. The mandate for the deployment was last extended by the *Bundestag* deci- 8

sion of 18 October 2018 until 31 October 2019.

8. By letter of 10 December 2015, the Federal Republic of Germany notified the President of the Security Council that it exercised its right of self-defence against ISIL under Art. 51 of the UN Charter and specified that the actions were not directed against Syria. 9

II.

With its application brief of 31 May 2016, the parliamentary group (*Fraktion*) in the German *Bundestag* DIE LINKE seeks a declaration that, by approving the deployment of German armed forces, the Federal Government and the *Bundestag* violated the German *Bundestag*'s rights under Art. 24(2) in conjunction with Art. 59(2) first sentence GG. 10

[…] 11-18

III.

1. Respondent no. 1 asserts that the application is inadmissible. 19

2. Respondent no. 2 asserts that the application is inadmissible, but in any case unfounded. [...] 20

[…] 21-22

3. Disagreeing with the statement submitted by respondent no. 2, parliamentary group *Bündnis 90/Die Grünen* submitted a separate statement. While sharing respondent no. 2's doubts as to the application's admissibility, the parliamentary group argues that if the application were admissible, it would in fact also be well-founded. [...] 23

B.

The application is inadmissible because the applicant lacks standing to assert a violation of rights in this matter. The applicant failed to sufficiently substantiate that the violation of constitutional rights of the *Bundestag* asserted by vicarious standing appears at least possible. 24

I.

1. As a parliamentary group in the German *Bundestag*, the applicant is entitled to assert its own rights, and to assert rights of the German *Bundestag* by invoking vicarious standing, i.e. standing to assert the rights of others in one's own name (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 2, 143 <165>; 45, 1 <28>; 67, 100 <125>; 131, 152 <190>; 139, 194 <220 para. 96>; 140, 115 <138 and 139 para. 56>; 142, 25 <49 para. 66>). Vicarious standing constitutes both a manifestation of Parliament's oversight function and a means of protecting the parliamentary minority (cf. BVerfGE 45, 1 <29 and 30>; 60, 319 <325 and 326>; 68, 1 <77 and 78>; 121, 135 <151>; 123, 267 <338 and 25

339>; 131, 152 <190>; 139, 194 <220 para. 96>; 142, 25 <49 para. 66>). Given that in a parliamentary system of government, the executive is largely aligned with the parliamentary majority from which its power derives, the Constitution specifically extends the right to bring *Organstreit* proceedings to parties other than the highest federal organs; the Parliamentary Council (*Parlamentarischer Rat*) [as the 1949 constituent assembly] viewed *Organstreit* proceedings as a means of affording parliamentary groups in the opposition – and thus the organised parliamentary minority as the governing majority's opponent – recourse to the Federal Constitutional Court in order to effectively assert the constitutional rights vested in Parliament (cf. BVerfGE 90, 286 <344> with references to the records of the Parliamentary Council's debate; 117, 359 <367 and 377>).

Vicarious standing as provided for in § 64(1) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) reflects the reality of political power dynamics, in which effective separation of powers is primarily realised through the recognition of minority rights beyond the traditional model of checks and balances between the formal institutions holding state authority. Thus, the object and purpose of vicarious standing is to allow the parliamentary minority to assert rights of the *Bundestag* not only in the event that the *Bundestag* chooses to refrain from exercising its rights vis-à-vis the Federal Government that it supports politically (cf. BVerfGE 1, 351 <359>; 45, 1 <29 and 30>; 121, 135 <151>); rather, it also allows the parliamentary minority to assert rights of the *Bundestag* directly vis-à-vis the parliamentary majority that politically backs the Federal Government (cf. BVerfGE 123, 267 <338 and 339>). 26

2. Pursuant to Art. 93(1) no. 1 GG in conjunction with § 13 no. 5, §§ 63 *et seq.* BVerfGG, the Federal Constitutional Court decides on the interpretation of the Basic Law in the event of disputes concerning the scope of the rights and obligations of highest federal organs or other parties vested with own rights under the Basic Law or under the rules of procedure of one of the highest federal organs. Applications in *Organstreit* proceedings must be directed against an act or omission on the part of the respondent. [...] The applicant must demonstrate that the challenged measure specifically affects their legal sphere (cf. BVerfGE 124, 161 <185>; 138 45 <59 and 60 para. 27>). 27

Pursuant to § 64(1) BVerfGG, an application in *Organstreit* proceedings is only admissible if the applicant asserts that an act or omission on the part of the respondent violates, or directly threatens to violate, the rights and obligations conferred by the Basic Law on the applicant or on the organ to which the applicant belongs. *Organstreit* proceedings constitute an adversarial dispute between parties (cf. BVerfGE 126, 55 <67>; 138, 256 <258 and 259 para. 4>); they primarily serve to delineate the competences between constitutional organs or their constituent parts in a relationship governed by constitutional law. However, the purpose of *Organstreit* proceedings is not to review the objective constitutionality of an organ's specific actions (cf. BVerfGE 104, 151 <193 and 194>; 118, 244 <257>; 126, 55 <67 and 68>; 140, 1 <21 and 22 para. 58>; 143, 1 <8 para. 29>; Federal Constitutional Court, *Bundesverfassungs-* 28

gericht – BVerfG, Order of the Second Senate of 11 December 2018 – 2 BvE 1/18 –, para. 18; established case-law). Rather, their main purpose, in respect of an applicant's position, is the enforcement of rights ([...] cf. [...] BVerfGE 67, 100 <126>; 124, 78 <113>; 143, 101 <132 para. 104>). Thus, in an *Organstreit* there is no possibility of challenging an act or omission solely on grounds of objective unconstitutionality (cf. BVerfGE 118, 277 <319>; 126, 55 <68>; 138, 256 <259 para. 5>; 140, 1 <21 and 22 para. 58>; 143, 1 <8 para. 29>; BVerfG, Order of the Second Senate of 11 December 2018 – 2 BvE 1/18 –, para. 18). There is no scope in *Organstreit* proceedings for a general or comprehensive abstract review of the constitutionality of a challenged act, independent of the applicant's own rights (cf. BVerfGE 73, 1 <30>; 80, 188 <212>; 104, 151 <193 and 194>; 118, 277 <318 and 319>; 136, 190 <192 para. 5>; BVerfG, Order of the Second Senate of 11 December 2018 – 2 BvE 1/18 –, para. 18). The applicant cannot use *Organstreit* proceedings to enforce other (constitutional) norms; the proceedings only serve to protect the rights of state organs in relation to each other, rather than providing general constitutional oversight (cf. BVerfGE 100, 266 <268>; 118, 277 <319>; BVerfG, Order of the Second Senate of 11 December 2018 – 2 BvE 1/18 – para. 18). Under the Basic Law, the German *Bundestag* acts as a legislative organ, not an all-powerful "legal oversight authority" vis-à-vis the Federal Government. No right of the German *Bundestag* can be derived from the Basic Law that would compel the Federal Government to refrain from any act that is substantively or formally unconstitutional (cf. BVerfGE 68, 1 <72 and 73>; 126, 55 <68>; BVerfG, Order of the Second Senate of 11 December 2018 – 2 BvE 1/18 –, para. 18). *Organstreit* proceedings also do not give rise to a general right of scrutiny of foreign and defence policy measures taken by the Federal Government (cf. BVerfGE 118, 244 <257>). Thus, as regards the relation between the *Bundestag* and the Federal Government, *Organstreit* proceedings will mainly bear upon legislative powers and other participation rights of the *Bundestag*. Legislative competences of the *Bundestag* might be infringed upon not only through the appropriation of such competences, but also through acts that are of legal significance but lack statutory authorisation, where such authorisation is required under constitutional law. Parliament may thus bring *Organstreit* proceedings seeking a decision on the constitutionality of such acts (cf. BVerfGE 104, 151 <194 and 195>; 118, 244 <258>).

For the application in *Organstreit* proceedings to be admissible, it is necessary but also sufficient to demonstrate that, based on the submitted facts of the case, the asserted violation of, or direct threat to, the constitutional rights invoked by the applicant appears possible in accordance with the standards developed by the Federal Constitutional Court (cf. BVerfGE 138, 256 <259 para. 6>; 140, 1 <21 and 22 para. 58>; BVerfG, Order of the Second Senate of 11 December 2018 – 2 BvE 1/18 –, para. 20; established case-law). 29

II.

The application in the present proceedings does not meet these requirements. The applicant failed to substantiate the assertion that the deployment challenged in the 30

proceedings violated the rights conferred on the German *Bundestag* under the Basic Law (§ 64(1) BVerfGG). Based on the facts of the case submitted by the applicant, the asserted violation of the *Bundestag*'s legislative rights under Art. 24(2) in conjunction with Art. 59(2) first sentence GG can be ruled out from the outset.

1. a) In Art. 24(2) GG, the Basic Law authorises the Federation to join a system of mutual collective security for the purposes of maintaining peace. At the same time, this authorisation provides a basis in constitutional law for the deployment of armed forces outside the German territory, provided that the deployment takes place within the framework and in accordance with the rules of such a system (cf. BVerfGE 90, 286 <345 *et seq*.>; 118, 244 <261 and 262>; 121, 135 <156 and 157>). This follows from the fact that the status of the Federal Republic of Germany as a member of an international defence alliance, and the protection enjoyed by Germany as a consequence thereof, are inextricably linked to treaty obligations assumed in keeping with the alliance's purpose of maintaining peace (cf. BVerfGE 90, 286 <345>; 118, 244 <261 and 262>; 121, 135 <156 and 157>). Under Art. 24(2) in conjunction with Art. 59(2) first sentence GG, the participation of Germany in a system of mutual collective security requires approval by the German *Bundestag*. The requirement of a statutory act of approval confers upon the *Bundestag*, in its capacity as a legislative organ, a right to participation in certain decisions on foreign affairs matters; to this extent, it gives rise to a right of the *Bundestag* within the meaning of § 64(1) BVerfGG (cf. BVerfGE 68, 1 <85 and 86>; 90, 286 <351>; 104, 151 <194>; 118, 244 <258>). 31

b) The legislative power under Art. 59(2) first sentence GG protects the *Bundestag*'s competence to participate in decisions concerning the Federal Republic of Germany's rights and obligations under an international treaty to the extent that the political relations of the Federation or subject matters of federal legislation are affected. This provision safeguards the specific function of the legislative bodies in the context of foreign affairs, with legislative consent in the form of an act of approval ensuring the applicability of an international treaty at the domestic level and providing legitimation for government action taken in the execution of the treaty at the level of international law (cf. BVerfGE 90, 286 <357>; 104, 151 <194>; 118, 244 <258>). 32

The parliamentary act of approval adopted pursuant to Art. 24(2) in conjunction with Art. 59(2) first sentence GG in relation to a system of mutual collective security determines the system's agenda, most notably its purpose and scope. Together with the Government, the competent legislative bodies significantly share in the responsibility for determining this agenda, and the political obligations it entails for the Federal Republic of Germany (cf. BVerfGE 104, 151 <209>; 118, 244 <259 and 260>; 121, 135 <157>). By adopting the act of approval to the treaty, the legislative organs determine the scope of the binding legal obligations deriving from the treaty and assume political responsibility vis-à-vis the citizens (cf. BVerfGE 104, 151 <209>; 118, 244 <260>; 121, 135 <157>). In this regard, the legal and political responsibility incumbent upon Parliament is not limited to the one-time act of granting approval; rather, Parliament remains responsible also with regard to the treaty's further execution (cf. BVerfG 104, 33

151 <209>).

c) At the same time, the responsibility for taking political action on the basis of the treaty and the treaty's specific implementation, i.e. the specific fulfilment and development of the agenda laid down in the treaty, rests with the Federal Government. Parliamentary approval of an international treaty confers upon the Federal Government the authority to further develop the treaty's agenda in accordance with international law; moreover, the act of approval to the treaty contains the order to give effect at the domestic level to decisions adopted under international law on the basis of the treaty (*innerstaatlicher Anwendungsbefehl*) (cf. BVerfGE 104, 151 <209>; 118, 244 <259>). At the domestic level, it is primarily incumbent upon the Federal Government to adapt a system of collective mutual security to the changing circumstances of global politics and to new security threats resulting therefrom (cf. BVerfGE 121, 135 <158>). In foreign policy matters, the Basic Law grants the Federal Government wide latitude for autonomous decision-making in the exercise of its functions. To this extent, the role of both Parliament as the legislature and courts as the judicial authority is restricted so as to afford Germany the necessary leeway in foreign and security policy matters; otherwise, the division of state powers would not be appropriate to the respective state functions (cf. BVerfGE 68, 1 <87 and 88>; 90, 286 <363 and 364>; 104, 151 <207>; 118, 244 <259>). 34

Political action on the basis of an international treaty and the treaty's specific implementation in practice do not generally require active participation on the part of the German *Bundestag*, provided that the action in question neither involves treaty amendments that would trigger anew the requirement of parliamentary approval under Art. 59(2) first sentence GG, nor further develops the system established by the treaty beyond the treaty's integration agenda, as this would again require parliamentary participation (cf. BVerfGE 104, 151 <199 and 200, 209 and 210>; 118, 244 >259 *et seq.*>; 121, 135 <158>). Where processes that further develop the treaty system remain within the ambit of the treaty agenda, they do not trigger the *Bundestag*'s right to participate pursuant to Art. 59(2) first sentence GG (cf. BVerfGE 68, 1 <84 *et seq.*>; 90, 286 <359 *et seq.*>; 104, 151 <206 *et seq.*>; 121, 135 <158>). 35

d) Where the Federal Government participates in further developing a system of mutual collective security, it violates the German *Bundestag*'s right to participate in foreign policy matters, as derived from Art. 24(2) in conjunction with Art. 59(2) first sentence GG, if the measure in question exceeds the authorisation conferred by the act of approval and thus constitutes an *ultra vires* measure; in this event, the *Bundestag* can no longer take responsibility for the contracting parties' application of the treaty in practice (cf. BVerfGE 104, 151 <209 and 210>; 118, 244 <260>; 121, 135 <158>). Material deviations from the treaty's basis or essential contents (*Identität*) are no longer covered by the original act of approval (cf. BVerfGE 58, 1 <37>; 68, 1 <102>; 77, 170 <231>; 89, 155 <188>; 104, 151 <195>; 118, 244 <260>; 121, 135 <158>). Thus, by bringing *Organstreit* proceedings on the grounds of a material deviation from or change to the original treaty, the *Bundestag* asserts its right to partici- 36

pate in decision-making concerning the rights and obligations of the Federation under international law (cf. BVerfGE 118, 244 <260>).

Nevertheless, not every breach of individual treaty provisions necessarily means that the Federal Government has acted outside the scope of authorisation conferred by the act of approval to the treaty. Rather, the Federal Constitutional Court can only issue the declaration, sought by the *Bundestag* as applicant, that the challenged acts violated the Constitution if it can be established that the Federal Government exceeded its wide latitude by acting outside the scope of authorisation determined by the original act of approval to the treaty; this is the case if the consensus-based further development of a system of mutual collective security violates material structural decisions of the treaty framework and thus falls outside the ambit of the political agenda set out therein (cf. BVerfGE 104, 151 <210>; 118, 244 <260 and 261>; 121, 135 <158>). The Federal Constitutional Court will limit its review to this standard when called upon to decide whether specific measures taken by the Federal Government at the level of international law are still covered by the act of approval to the treaty in line with the relevant constitutional requirements (cf. BVerfGE 58, 1 <36 and 37>; 68, 1 <102 and 103>, 90, 286 <346 *et seq.*, 351 *et seq.*>; 104, 151 <196>; 118, 244 <261>). 37

e) The *Bundestag* may furthermore have a relevant interest in bringing *Organstreit* proceedings seeking a declaration that the further development of a treaty which forms the basis for a system of mutual collective security within the meaning of Art. 24(2) GG exceeds the limits that the domestic legislative bodies themselves must not exceed in adopting an act of approval to an international treaty (cf. BVerfGE 118, 244 <261>). In Art. 24(2) GG, the Basic Law authorises the Federation to join a system of mutual collective security aimed at “maintaining peace”, while barring the Federal Republic of Germany from participating in any system of military security not serving this objective (cf. BVerfGE 118, 244 <261>). Constitutional law thus subjects Germany’s membership and continuous engagement in such a system to the reservation that the system serve the maintenance of peace. The Constitution also prohibits the transformation of a system that initially satisfied the requirements deriving from Art. 24(2) GG into a system that no longer serves the maintenance of peace, let alone a system actually preparing for wars of aggression. Such a development can no longer be regarded as covered by the act of approval adopted on the basis of Art. 24(2) in conjunction with Art. 59(2) GG (cf. BVerfGE 104, 151 <212 and 213>; 118, 244 <261>). It follows that a treaty basis serving the objective to maintain peace is an indispensable element of any system of mutual collective security in this sense. The commitment to the maintenance of peace as the purpose pursued by a system of mutual collective security is not only a prerequisite for Germany’s initial accession to the system but also for its continued membership. If the system’s general stance were no longer informed by the aim to maintain peace within the meaning of Art. 24(2) GG, the constitutional authorisation to participate would be exceeded. 38

f) Lastly, the German *Bundestag* is not without means to protect itself against changes to the treaty basis undertaken with the participation of the Federal Government even where such action remains within the limits of the treaty agenda. In the parliamentary system of government under the Basic Law, the *Bundestag* disposes of sufficient instruments to exercise political oversight of the Federal Government, including with regard to the further development of a system of mutual collective security (cf. BVerfGE 68, 1 <89>; 90, 286 <364 and 365>; 104, 151 <208>; 121, 135 <158 and 159>). 39

2. In its main submission, the applicant asserts a violation of the *Bundestag*'s legislative rights under Art. 24(2) in conjunction with Art. 59(2) first sentence GG by arguing that the challenged deployment of armed forces does not fit the elements of Art. 24(2) GG; however, based on the case-law set out above, the asserted violation can be ruled out from the outset. 40

a) The applicant's main argument is that Art. 24(2) in conjunction with Art. 59(2) first sentence GG was violated given that the deployment challenged in the present proceedings was not based on a recognised system of mutual collective security and given that the *Bundestag* would have had to approve the establishment of such a system. Essentially, the applicant thereby asserts that a system as set out in Art. 24(2) GG is required but does not exist in respect of the challenged deployment of armed forces. 41

The applicant's submission is not sufficient for asserting a violation of the *Bundestag*'s rights in the present *Organstreit* proceedings because the applicant hereby attempts to establish that the rights of the *Bundestag* as a constitutional organ are affected solely by referring to the *Bundestag*'s status as a legislature (in treaty matters), regardless of whether a treaty was actually concluded or executed by the Federal Government. However, this status on its own does not confer on the *Bundestag* a right within the meaning of § 64(1) BVerfGG given that such a right would otherwise make it possible to use *Organstreit* proceedings to subject executive action to an abstract review of constitutionality (cf. BVerfGE 68, 1 <73>; 126, 55 <73 and 74>). 42

To the extent that the applicant asserts a violation of the *Bundestag*'s rights under Art. 59(2) first sentence in conjunction with Art. 24(2) GG relating to its status as a constitutional organ on the grounds that there is an act of legal significance which lacks the statutory authorisation required by constitutional law (cf. BVerfGE 104, 151 <194>; 118, 244 <258>), it disregards that such a violation of rights could only be found if the Federal Government had concluded a (new) treaty within the meaning of Art. 59(2) GG or if it had at least exceeded the limits of an act of approval to a treaty within the meaning of Art. 59(2) GG relating to an existing system of mutual collective security pursuant to Art. 24(2) GG. The applicant asserts neither of these scenarios in its main submission. 43

b) The applicant sets out the need for a broader design of *Organstreit* proceedings in cases where the review sought by the applicant concerns the deployment of armed 44

forces on the grounds that adherence to the applicable constitutional requirements would otherwise be the sole and unchallengeable responsibility of the executive. However, this submission, too, is not capable of establishing the applicant's standing to assert a violation of rights in this matter. Firstly, it is not the executive, but rather the German *Bundestag* as the organ representing the people that is entrusted with deciding on deployments abroad, given the constitutional requirement of parliamentary approval of these matters (cf. BVerfGE 90, 286 <381 *et seq*.>; 121, 135 <153 and 154> with further references; 140, 160 <187 *et seq*. para. 66 *et seq*.>). Secondly, the constitutional significance of a measure by itself does not justify establishing new types of proceedings or extending existing types of proceedings before the Federal Constitutional Court; this would run counter to the principle of enumeration enshrined in the Basic Law (cf. BVerfGE 2, 341 <346>; 21, 52 <53 and 54>). It is for the constitution-amending legislature rather than for the Federal Constitutional Court to create new types of proceedings in order to address conflicting value decisions as asserted by the applicant.

3. By way of subsidiary submission, the applicant asserts that the deployment exceeded the limits of integration set by the Act of Accession of the Federal Republic of Germany to the Charter of the United Nations (Federal Law Gazette, *Bundesgesetzblatt* – BGBl II 1973 p. 430) and that this amounted to a violation of the rights of the *Bundestag* under Art. 24(2) in conjunction with Art. 59(2) first sentence GG; however, this can also be ruled out (see a below). In substance, the declaration sought by the applicant also concerns the Treaty of Lisbon of 13 December 2007 (BGBl 2008 II p. 1038), given that the respondents relied on the mutual defence clause in Art. 42(7) TEU in conjunction with Art. 51 of the UN Charter to justify the deployment challenged in the present *Organstreit* proceedings; the applicant objected to this view on the grounds that it was contrary to constitutional case-law (see b below). 45

a) The applicant contends that legal positions of the *Bundestag* deriving from Art. 24(2) in conjunction with Art. 59(2) first sentence GG were affected in the present case because the challenged deployment of armed forces fundamentally extended or changed the framework of rights and obligations under the United Nations Charter for the future – specifically by applying it to military missions against non-state actors on the territory of a third state even where the conduct of the targeted non-state actor is not attributable to that state. In this regard, the applicant asserts that the limits of the relevant act of approval were exceeded. This asserted violation of rights can be ruled out from the outset. Based on the facts of the case submitted by the applicant, it is not ascertainable that the deployment challenged in the proceedings or the underlying decisions of the respondents contravene the purposes, structure or fundamental principles of the United Nations, let alone its objective of maintaining peace. It is irrelevant in this respect whether the Federal Constitutional Court agrees with the respondents' understanding of international law, upon which the respondents' actions are based (cf. BVerfGE 118, 244 <268>). Rather, the constitutional review is in principle limited to determining whether this understanding exceeds tenable limits. It is 46

the task of the Federal Government to provide a tenable interpretation of its rights and obligations in a system under Art. 24(2) GG and to act within such a system, also in response to new security challenges (cf. BVerfGE 121, 135 <158>); this is generally within the scope of the authorisation granted by the act of approval to a treaty.

aa) The Security Council's call to action against ISIL and the corresponding measures taken by UN Member States serve the purpose expressly stated in Art. 1(1) of the UN Charter, namely "to maintain international peace and security, and to that end [...] take effective collective measures for the prevention and removal of threats to the peace". UN Secretary General Ban Ki-moon similarly referred to the measures taken by the coalition against ISIL in the context of this purpose (UN Secretary General, Remarks at the Climate Summit press conference [including comments on Syria] of 23 September 2014, www.un.org). In contrast to past proceedings before the Court that concerned the strategic reorientation of NATO (BVerfGE 104, 151; 118, 244), the present proceedings do not concern a comparable transformation of the United Nations in its capacity as a system of mutual collective security; rather, the challenged measures merely serve to realise the declared purposes of the United Nations Charter, i.e. to maintain peace and security, by responding to the new phenomenon of an international terrorist group operating from third state territory. 47

bb) The deployment challenged in the present proceedings does not affect the structure of the United Nations. Even when invoked in response to attacks from non-state actors operating from the territory of a third country, it is clear that the right of self-defence stands back behind the Security Council's powers under Chapter VII of the United Nations Charter. Pursuant to Art. 51 first sentence, second half-sentence of the UN Charter, the right of self-defence cannot be invoked if the Security Council has taken measures necessary to maintain international peace and security. In line with the fundamental structures of the United Nations as a peacekeeping system, the primary responsibility for maintaining global peace and international security still rests with the Security Council; it notably retains the power to take measures necessary for restoring peace at any time and can thereby put an end to the individual or collective exercise of the right of self-defence by other actors. 48

cc) In its subsidiary submission, the applicant essentially asserts that the limits of the Act of Accession to the United Nations Charter were exceeded given that the respondents provided an untenably broad interpretation of Art. 51 of the UN Charter. Against this assertion, it could already be argued that Security Council Resolution 2249 (2015) provides a sufficient basis for the deployment of *Bundeswehr* soldiers so that it was not even necessary to invoke Art. 51 of the UN Charter. In any case, it cannot be ascertained that the respondents' interpretation of Art. 51 of the UN Charter was indeed untenably broad; it must be kept in mind that there has never been complete consensus regarding the normative contents of Art. 51 of the UN Charter nor regarding a possible corresponding norm of customary international law; to the contrary, since its adoption, this provision has been the subject of various disputes as to its correct interpretation, including whether it can be invoked against attacks by 49

non-state actors [...].

In principle, the wording of Art. 51 of the UN Charter does not preclude an interpretation that recognises non-state actors as possible aggressors for the purposes of this provision. Nor does its wording give rise to an absolute prohibition on self-defence measures adversely affecting third parties, for instance states from whose territory non-state actors operate. This broad interpretation of Art. 51 of the UN Charter, as challenged by the applicant, does also not contravene the object and purpose of the provision. Ultimately, the provision aims to ensure that UN Member States, though bound to fully respect the prohibition on the use of force, remain capable of defending themselves against attacks, regardless of the aggressor. The finding that, in the past, such threats primarily originated from international conflicts between state actors merely describes historic realities; it does not, however, necessarily require that the right of self-defence be limited to attacks by state actors. In light of the object and purpose of the right of self-defence, which is to ensure that UN Member States can take effective defence measures until the Security Council takes action, it is at least tenable to consider attacks by non-state actors as permissible grounds for exercising this right. 50

This interpretation does not run counter to the decisions of the International Court of Justice (hereinafter: ICJ). Art. 59 of the ICJ Statute provides that decisions of the ICJ only have binding force between the parties. Nevertheless, the opinions and decisions rendered by the ICJ provide factual guidance beyond the particular case decided, serve as a subsidiary means for the determination of rules of law pursuant to Art. 38(1) lit. d of the ICJ Statute, and must be taken into account by German courts based on the Constitution's openness to international law (cf. Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 9, 174 <192 and 193>; cf. on the principle of openness to international law BVerfGE 148, 296 <350 *et seq*. para. 126 *et seq*.>). It is true that the ICJ generally tends to interpret Art. 51 of the UN Charter restrictively in its decisions, finding self-defence measures against a state in response to acts of aggression by non-state actors to be permissible only if these acts are attributable to the affected state (cf. ICJ, Judgment of 27 June 1986 – Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America –, ICJ Reports 1986, p. 14 <64 and 65 para. 115; 103 and 104 para. 195>; Opinion of 9 July 2004 – Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory –, ICJ Reports 2004, p. 136 <194 para. 139>). However, in more recent decisions the ICJ has avoided any clear determination on this issue (cf. ICJ, Judgment of 19 December 2005 – Armed Activities on the Territory of Congo, Democratic Republic of the Congo v. Uganda –, ICJ Reports 2005, p. 168 <223 para. 147>). Moreover, the ICJ has yet to decide whether the restrictive interpretation of Art. 51 of the UN Charter also applies in the event that the right of self-defence is not directly invoked against the affected state, but against non-state actors operating from that state's territory (Justices Kooijmans and Simma have argued, in their separate opinions, that invoking the right 51

of self-defence was permissible in this scenario, cf. ICJ, Judgment of 19 December 2005 – Armed Activities on the Territory of Congo, Democratic Republic of the Congo v. Uganda -, Separate Opinion of Justice Simma, ICJ Reports 2005, p. 334 <337 and 338 paras. 12 and 13>, and Separate Opinion of Justice Kooijmans, ICJ Reports 2005, p. 306 <313 and 314, para. 25 *et seq*.>; see also ICJ, Opinion of 9 July 2004 – Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory –, Declaration of Justice Buergenthal, ICJ Reports 2004, p. 240 <242 and 243 para. 6>). In this scenario, the rights of the territorial state are only affected in the sense that the territory on which the acts of self-defence are carried out is recognised as part of its state territory under international law – despite the fact that the state exercises, at best, limited control over it.

b) Based on the facts submitted by the applicant, a violation of the *Bundestag*'s rights under Art. 24(2) in conjunction with Art. 59(2) first sentence GG in relation to the European Union is also not ascertainable. Contrary to the applicant's view, the case-law of the Federal Constitutional Court is not to be interpreted to the effect that the European Union can generally not be considered as a system within the meaning of Art. 24(2) GG. A system of mutual collective security within the meaning of Art. 24(2) GG requires a normative framework reflecting the objective of peacekeeping as well as the establishment of proper organisational structures; moreover, it must entail mutual binding commitments under international law, obliging its members to maintain peace and guaranteeing their security (cf. BVerfGE 90, 286 <347 *et seq*.> with further references). Based on these criteria, it is at least tenable to regard the European Union as a system of mutual collective security [...]. In the Federal Constitutional Court's Judgment on the Treaty of Lisbon, the Second Senate held – in response to the matters raised in those proceedings – that if the EU were to attain an even deeper level of integration, for instance, by introducing a system of common defence as envisaged in the second subparagraph of Art. 42(2) TEU, any deployment of German armed forces would still be subject to parliamentary approval; the Court also considered this requirement of a parliamentary decision to be beyond the reach of European integration (cf. BVerfGE 123, 267 <361; 425 and 426>). However, these considerations do not rule out that the European Union as such could be regarded as a system of mutual collective security. The legal bases invoked by the respondents to justify the challenged deployment included Art. 24(2) GG in conjunction with Art. 42(7) TEU. In principle, constitutional law does not preclude the deployment of armed forces based on the mutual defence clause enshrined in Art. 42(7) TEU. 52

Art. 42(7) TEU refers to the right of self-defence enshrined in Art. 51 of the UN Charter, both explicitly by citing that provision and implicitly by mirroring its wording. In this respect, the above considerations relating to Art. 51 of the UN Charter (see paras. 49-51 above) apply accordingly, establishing that it is tenable to assert that the challenged deployment fits the elements of Art. 42(7) TEU. 53

When the Act of Approval to the Treaty on European Union was adopted in 2007, the international community was already acutely aware of the potential threats posed 54

by non-state actors owing to the 9/11 attacks. It was thus also foreseeable at the time that a terrorist attack might one day be held to fit the conditions for invoking the mutual defence clause of Art. 42(7) TEU, as in the present case. With regard to the legal consequences, it cannot be ascertained that the deployment challenged in these proceedings exceeded the limits of what was to be expected in a mutual defence scenario under Art. 42(7) TEU, given that the EU Member States are under the obligation, in the wording of Art. 42(7) TEU, to provide aid and assistance to the attacked Member State by all the means in their power.

C.

[…] 55

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