DEVELOPMENTS

Parliamentary Consent to the Use of German Armed Forces Abroad: The 2008 Decision of the Federal Constitutional Court in the *AWACS/Turkey Case*

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A. Introduction

Since the German Federal Constitutional Court's 1994 decision on the deployment of AWACS surveillance aircraft over the Adriatic Sea[1], it is one of the cornerstones of German constitutional law that Parliament (the *Bundestag*) needs to consent to the external use of German Armed Forces in situations where imminent involvement in hostilities is likely.[2] However, the *Bundestag* may neither determine "the modalities, the dimension and the duration of the operations, nor the necessary coordination within and with the organs of international organizations."[3] As the requirement of constitutive parliamentary approval is not directly set out in the German Basic Law, the Federal Constitutional Court (in the following: FCC or the Court) derived it from the general constitutional framework.[4] The concept of "parliamentary army", designed by the Court, attempts to strike a balance between executive effectiveness and parliamentary participation.

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[1] *AWACS/Somalia Case*, BVerfGE 90, 286; other aspects of the case pertained to the deployment of German soldiers to Somalia.

[2] For a general assessment of the legal, historical and political issues see Georg Nolte, *Germany: ensuring political legitimacy for the use of military forces by requiring constitutional accountability*, in DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 231 (Charlotte Ku & Harold K. Jacobson eds., 2003).

[3] BVerfGE 90, 286, 389.

[4] BVerfGE 90, 286, 383-384; on this decision see Georg Nolte, *Bundeswehreinsätze in kollektiven Sicherheitssystemen – Zum Urteil des Bundesverfassungsgerichts vom 12. Juli 1994*, 54 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 652, 673 (1994).

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The increasing involvement of Germany in international military structures is a challenge to parliamentary control: almost by definition, operations by NATO's envisaged (rapid) Response Force will be difficult to subject to previous parliamentary scrutiny.[5] While the executive has broad leeway in implementing foreign policy goals including military cooperation[6], the FCC has made it clear that the legislature's approval of German membership in a system of mutual self-defence such as NATO is not a generalized substitute for parliamentary authorization of the concrete deployment of the armed forces.[7] However, the Court's broad interpretation of the executive's treaty-making powers in other cases is, according to some, bound to erode parliamentary scrutiny over large areas of German foreign policy.[8] In 2001, the Constitutional Court decided that the 1999 NATO Strategic Concept, which allowed for so-called "non-Article 5 missions" beyond the North Atlantic area, did not require a renewal of parliamentary approval of the NATO Treaty.[9] The stance taken by the Court in a 2007 decision concerning the use of German Tornado aircraft in Afghanistan underlined the Court's unwillingness to require a greater role of Parliament in the processes of treaty-interpretation and development.[10]

At the moment, a number of states are considering to extend parliamentary rights in the control of the armed forces. This is the case with the United Kingdom where Prime Minister Gordon Brown has ventilated the idea to leave it to the House of Commons to decide when the British armed forces should be used in an armed

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[5] ROMAN SCHMIDT-RADEFELDT, PARLAMENTARISCHE KONTROLLE DER INTERNATIONALEN STREITKRÄFTEINTEGRATION (2005); Roman Schmidt-Radefeldt, *Parliamentary Accountability and Military Forces in NATO: The Case of Germany*, in THE 'DOUBLE DEMOCRATIC DEFICIT': PARLIAMENTARY ACCOUNTABILITY AND THE USE OF FORCE UNDER INTERNATIONAL AUSPICES 147 (Hans Born & Heiner Hänggi eds., 2004).

[6] BVerfGE 68, 1, 89, 106; BVerfGE 104, 151, 207; see Andreas L. Paulus, *Quo vadis Democratic Control? The Afghanistan Decision of the Bundestag and the Decision of the Federal Constitutional Court in the NATO Strategic Concept Case*, 3 GERMAN LAW JOURNAL (GLJ), No. 1 (2002); Markus Rau, *NATO's New Strategic Concept and the German Federal Government's Authority in the Sphere of Foreign Affairs: The Decision of the German Constitutional Court of 22 November 2001*, 44 GERMAN YEARBOOK OF INTERNATIONAL LAW 544 (2001).

[7] BVerfGE 90, 286, 387.

[8] See, *e.g.*, Andreas Fischer-Lescano, *Bundeswehr als globaler Sicherheitsdienstleister? Grenzen der Zustimmungsfähigkeit von bewaffneten Streitkräfteeinsätzen,* in FRIEDEN IN FREIHEIT - PEACE IN LIBERTY - PAIX EN LIBERTÉ. FESTSCHRIFT FÜR MICHAEL BOTHE ZUM 70. GEBURTSTAG 81 (Andreas Fischer-Lescano et al. eds., 2008).

[9] *New Strategic Concept Case* – BVerfGE 104, 151.

[10] *Tornado Case* – BVerfGE 118, 244.

conflict.[11] France has amended its Constitution with a reformulated Article 35. According to this provision, the National Assembly is now to vote on the use of the armed forces, but only once four months have passed since the start of the respective mission. In general, an international trend towards more parliamentary scrutiny over the use of the armed forces has been noticed by some in recent years.[12] Against the background of these developments, a new judgment of the German Federal Constitutional Court may be of interest for an international audience. Its decision of 7 May 2008 on the deployment of NATO AWACS aircraft to Turkey in March 2003 deals with important questions of parliamentary consent to the use of armed forces.[13] In the constitutional dispute (*Organstreit*), which was brought by the Parliamentary Group of the Liberal Democrats on behalf of the *Bundestag* against the Federal Government, it was at issue at which threshold the requirement of constitutive parliamentary consent would be triggered. Hence, the questions of whether, when and why Parliament should consent to the deployment of Federal Armed Forces abroad were examined in greater detail than before: Whether in the concrete case it was necessary for Parliament to give its assent to the deployment of the aircraft, when such a vote should take place, and finally why the rights of Parliament would need to be preserved in a time which has been described by some as one of "de-parliamentarization".[14]

In this article, we would like to present the essentials of the 2008 AWACS decision (section B). Following that, we will analyze its relationship with some aspects of the 2007 Tornado case (section C) and the general impact of the decision on the flexibility of the executive in the conduct of the Federal Republic's external relations (section D). In section E, we will provide our conclusions.

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[11] See, Gordon Brown, Constitutional Reform Statement of 3 July 2007, available at: http://www.number10.gov.uk/Page12274, last accessed, 20 November 2008.

[12] See, in this sense Lori F. Damrosch, *The interface of national constitutional systems with international law and institutions on using military forces: changing trends in executive and legislative powers*, *in* DEMOCRATIC ACCOUNTABILITY, *supra*, note 2, 39, 59.

[13] *AWACS/Turkey Case* – BVerfG, 2 BvE 1/03, Decision of 7 May 2008; DEUTSCHES VERWALTUNGSBLATT 770 (2008); 35 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 312 (2008); NEUE JURISTISCHE WOCHENSCHRIFT 2018 (2008); not yet reported in the official collection.

[14] See, *e.g.*, Matthias Herdegen, *Informalisierung und Entparlamentarisierung politischer Entscheidungen als Gefährdungen der Verfassung?*, 62 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER 7 (2003); see also Armin von Bogdandy, *Parlamentarismus in Europa – eine Verfalls- oder Erfolgsgeschichte?*, 130 ARCHIV DES ÖFFENTLICHEN RECHTS 445 (2005); see also the speech of Judge Papier which triggered this discussion: Hans-Jürgen Papier, *Reform an Haupt und Gliedern. Eine Rede gegen die Selbstentmachtung des Parlaments*, FRANKFURTER ALLGEMEINE ZEITUNG 8 (31 January 2003).

B. The 2008 AWACS Decision: The Essentials

I. Factual Background

Prior to the attacks of the US-led coalition of States against Iraq in March 2003, Turkey requested consultations of NATO and its Member States under Article 4 of the NATO Treaty[15] which provides that the Member States will consult each other when the political independence or the security of one of them is threatened. On the basis of these consultations, the Defence Planning Committee of NATO launched "Operation Display Deterrence" on 19 February 2003. Pursuant to this scheme, four AWACS airplanes that allow for the surveillance of large areas of airspace were deployed to Turkey as of 26 February 2003. They were operated by military personnel of various NATO Member States. Soldiers of the German Armed Forces accounted for about a third of the crews of the AWACS airplanes. The operation lasted until 30 April 2003.

Under the NATO Rules of Engagement Applicable in Times of Peace and a subsequent modification for the specific operation on 20 March 2003[16], the AWACS airplanes were not entitled to surveillance measures affecting Iraqi territory or to support military units engaged in the armed conflict in Iraq. Instead, they were meant to allow for the protection of Turkish territory and airspace against impending attacks from Iraq by providing the relevant information to the allies involved in the armed conflict. In a statement to the German Parliament, the German Federal Government emphasized that no support for operations in or against Iraq would be furnished.[17] Before and after the outbreak of hostilities in Iraq on 20 March 2003, no violations of the Turkish airspace by Iraqi airplanes occurred.

The deployment of the German military personnel was not voted on by the *Bundestag*. While both the applicant, the Parliamentary Group of the Liberal Democratic Party (*Freie Demokratische Partei*) and the respondent in this constitutional dispute (*Organstreitverfahren*), the Federal Government, agreed in general that it is for the *Bundestag* to decide on the use of German Armed Forces in "armed operations", the contours of the latter concept gave rise to differing interpretations. While the Liberal Democrats favoured a wider understanding, the

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[15] The North Atlantic Treaty, 4 April 1949, UNTS, Vol. 34, 243; UNTS, Vol. 126, 350; UNTS, Vol. 243, 308 (ratified through to present by 26 Member States).

[16] *Statement of NATO Secretary General, Lord Robertson* (20 March 2003), available at: http://www.globalsecurity.org/military/library/news/2003/03/mil-030320-usia01.htm, last accessed, 7 August 2008.

[17] *Statement of the German Chancellor Mr. Gerhard Schröder*, in: Protocol 15/34, Preliminary version, 2727.

Government pledged that "Operation Display Deterrence" was a mere routine operation which would not require the consent of the *Bundestag*. In the meantime, the Court declared a motion for a temporary injunction of the applicant as unfounded on 25 March 2003.[18] This finding was based on a balancing between "the consequences that would arise in the event that the temporary injunction is not issued but the underlying measure were later on declared unconstitutional" with "the negative effects that would arise if the measure does not enter into force but proves constitutional in the main action."[19] In the face of the "critical situation in foreign policy" which represented the situation in Turkey at the time, the Court did find that ordering a parliamentary vote in the proceedings concerning the motion for a temporary injunction could "constitute a considerable encroachment upon the core area of the federal government's responsibility in the fields of foreign and security policy."[20]

The case had to be resolved by means of constitutional interpretation as the "Parliamentary Participation Act" of 2005[21] had not yet entered into force.[22] At any rate, this statute, regulating the procedures under which the *Bundestag* exercises its right of control over the external use of the Federal Armed Forces, does not satisfactorily clarify the concept of armed operations.[23] Consequently, the Court has made it clear that the relevant constitutional principles will continue to determine whether the use of the Federal Armed Forces is subject to a parliamentary vote.

II. The Main Findings of the Court

At the outset, the Court noted that under the Basic Law, decisions on war and peace are entrusted to the *Bundestag*, including the use of armed forces within systems of collective security in the meaning of Article 24(2) of the Basic Law.[24] A

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[18] BVerfGE 108, 34; an English translation of this decision is available at: http://www.bverfg.de/en/decisions/qs20030325_2bvq001803en.html, last accessed, 15 September 2008.

[19] *Id.*, para. 28.

[20] *Id.*, para. 39.

[21] *Gesetz über die parlamentarische Beteiligung bei der Entscheidung bewaffneter Streitkräfte im Ausland (Parlamentsbeteiligungsgesetz – ParlBG)*, 1 BUNDESGESETZBLATT (FEDERAL LAW GAZETTE) 775 (2005).

[22] For an overview on the *Parliamentary Participation Act, 2005* see Dieter Wiefelspütz, *Das Parlamentsbeteiligungsgesetz vom 18.3.2005*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 496 (2005).

[23] See, *supra*, note 21 at art. 2: "If the circumstances indicate that the armed forces may be engaged in armed operations, the military deployment has to be approved by the legislature."

[24] *AWACS/Turkey Case*, *supra*, note 13, para. 57.

parliamentary vote on the deployment of German soldiers would be required when the concrete circumstances of the case warrant the assumption that a participation of German soldiers in armed operations is to be expected.

Some uses of armed forces clearly fall out of the category of "armed operations": relief missions do not need to be approved by Parliament provided that the soldiers carrying out these missions are not involved in any kind of armed undertakings.[25] A mere possibility that armed operations will occur is also not sufficient to trigger the requirement of parliamentary consent. Rather, two further conditions have to be met. First, there is the requirement of sufficiently concrete factual indications that a mission will eventually entail the use of military force. In this regard, its purpose, the concrete political and military circumstances as well as the rules of engagement would need to be taken into account. Hence, a concrete situation of military danger (*konkrete militärische Gefahrenlage*) would need to exist.[26] Second, for this "qualified expectation" to materialize, it is required that there is a certain imminence of the use of military force. Such imminence can either be given due to the time factor alone – a military conflict being on the horizon – or to a more general assessment of the rules of engagement that can indicate the probability of the use of military force.[27] An indication that the German soldiers may become engaged in hostilities can, *inter alia*, be found in the level of armament of the troops and the authorization to make use of them. An authorization to self-defence (in the sense of self-defence of the individual unit of the Federal Armed Forces) and the deployment of armed forces which is of a non-military character does not require parliamentary approval. Yet, a mission has a military character if it has been launched to defend a given territory against foreign attacks. Under these circumstances the military operation has to be voted on by Parliament even if the soldiers are not armed and do not constitute part of an integrated military unit. The decision whether or not an involvement in armed operations has taken place, is subject to full judicial review by the FCC.[28]

In the concrete case, to which the Court then did turn, it was to be expected with the requisite degree of concreteness that an engagement of German soldiers in armed operations would take place. According to the Court, the measures in which "Operation Display Deterrence" engaged did not amount to mere deterrence as was the case, in comparison, with routine flights of AWACS aircraft along the

[25] *Id.*, paras. 59.

[26] *Id.*, para. 78.

[27] *Id.*, para. 79.

[28] *Id.*, para. 82.

border of NATO States during the Cold War. Rather, the 2003 mission concerned concrete measures to prevent a possible attack against Turkey. The possibility of such attacks was given as the Iraqi President Saddam Hussein had previously indicated his willingness to attack all US allies in the region. That the deployment of the AWACS aircraft did not amount to mere routine business would also be evidenced by the consultations of the NATO Member States under Article 4 of the Washington Treaty which were so far without precedence in the practice of the organization.[29] Accordingly, the Court considered the danger of an involvement of German soldiers in hostilities to be imminent.[30]

III. Summary of the Court's Argument

In sum, the Court laid great emphasis on the protection of the rights of the *Bundestag*. It stressed that the requirement of parliamentary consent is compensatory for the losses of influence the *Bundestag* suffers with respect to the increasing role the executive plays in processes of evolutionary development of the NATO collective security system.[31] It also emphasized that, given a certain probability that German soldiers will become involved in armed operations, parliamentary consent needs to be given fairly early, as otherwise the right of Parliament to give its avail to the operation in context would become meaningless. At the same time, the Court underlined that it was also in the interests of the executive to have Parliament decide on the deployment in question at an early stage – otherwise the government would face the risk of Parliament recalling the soldiers in the midst of a military operation; a decision which would have far reaching foreign policy implications.

C. The 2007 *Tornado Case*, the Requirement of Peacefulness and the Support for Turkish Defence against Iraq

A relevant point of comparison for the decision is the *Tornado Case* the FCC decided a year earlier.[32] Some political commentators have noticed an interesting contrast between the two cases: whereas the executive would enjoy considerable freedom to

[29] *Id.*, para. 85.

[30] *Id.*, para. 90.

[31] *Id.*, para. 70; see also BVerfGE 104, 151, 208. This emphasis of the compensatory effect was a departure from the Court's earlier reasoning in BVerfGE 89, 155: see Volker Röben, *Der Einsatz der Streitkräfte nach dem Grundgesetz*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 585, 594 (2003).

[32] BVerfGE 118, 244.

independently contribute to changes in the conceptual outlook of a whole international organization according to the Tornado judgment, the AWACS decision requires parliamentary approval to deployments of relatively small contingents of German soldiers.[33] In the *Tornado Case*, the FCC was asked to determine whether a renewal of parliamentary consent to the NATO Treaty was called for in the face of alleged subsequent changes to NATO's overall mission and policy outlook. The applicants – the Parliamentary Group of the Left Party – also raised possible international law violations to which the Federal Republic was allegedly contributing through the close cooperation between ISAF and OEF in Afghanistan.

The Court affirmed that, in general, it is for the executive to contribute to processes by which an international treaty undergoes evolutionary development.[34] Without wanting to enter into the details of the case here, suffice it to say that the FCC highlighted two limits the executive would need to respect while participating in collective security efforts such as NATO. First, the structural limits of the original treaty shall not be trespassed by subsequent changes to the modes of cooperation within the respective organization; were this to occur, a renewal of parliamentary consent through the adoption of a new federal law according to Article 59(2) of the Basic Law would be called for.[35] Second, by virtue of Article 24(2) of the Basic Law, only participation in systems of mutual collective security is authorized which respect the requirement of peacefulness. It is for the Federal Government to participate in transformation and evolutionary development of such systems. However, the executive's margin of discretion in foreign affairs ends where the use of armed force is at stake.[36] While the FCC refused to control compliance with this requirement on a case-by-case basis, it nevertheless affirmed that the use of force in violation of international law in individual cases could be an indication that NATO is departing from the requirement of peacefulness. The FCC did, however, not find any such violations in the case at hand.[37]

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[33] See, *e.g.*, Heribert Prantl, *Das Karlsruher Trostpflaster*, SÜDDEUTSCHE ZEITUNG 4 (8 May 2008) , available at: http://www.sueddeutsche.de/deutschland/artikel/921/173406/, last accessed, 20 November 2008.

[34] One can think here of subsequent practice and subsequent agreement as modes of treaty interpretation, see the Vienna Convention on the Law of Treaties, 23 May 1969, Art. 31(3)(a), UNTS, Vol. 1155, 331 (ratified by 108 Member States).

[35] BVerfGE 118, 244, 270.

[36] *AWACS/Turkey Case*, *supra*, note 13, paras. 63-70.

[37] The Court dealt with these issues only on a very limited basis. It examined whether the six Tornado surveillance jets that Germany deployed to Afghanistan would pass on information to OEF. On the basis of evidence supplied by the Federal Armed Forces, it came to the conclusion that this was generally not the case. Furthermore, it noted the recurrent call of the UN Security Council on ISAF and OEF to cooperate.

This second criterion could have been of potential relevance for the 2008 AWACS decision. The issue could have been raised as to whether the *Bundestag* could have validly consented to the mission. This is not the right place to re-enter the discussions on the legality of the 2003 Iraq war.[38] Nonetheless, it may be asked whether "Operation Display Deterrence" conformed to the spirit and purpose of Article 4 of the NATO Treaty. Although the Iraqi Government did indeed threaten to attack US allies in the region before the outbreak of hostilities on 20 March 2003, this threat needs to be seen in the context that the very same US allies allowed the use of their territory (Kuwait) or airspace (Turkey) by the United States in order to attack Iraq.[39] The NATO Rules of Engagement for "Operation Display Deterrence" affirmed that the AWACS aircraft had no right to engage in surveillance of Iraqi airspace and that they were not meant to be used in the context of the attacks on Iraqi territory. The same was made clear by various statements of the governments of Belgium, France and Germany.[40] However, especially from an Iraqi perspective, it appears questionable whether a clear distinction could be drawn between aircraft which only engage in the protection of Turkey and those which engage in attacks on Iraqi territory. After all, the latter aircraft would need to enter Iraqi airspace from the very same territory the AWACS aircrafts were meant to protect. Another important factor which should also be taken into account is the alleged presence of Turkish soldiers in Northern Iraq at the time.[41]

While we do not argue that the deployment of the AWACS aircraft to Turkey did amount to a threat of force in the meaning of Article 2(4) of the UN Charter[42], attacks by the US on Iraq emanating from Turkish airspace made it at least debatable whether Iraq could have responded in self-defence against Turkey once

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[38] For a concise overview see Andreas L. Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 691 (2004).

[39] On the Turkish position see the coverage in the *New York Times*, Section A, Column 1, 11 (5 March 2003), Section A, Column 1, 15 (19 March 2003); for a brief legal assessment, see OLIVIER CORTEN, LE DROIT CONTRE LA GUERRE 280 (2008).

[40] CORTEN, *supra* note 39, 287.

[41] The factual assessment is difficult in this regard: see *AWACS/Turkey Case*, *supra*, note 13, para. 17, on the one hand, and Andreas Fischer-Lescano, *Konstitutiver Parlamentsvorbehalt: Wann ist ein AWACS-Einsatz ein "Einsatz bewaffneter Streitkräfte"?*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1474, 1476 (2003) on the other. See also, *War in the Gulf: Turkish Troops Enter Northern Iraq,* THE GUARDIAN 2 (22 March 2003), available at: http://www.guardian.co.uk/world/2003/mar/22/iraq.turkey, last accessed, 20 November 2008.

[42] On the prohibition of threat of force see the study of NIKOLAS STÜRCHLER, THE THREAT OF FORCE IN INTERNATIONAL LAW (2007).

these attacks had taken place.[43] From this perspective, it is doubtful whether the operation could have been authorized under the NATO Treaty.[44] At least, there is a shadow of doubt over the legality of "Operation Display Deterrence".[45] Due to the factual circumstances, the AWACS case could have given rise to more serious interrogations on the conformity of the NATO mission with the constitutional requirement of peacefulness than the German participation in the ISAF mission in Afghanistan. While the latter is based on repeated Security Council authorizations[46] and the consent of the Afghan Government, a closer look at the 2003 deployment of the AWACS aircraft reveals a rather troublesome relation between "Operation Display Deterrence" and the 2003 attacks on Iraq. This is also implicitly shown by the reasoning of the Court: only the proximity of the build-up to the attacks on Iraq and the subsequent start of these attacks did create the requisite imminence of the use of force. It is thus difficult to detach the deployment of the AWACS aircraft from the main theatre of conflict in Iraq.

D. Potential Impacts on German Foreign Policy: Is the executive's flexibility diminished?

With respect to the potential impact of the case on German foreign policy, two particular aspects should be highlighted which are however interrelated. The first one pertains to the question how the relationship between the executive and the legislature is affected by this decision.

The judgment of 7 May 2008 broadened parliamentary options to control military operations abroad. According to this new line of jurisprudence, one can now say that in cases of doubt, Parliament should vote on the deployment of the armed forces.[47] There will not be a great many deployments of German soldiers which will

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[43] The complexity of this question is evidenced by the response of Professor Bothe to it who wrote that it would be difficult to give a negative answer, yet he would be inclined to do so. He then mentioned the example of the Tanker War in the Iran-Iraq Conflict of 1980-1988 in which the US never accepted a right of Iran to exercise self-defence against Saudi-Arabia and Kuwait which supported Iraq in the conflict. Bothe, who was a counsel for Iran in the *Oil Platforms Case*, mentions that Iran ultimately did not rely on such a right in the ICJ proceedings; see Michael Bothe, *Der Irak-Krieg und das völkerrechtliche Gewaltverbot*, 41 ARCHIV DES VÖLKERRECHTS 255, 268 (2003).

[44] The primacy of the UN Charter is not only guaranteed by its Article 103 but also emphasized by Article 1 of the NATO Treaty.

[45] See, Andreas Fischer-Lescano, *supra*, note 41, 1475-1476.

[46] See, SC Res. 1368 of 20 December 2001 and subsequent resolutions.

[47] Christian M. Burkiczak, *AWACS II – In dubio pro Bundestag*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 752, 754 (2008); see also, Volker Epping, *Die Evakuierung Deutscher Staatsbürger im*

not have the requisite features to trigger the requirement of parliamentary consent. It is, however, rather questionable to what extent the judges clarified the meaning of the concept of "armed operations" and determined the threshold at which the constitutional requirement of parliamentary approval shall be triggered. The notion of a "qualified expectation" appears to be rather vague.[48] This uncertainty is likely to increase the number of operations to which Parliament will need to give its approval. Otherwise, the Federal Government will always face the risk of an unfavourable judgment from the FCC, a political risk that not many governments will want to take.

The Court also confirms the right of Parliament to consent to the deployments of German Armed Forces that acquired a military character in the course of their deployment. It is, however, unclear at what point the respective deployment acquires such a military character. Parliament is not in a position to analyse the circumstances on the ground. It will have to rely on the information submitted by the executive without being able to verify the quality of this information. Accordingly, the executive may still have a certain leeway with respect to the question when it wishes to ask for parliamentary consent in such cases. Parliament cannot be politically responsible for the changing operational modalities of military missions that it is not able to control. It should be noted in this context that the Court did not question the ruling of the *Tornado Case* that the use of armed forces which is part of a previous military operation already agreed to by Parliament does not require fresh parliamentary approval.

The second aspect concerns the question how a "premature" vote of Parliament on the use of the Federal Armed Forces may be perceived abroad – is it likely to be regarded as a modern form of a "declaration of war"? Parliament voting on the deployment of the armed forces could signal a country's willingness to opt for a military solution instead of diplomatic avenues. From this perspective, one may argue that the rather strict jurisprudence of the FCC could critically reduce the room of manoeuvre for the government and could curtail its ability to positively influence the settlement of international crises which may sometimes require a swift response including the build-up of a military scenario. However, this concern appears unwarranted. The German practice of deployment of its soldiers does not usually occur in a setting which would easily lend itself to the interpretation that a parliamentary vote equals a "declaration of war". Moreover, the international partners of the Federal Republic are aware of the existing constitutional restraints

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Ausland als neues Kapitel der Bundeswehrgeschichte ohne rechtliche Grundlage? Der Tirana-Einsatz der Bundeswehr auf dem rechtlichen Prüfstand, 124 ARCHIV DES ÖFFENTLICHEN RECHTS 423, 455 (1999).

[48] See, Florian Schröder, *Anmerkung*, DEUTSCHES VERWALTUNGSBLATT 778, 779 (2008).

on the external use of the Federal Armed Forces. Additionally, the German Armed Forces are mainly used within the context of UN Security Council mandated missions.

For the case of Security Council authorizations, a parliamentary vote was already mandatory under the previous jurisprudence of the Court.[49] Before the 2008 AWACS decision, it was thus easier for the executive to deploy the armed forces in cases which did not involve such authorization. As a UN Security Council authorization clears almost all concerns on the lawfulness of the use of the armed forces – at least in terms of the *jus ad bellum* – deployments without such authorization should, in comparison, meet higher standards of parliamentary scrutiny. It can thus only be welcomed that the Court has made it clear that a strict scrutiny standard must apply which requires a fairly early vote from the *Bundestag*.

All this may sound as if the executive has been heavily burdened by this decision. This is, however, not necessarily the case. First, an early vote on the deployment of German soldiers increases the political responsibility of Parliament and makes it less likely that a recall of the German Armed Forces will occur. Parliament will presumably be reluctant to pay such a high price anyway unless there are compelling reasons to end the military operation against the will of the government. The strict standards for early parliamentary participation the Court has now established are susceptible to reduce this danger even further.

Second, the decision preserves enough leeway for the executive in cases of urgency. The role of Parliament remains rather limited in situations where a rapid military response to an existing external threat is required. The decision of the Court does not explain how to understand immediacy[50] and leaves it to the executive branch to choose a reasonable interpretation. It can be assumed that the government will decide on the issues of self-defence if need be and will have to justify its decision in Parliament *ex post facto* according to section 5, para. 3 of the "Parliamentary Participation Act." A prior parliamentary approval in the situation of extreme urgency would not always be feasible and the executive should retain its flexibility to use armed forces in order to prevent immediate security threats to the Federal Republic. The Court has also indicated that situations of urgency are not limited to individual self-defence but can encompass measures taken within mutual systems

[49] BVerfGE 89, 286, 387.

[50] On the concept of immediacy see Markus Rau, *Auslandseinsatz der Bundeswehr: Was bringt das Parlamentsbeteiligungsgesetz?*, 44 ARCHIV DES VÖLKERRECHTS 93, 105 (2006); Hans-Hugo Klein, *Rechtsfragen des Parlamentsvorbehalts für Einsätze der Bundeswehr*, in RECHT IM PLURALISMUS – FS FÜR WALTER SCHMITT GLAESER ZUM 70. GEBURTSTAG 262 (Hans-Dieter Horn, ed., 2003).

of collective defence.[51] Hence, the new jurisprudence of the Court is not necessarily a barrier towards effective participation in NATO's Response Force. Germany's ability to participate quickly in NATO operations would only be constrained if the requirement of parliamentary approval will be extended to various operational details of a military mission.

Third, the Federal Government may even welcome having such a powerful bargaining tool at hand in some instances. International interlocutors are well aware of the restrictions German constitutional law puts upon the government in matters which involve the use of the German Armed Forces. In the face of ever increasing calls for stronger German participation in Afghanistan or post-war Iraq, the German Federal Government may not be too outraged at the prospect of having to go to Parliament before being able to promise the deployment of German soldiers to these international hotspots.

E. Concluding Observations

In sum, the decision of the Constitutional Court should be seen as a welcome step towards more effective democratic control over the government's use of armed forces. The Court can, of course, be criticized for the time lapse before its decision intervened. It was only five years after the 2003 Iraq war that the Court finally rendered its decision. This cannot be explained alone by the Court's workload. The 2007 *Tornado Case* shows that the Court can decide complex foreign relations cases in a timely manner. Although there can be no universal answer to the question as to whether the courts should remain silent in times of crisis[52], it can be positively mentioned that the FCC finally raised its voice in a controversial matter which is likely to be of high relevance for the future practice of the branches of government. It is for the judiciary to induce the branches of government to cooperate if they fail to do so according to the principle of a functional separation of powers.[53] On the face of it, the Court's reasoning may appear to be contradictory to it denying the motion for a temporary injunction in 2003. However, this denial was based on the reasoning that the Court needs to be careful in interfering with complicated foreign

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[51] *AWACS/Turkey Case*, *supra*, note 13, para. 58.

[52] See, for a variation of this theme, HCJ 769/02, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, Judgment of 11 December 2006, para. 61 (Opinion by President (Emeritus) A. Barak).

[53] See also, Andreas L. Paulus & Mindia Vashakmadze, *Parliamentary Control over the Use of Armed Forces Against Terrorism – In Defence of the Separation of Powers*, 38 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 113, 159 (2007).

policy issues. Now that the Court has spent more attention to the criteria under which Parliament needs to consent to the use of the German Armed Forces, it can be expected that the Court would, were it seized with a similar matter again, interfere with the political process at a potentially earlier stage.

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