Quo vadis Democratic Control? The Afghanistan Decision of the *Bundestag* and the Decision of the Federal Constitutional Court in the NATO Strategic Concept Case

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[1] The parliamentary control of executive power in foreign affairs in Germany suffered two severe blows last November; one may wonder whether it will ever recover. First, on 16 November 2001, Chancellor Gerhard Schröder transformed one of the most important foreign policy debates in the *Bundestag* (Parliament) into a more general policy debate by combining the decision regarding the provision of German troops to the American-led, so-called "War on Terrorism" in Afghanistan with a vote of confidence with respect to his government, pursuant to Article 68 of the *Grundgesetz* (GG – Basic Law). With the fate of the Red/Green coalition government hinging on the vote, and the very existence of the Green Party at stake, it was not surprising that Foreign Minister Joschka Fischer (Greens), in his speech on the issue, took a tone more suited for a party convention than for a foreign and security policy debate. (1) And although deploring that posture, (2) most of the opposition speakers followed suit. It was a sad day for German parliamentary democracy. The failure of the *Bundestag* to live up to its responsibilities is even more apparent in the declarations that accompanied the vote, (3) which show that a considerable number of members of the *Bundestag* voted for the *government* in spite of their continuing opposition to the *provision of Bundeswehr (German Army) forces*, the very conjunction rendered impossible by the use of Article 68. The use of this Article both quashed the existing strong parliamentary backing for the provision of German troops to the anti-terrorism effort in Afghanistan and elsewhere, and denied the *Bundestag*, and the German public, a serious debate about the first German military operation outside Europe since World War II, excepting the humanitarian contributions to UN missions in Cambodia, East Timor and Somalia.

[2] Second, less than a week later, on 22 November 2001, the Bundesverfassungsgericht (Federal Constitutional Court) decided that the 1999 NATO Strategic Concept, which prepared the way for the deployment of Alliance troops beyond the North Atlantic Area to counter terrorism and other world-wide threats to the Alliance and its members, did not require the assent of the German parliament. It is not so much the result itself that is troubling. After all, as the Federal Constitutional Court points out, (4) the Strategic Concept did not intend to amend the North Atlantic Treaty. It was the Court's reasoning that was most troubling; the Court combined an (unnecessarily) broad reading of the executive power in foreign affairs with a narrow construction of parliamentary participation in treaty-making, an interpretation which can only be compared to the decision of the United States Supreme Court in *United States v. Curtiss-Wright Export Corporation*, in which the Supreme Court affirmed almost unlimited presidential prerogatives in foreign affairs. (5) Seen in the light of the changes brought about by contemporary developments in international law and by the need for the regulation of globalization, the decision to uphold the conventional wisdom on sweeping executive power in foreign policy appears even more remarkable. If this line of reasoning will be confirmed on other matters, too, the *Bundestag* will be even more muted as is the case already in discharging its function to control the exercise of the foreign affairs power by the executive branch.

[3] This article will concentrate on the latter issue. First, it will set out the reasoning of the Constitutional Court in the NATO Strategic Concept case (Section I). The article will then put the decision in the context of both the Basic Law and earlier decisions of the Constitutional Court (Section II), in particular the *Somalia/AWACS* decision, which addressed the use of the *Bundeswehr* (German Army) beyond the NATO area in the framework of collective security organizations. (6) An analysis of the *Somalia/AWACS* decision shows that the Court has construed both the foreign affairs powers of the executive branch and the legal impact of the Strategic Concept too broadly. In the Conclusion, the article argues that, in the age of globalized terrorism, the loss of direct democratic control of foreign policy seems unavoidable. The article cautions, however, that alternative means of control must be found if Western parliamentary democracies do not wish to return to an international politics dominated by government bureaucracies at the expense of parliaments.

I.

[4] On 24 April 1999, the Heads of the NATO Member Governments, participating in the meeting of the North Atlantic Council on the occasion of the NATO Alliance's 50th Anniversary in Washington D.C., approved, *inter alia*, a new Strategic Concept. (7) The Concept was intended to "guide the Alliance as it pursues" its agenda, expressing "NATO's enduring purpose and nature and its fundamental security tasks," as well as to "identif[y] the central features of the new security environment," and to "provide[] guidelines for the further adaptation of its military forces" (Paragraph 5 of the Concept). The concept also takes note of the developments at the end of the Cold War, involving both new opportunities and "complex new risks to Euro-Atlantic peace and stability, including oppression, ethnic

conflict, economic distress, the collapse of political order, and the proliferation of weapons of mass destruction" (Paragraph 3 of the Concept). It defines the "fundamental security tasks" relating to security, consultation, deterrence and defence, crisis management, and partnership (Paragraph 10 of the Concept). The Concept reaffirms the commitment of NATO towards the Charter of the United Nations (Paragraph 10 of the Concept) as well as the "primary responsibility" of the UN Security Council "for the maintenance of international peace and security" (Paragraph 15 of the Concept; Article 24 of the UN Charter).

[5] While this wording sounds rather harmless, the concept must be seen in the context of NATO's Kosovo intervention which was under way at the time. (8) Thus, the Concept document goes on to reaffirm NATO's "commitment, exemplified in the Balkans, to conflict prevention and crisis management, including through peace support operations" (Paragraph 12 of the Concept). Even more importantly, the Concept also describes risks requiring responses well beyond the traditional NATO task of taking action against an armed attack "on the territory of any of the Parties in Europe or North America … in the North Atlantic area north of the Tropic of Cancer" (Art. 6 North Atlantic Treaty (9)). As Paragraph 24 of the Concept explains: "Alliance security must also take account of the global context. Alliance security interests can be affected by other risks of a wider nature, including acts of terrorism, sabotage and organised crime, and by the disruption of the flow of vital resources." (Paragraph 24 of the Concept). After September 11, this passage has attained a rather prophetic character.

[6] Concerning actions – let alone concrete obligations – to counter new security threats, the Concept remained rather cryptic. Paragraph 24 refers to consultations according to Article 4 of the North Atlantic Treaty. Paragraph 29 is more concrete: "Military capabilities effective under the full range of foreseeable circumstances are also the basis of the Alliance's ability to contribute to conflict prevention and crisis management through non-Article 5 crisis response operations" which are to "be handled through a common set of Alliance structures and procedures." Similarly, Paragraph 31 of the Concept provides: "In pursuit of its policy of preserving peace, preventing war, and enhancing security and stability and as set out in the fundamental security tasks, NATO will seek, in cooperation with other organisations, to prevent conflict, or, should a crisis arise, to contribute to its effective management, consistent with international law, including through the possibility of conducting non-Article 5 crisis response operations." However, "participation in any such operation or mission will remain subject to decisions of member states in accordance with national constitutions." Thus, the Concept does not create international obligations for Member States to provide support for such operations or to supply troops. Nevertheless, as the aftermath of September 11 has shown, political pressure can run high. In addition, Part IV of the Concept contains detailed "Guidelines for the Alliance's Forces" concerning "the necessary military capabilities to accomplish the full range of NATO's missions" (Paragraph 41 of the Concept), including "effective non-Article 5 crisis response operations" (Paragraph 47 of the Concept).

[7] The Concept, however, did not provide for any concrete changes of the NATO treaty. Nevertheless, the parliamentary group of the Party of Democratic Socialism (PDS, the reformed Socialist Unity Party in the GDR), which had obtained 5,1 % of the votes nation-wide in the last federal elections, considered the rights of the *Bundestag* violated because the government had not submitted the concept for the approval of the legislative bodies as required by Article 59.2 of the Basic Law. Article 59.2, Sentence 1 reads: "*Verträge, welche die politischen Beziehungen des Bundes regeln oder sich auf Gegenstände der Bundesgesetzgebung beziehen, bedürfen der Zustimmung oder der Mitwirkung der jeweils für die Bundesgesetzgebung zuständigen Körperschaften in der Form eines Bundesgesetzes.*" (10) In other words, if the federal government does not submit a treaty to the *Bundestag* contrary to Article 59.2, it violates the German constitution and infringes upon the rights of Parliament, if and to the extent this treaty either regulates matters of a "highly political" character or falls under the legislative competence of the two parliamentary chambers, the *Bundestag* and *Bundesrat*, pursuant to the rules applicable to domestic legislation. According to established jurisprudence, which was once more confirmed in the judgment at hand (Paragraph 112), a parliamentary group possesses the capacity to sue before the Constitutional Court alleging the violation of rights of the *Bundestag* (Article 93 GG).

[8] In the opinion of the PDS group, the federal government had, indeed, violated Article 59 of the Basic Law by not submitting the NATO concept to the *Bundestag* for its consent (Paragraph 64). The PDS argued that, even if the Concept was not a formal treaty amendment, it was of comparable gravity and effect. The Concept, the PDS argued, allegedly contained new international obligations binding upon Germany under international law. Article 59 of the Basic Law, read in conjunction with the principle of democracy (Article 20.2 of the Basic Law), required not only parliamentary consent for the conclusion of formal treaties under international law and amendments thereto, but also for questions dealing with the exercise of fundamental rights and freedoms. International agreements can now also concern individuals, just as much as domestic legislation. Taking up an expression coined by Georg Ress, a "treaty on wheels," (11) which would extend the competencies of international organizations beyond the original covenant, should be subject to the renewed consent of the *Bundestag*.

[9] According to the PDS group, the Concept went well beyond the North Atlantic treaty to which the *Bundestag* consented in 1955. By virtue of Articles 5 and 6 of the treaty, NATO would be limited to the collective exercise of its

right to self-defence pursuant to Article 51 of the UN Charter. Thus, the Concept could not be considered a mere "authentic interpretation" but amounted to a full-fledged amendment to the treaty (Paragraph 74). For threats other than armed attacks, the treaty only provided for consultations. In addition, the historical context of the adoption of the Concept demonstrated that NATO was ready to take military measures that were not covered by the UN Charter, in particular military actions not mandated by the Security Council. In the opinion of the PDS, even if this was not clearly expressed in the text of the document, the frequent references to the Balkan activities proved that the concept was preparing NATO to frequently violate the international prohibition of the use of force (Paragraph 78). In addition, the continuation of the nuclear option would be contrary to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons.

[10] The German government and the majority of the *Bundestag* were of the opinion that the complaint was both inadmissible and unfounded. It was inadmissible because the Strategic Concept did nothing but repeat its predecessor, which the Court had already upheld in its decision on the German participation in the UN Somalia operation and the WEU action on the Balkans. (13) In addition, the Constitutional Court had already rejected a complaint by the PDS group against the NATO attacks against Yugoslavia for lack of standing. (14) It was unfounded because Article 59 was to be construed narrowly and only applied to formal treaties and amendments. Further, in defence of the constitutional challenge, the government argued that the Concept was not a treaty under international law and did not contain any legal obligations for NATO member States. In addition, the treaty clearly fell under the provisions of the North Atlantic Treaty, which adopted a broad view of the notion of "security". NATO practice, the government argued, pointed in the same direction.

[11] The Court held that the complaint was admissible but unfounded. If the North Atlantic Treaty had been amended without the consent of the *Bundestag*, the rights of the *Bundestag* under Articles 59 and 24 of the Basic Law (15) would have been infringed. The authorization provided by Article 24.2 of the Constitution permitting Germany's participation in NATO "as a system of collective security" (16) did not cover substantive amendments or changes of the "program of integration" of NATO. The Court held that the earlier decisions had dealt with different complaints of the same applicant or similar complaints of other applicants (Paragraphs 121, *et seq.*).

[12] However, the claims of unconstitutionality were unfounded. The Court concluded that the Concept was not a treaty in the international legal sense and that Articles 54 and 24 of the Basic Law did not require the consent of the *Bundestag* to the Strategic Concept as long as NATO practice and interpretation did not abandon the program of integration embodied in the NATO treaty. To arrive at the latter conclusion, the Court proceeded in three steps: First, it denied that the Concept amounted to a treaty amendment in the sense of Article 59. Second, in the absence of such an amendment, the consent of the *Bundestag* was not required to further develop NATO as a system of collective security. Third, the government had remained well within the program of integration of NATO and had not violated the purpose of the treaty to contribute to keep the peace.

[13] The Concept was not a treaty, the Court held, because the respective will of the parties to conclude a document binding under international law was lacking. Neither could the content of the Concept be regarded as an objective amendment of the treaty (Paragraph 133/3). The Court pointed to the generality and the high degree of flexibility of the Concept's wording and its openness to a wide variety of interpretations (Paragraph 137-38/8-9). Neither did the Concept expressly or implicitly contradict the treaty but rather confirmed its continuous validity (Paragraph 139-40/10-11). Even if the possibility of so-called crisis response operations constituted an important expansion of NATO powers beyond collective defence, as provided by Article 5 (Paragraph 141/12), it could not be considered an objective amendment of the North Atlantic Treaty (Paragraph 145/16). The treaty only required consultation and did not contain any undertaking to contribute to any collective mission. In addition, the Court pointed to the passage requiring the adoption of measures adopted according to Member State constitutions. And indeed, the Concept uses a formula that usually implies the primacy of constitutional provisions over treaty obligations. Article 24 of the Basic Law would allow for flexibility for the developments of systems of collective security (Paragraph 147/18). In this passage of the judgment, the considerable importance of the historical classification of NATO as a system of collective security in the sense of Article 24 of the Basic Law again becomes visible. (17)

[14] In a core passage of the decision, the Constitutional Court explained that Article 59.2 of the Basic Law is "not accessible to an expansive interpretation" ("*keiner erweiternden Auslegung zugänglic*h", Paragraph 148/19). Short of a treaty amendment, the development of a system of mutual collective security under Article 24 of the Basic Law did not require parliamentary consent. The Court avoids the answer to the question whether the Strategic Concept had created new legal obligation "below the level of the conclusion of the treaty" ("*unterhalb des Vertragsschlusses*", *ibid.*) but refers to the possibilities of a concretisation or authentic interpretation of the North Atlantic Treaty by the Concept or the development of further treaty practice, without determining whether and how that practice could have developed into customary law. In any case, the court held that the government was not obliged by the terms of Article 59.2 of the Basic Law to submit these acts to the *Bundestag* for approval. The Court emphasized the primary responsibility of the government for foreign policy decisions. Functionally, neither Courts nor the legislature were well

equipped to substitute for government action (Paragraphs 149/20). Concerning parliamentary control, the court refers the *Bundestag* to the more general tools of government control, such as the duty of the government to respond to parliamentary questions, but also the right to finally approve the conclusion of or accession to treaty amendments and, of course, the right to approve the deployment of troops pursuant to the previous *AWACS/Somalia* decision of 1994 (18) (Paragraph 150/21).

[15] In Section II the Court seems to retreat from some of its holdings from Section I. Here, it argued against organizational acts *ultra vires* (Paragraph 152/23) and even seems to admit that foreign policy is an area of co-operation between executive and parliament which would point into the direction of a "shared" responsibility of the executive and legislative branches for foreign policy. The judgment as a whole shows that this amounts to mere lip service to the parliamentary role in international affairs. In the same vein, the Court comes to the conclusion that the Concept had not strayed from the "integration programme" embodied in the consent of parliament to NATO accession. In this reasoning, the Court applied the jurisprudence it developed for the European Union in its well known *Maastricht* decision on the ratification of the Treaty on European Union. (19) If the government had acted *ultra vires* by transgressing the authority granted to it by Article 24.2 of the Basic Law in combination with the "consent act" of parliament, the rights of the *Bundestag* would have been violated.

[16] Thus, compared to European integration, the decision seems to extend to the executive branch a somewhat broader authority. Whereas, in the *Maastricht* decision, the Court left open the question when such a transgression had taken place and even warned the European Court of Justice that the Constitutional Court would not recognize EU acts that go beyond EU competencies as interpreted by the Court, (20) the Court here expressly stated that not every violation of the North Atlantic Treaty amounts to a transgression of the authority granted by Article 24.2 of the Basic Law (Paragraph 154/25). Such a statement would only be warranted "if the further development of the NATO Treaty that took place by consensus infringes essential structural decisions of the system of treaties", that is the violation of the basic structures of the NATO treaty ("*wenn die konsensuale Fortentwicklung des NATO-Vertrags gegen wesentliche Strukturentscheidungen des Vertragswerkes verstößt*", Paragraph 154/25).

[17] It is no surprise, then, that the Court arrives at the conclusion that the legally non-binding Concept did not infringe on the rights of parliament under Articles 24.2 and 59.2 of the Basic Law. Drawing on the Preamble and Articles 1, 2, 10 and 12, the Court interpreted the NATO treaty as "obviously orientated towards comprehensive preservation of peace on a regional level in the European and North American area" (Paragraph 156/27). According to the Court, NATO aims at the "comprehensive preservation of peace on a regional level in the European and North American area" (Paragraph 157/28). And further: "If the manifestation of possible threats to peace changes, the Treaty leaves sufficient room for developments that adapt to these changes … inasfar and inasmuch as there is compliance with the basic mission of preserving peace in the region." (*ibid.*). In addition, the Court emphasizes the Concept's emphasis on cooperation with the UN and other bodies. In regard to the broadness of this construction, it is little surprising that the Strategic Concept is held to fit into the treaty framework.

[18] In the final part of the judgment, the Court dealt with the relationship between the Alliance and the goal of peace. According to Article 24.2 of the Basic Law, a system of mutual collective security must aim at the preservation of peace. The Court granted the *Bundestag* "the right to challenge on infringement of this … purpose as a transgression of the integration programme for which the Bundestag is competent." (Paragraph 161/30). And further: "In the framework of collective security systems, the Federal Republic of Germany complies with the prohibition on the threat or use of force under customary international law …, the domestic application of which is prescribed by Article 25 of the Basic Law" (Paragraph 162/31). Referring to the passages of the NATO concept which emphasize the consistency of NATO action with public international law, the Court apparently sees no reason to doubt the fulfilment of this requirement in practice, in spite of the Applicant's claims to the contrary. (21) The Court stresses that the Concept is in line with Article 24.2 of the Basic Law by maintaining the object of the Treaty as to the maintenance of peace (Paragraph 156/27, 159/30). In that respect, the Court emphasized the references of both the treaty and the Concept to other arrangements, in particular to the primary responsibility of the UN Security Council, and to international law (*see also*, Paragraph 162/33).

[19] Only in this context did the Court refer to the Kosovo intervention, however, without taking a stand on its legality. The Court rather is content with the observation that "when justifying the air strikes, the North Atlantic Council had already relied to a considerable extent on Security Council resolutions." (Paragraph 157/28). Thus, the Court seems little troubled by the fact that the intervention was not authorized by the UN Security Council as required by Article 2.4 and Chapter VII of the UN Charter. Apparently, in the broad interpretation adopted by the Court, peace and international law are the only limitations Article 24.2 of the Basic Law sets to treaties of collective security. As emphasized by the last paragraph of the judgment (Paragraph 164/35), this leaves enough space for both the Concept in its present forms, as to its further development.

II.

[20] On the face of it, the decision contains no great surprises. As already observed, the Concept is a political document that does not transform existing international legal rights or obligations of Member States. No Member is legally bound to participate in NATO operations, even less so in those of crisis prevention, by providing troops or other forms of support. The question of the legality *vel non* of the consent of the German Chancellor to the Concept without parliamentary approval rather relates to the possibility of NATO military operations undertaken without the invitation of a government in the territory concerned or an authorization by the UN Security Council as provided for by Article 39, *et seq*. of the UN Charter. But, as the Applicant itself had to admit, the Concept does not explicitly endorse such operations and emphasizes its fidelity to existing international law. The clarity contained in other documents, such as a non-binding resolution of the North Atlantic Parliamentary Assembly, is missing, (22) not the least, if press reports are true, for the insistence of the German and French governments.

[21] Having declined the invitation of the very same Applicant to pronounce itself on the Kosovo intervention just one day after it had begun, (23) it was highly unlikely that the Court would take the matter up now, in spite of an opening towards similar claims in the future contained in the phrase that the *Bundestag* would have the capacity to apply to the Court if NATO ceased to aspire to the preservation of peace (Paragraph 161/30). Instead, the Court broadly interpreted both the NATO treaty as well as the authority of the German government to share full responsibility in the organization without a substantial involvement of the *Bundestag*.

[22] Only in the context of earlier decisions of the Court concerning the foreign affairs power, the treaty power and the integration power as contained in Articles 32, 24, and 59 of the Basic Law, the importance of the decision becomes visible. The decision does not constitute a fresh start but rather symbolizes the end of a period in which the Court – or at least parts of it – seemed ready to involve the German parliament more deeply in the conduct of foreign policy. In a time of crisis, in which the threats contemplated by the Concept seem to have materialized much earlier than imagined, the Court returns to conventional wisdom: foreign affairs are the business of the government and parliament will only have a say in those limited cases expressly provided for by the constitution. In this connection, it is of some interest that observers of the oral hearings in the case, which took place well before September 11, had gained the impression that the Court would rather continue the progressive line of the more recent judgements. (24) Indeed, it must have been a nightmare for the government to be put into a straightjacket of constitutional requirements and limits that would hamper German influence in international organizations and international politics at large.

[23] The decision may well be the last word of the Court on a question that has been in dispute since the birth of the Federal Republic. The Basic Law does not contain any general provision on the competence of the various Constitutional bodies for foreign policy. Article 32 of the Basic Law merely deals with the (exclusive) federal competence for foreign affairs and the participation of the *Länder* (Federal States) in its exercise. Articles 24 and 59 of the Basic Law require parliamentary consent in narrowly defined cases only: For the transfer of powers to international organizations with direct effect in the internal legal order (Article 24.1), for the integration into a system of mutual collective security (Article 24.2), and for "political" treaties and treaties relating to legislative competencies (Article 59.2). Thus, the question arises whether the foreign power is an executive power or whether it is a "mixed power" jointly exercised by the executive and parliament. (25) In the first case – let us call it the "executive interpretation" – Article 59 of the Basic Law would probably not allow for an extensive reading and would be strictly limited to formal treaties and their amendments. In the second – the "democratic" interpretation – Articles 59 and 24 of the Basic Law should be re-interpreted in a way that would allow the *Bundestag* to exercise its influence also in those cases which do not neatly fit into either of the categories of Articles 24 and 59, for instance interpretative understandings, unilateral acts, treaty practice, soft law instruments, etc. Of course, none of those theories decides the concrete issues at hand, and one may come to different result by applying any of those positions. Thus, a careful and extensive reading of Article 59.2 of the Basic Law could still be in line with the traditional interpretation. Nevertheless, whereas the traditional interpretation is very reluctant to expand the scope of Articles 24 and 59, the mixed interpretation almost requires such a reading of the provisions. If foreign affairs fall both under the executive and the legislative powers, the parliamentary competencies must be interpreted in a way that would render the legislative share of that power practical and effective. But if parliamentary participation in foreign policy decisions merely constitutes the exception to the rule of an exclusive executive prerogative, a narrow interpretation of legislative competencies is in order.

[24] Until the beginning of the 1990s, the Constitutional Court consistently applied the executive interpretation, arguing both with the wording of the Basic Law and with functional arguments. In the words of the so-called *Pershing Missile* decision of 1984:

This strict demarcation of powers … is an element in the separation of powers … . The organizational and functional distinction and separation of powers … also aims at securing the taking of governmental decisions as rightly as possible, that is, by those agencies in the best position to do so according to their organization, composition, function

and mode of procedure, and acts towards moderation of State power as a whole. … An extension of the objective area of application of Art. 59(2), first sentence, Basic Law to non-treaty acts of the Federal Government vis-à-vis foreign subjects of international law … would … constitute interference with central spheres of operation of the executive … . … The allocation in principle of acts in international transactions to the area of competence of the executive is based on the assumption that institutionally and in the long term it would be typically only the government that will adequately dispose of the personal, material and organizational capacities to respond speedily and properly to changing external positions and thus carry out in the best possible way the national task of responsibly handling foreign affairs. (26)

In that decision, the Constitutional Court also emphasized the democratic legitimacy of the executive in its own right.

[25] The *AWACS/Somalia* decision on the deployment of German troops abroad much more clearly exposed the divisions in the doctrine on the matter, resulting in a 4:4 split of the judges. Formally, a unanimous Court agreed on the basics: Article 59 of the Basic Law was again considered an exception to the general rule of exclusive executive competence in foreign affairs. (27) However, when applying those principles in practice, the Constitutional Court showed much more openness towards the democratic interpretation. Although the four judges which were instrumental for the rejection of the application at the origin of the dispute (28) repeated the conventional wisdom that no consent of parliament was required for acts not creating new international rights or obligations for Germany, (29) they supported the more extensive – indeed, quite innovative – reading of the Basic Law according to which the *Bundeswehr* (German Army) was a "parliamentary army" requiring *Bundestag* consent for military operations abroad. (30)

[26] For the four dissenting judges (that is, the four judges having voted against this part of the decision), the Basic Law required more: that is, it demanded the consent of the *Bundestag* not only to formal treaty amendments, but also to more subtle methods of substantive treaty amendments, *e.g.* in the form of "authentic interpretation". (31) A "treaty on wheels" (32) should not be allowed to run beyond the limits drawn by the formal treaty – and that is, not leave the program of integration as consented to by the Bundestag. To them, such a result was reached when a "*Prozeß der Fortbildung des vertraglichen Aufgabenkonzepts*" ("process of expansion of the conceptual scope of the treaty" (33)) was set into motion. (34) It was not sufficient, they argued, that new competencies fell under the general purpose of the treaty. (35)

[27] Although two of the judges sharing this opinion, President (then Judge) Limbach and Judge Sommer, also participated in the present case, they did not add a separate or dissenting opinion. As there is no note indicating unanimity, it may be guessed that there were dissenting voices on the bench. Many had expected the Court to develop even further the concept of the "progressive" Judges of the 1994 decision. The reasons why even the Judges holding that view in 1994 did not dare to come up with a separate or dissenting vote now is strong evidence of the fact that the original zeal for the "parliamentarization of will formation in foreign policy", which even the conservative Judges of the Court had displayed in 1984, (37) seems to have waned.

[28] In the present decision, the Constitutional Court does not take a clear stand on the issue but the context and thrust of the argument clearly retrenches to the traditional interpretation of foreign affairs as an executive competence. In Section C. II of the decision, the Court unequivocally states that "[t]he concretisation of the Treaty, as well as the concretisation of the integration programme …, is the task of the Federal Government. With reference to the traditional concept of the state in the sphere of foreign policy, the Basic Law has granted the Government a wide scope for performing its task in a directly responsible manner." (Paragraphs. 149/22). Parliament is more or less reduced to the traditional means of political control, and also the judiciary possesses only a restricted competence in the field. The Court is explicitly anxious not to "reduce the Federal Government's capability of acting in the field of foreign and security policy in an unjustified manner" (*ibid.*). Strangely enough, the Court does not even refer to the extensive debate, with its dramatic energy in the 1994 decision and beyond, on an extension of Article 59 of the Basic Law to acts not amounting to a formal treaty amendment. (47)

[29] As to treaties on wheels, the Court limits parliament to the political means of control and its capacity to block any troop deployment abroad. Only in case of a transgression of the programme of integration, parliament could go again to the Court (Paragraph 150/22). This is a far cry from the assertiveness of the Court, which it still displayed in its *Maastricht* decision on European integration. (38) The Court in the *Strategic Concept* decision is a court that hesitates to limit the government in foreign and security policy, unlike the Court in the *Maastricht* decision, which asserted its role and that of the legislative branch in European or international policy-making. The Court in *Maastricht* placed in question the validity of EU decisions on German territory which might be found to fail to respect the limits of EU competencies as interpreted by the Constitutional Court. The Court in the *Strategic Concept* decision gives the executive branch a broad margin of both appreciation and further development of international instruments before either *Bundestag* or the Constitutional Court may be involved. Along with the Court's final decision in the Banana case, the judicial restraint of the Second Senate of the Court in its present composition in relation to foreign and

European affairs is striking if compared to the Somalia/Awacs or Maastricht courts. Some passages in the judgment can be understood as an explicit endorsement of a general doctrine of judicial (and parliamentary) restraint in foreign policy (Paragraph 149/20). (40)

[30] In the same vein, the broad interpretation of NATO powers in the judgment (Paragraph. 156/27) is everything but "obvious" or "apparent" as claimed by the Court. By mentioning the UN Charter, the State parties certainly not intended to extend NATO powers to those of the UN. Peaceful settlement of disputes (Art. 1) and the development of peaceful and friendly international relations (Art. 2) hardly constitute tasks to be fulfilled by the use of force beyond self-defence. And the mentioning of the provisions for NATO enlargement (Art. 10) and amendment (Art. 12) do certainly not urge the interpretation that the scope of the treaty may be broadened without formal treaty amendment. The Court seems anxious to preserve the freedom of manoeuvre of both the German executive and the Alliance, especially regarding new security threats such as terrorism: "If the manifestation of possible threats to peace changes, the Treaty leaves sufficient room for developments that adapt to these changes" (Paragraph. 156/27). In the opinion of the Constitutional Court, the NATO treaty does not exclude the extension of the NATO mandate if this furthers the objectives of NATO members and is consistent with international law, in particular with the UN Charter. And, as the executive branch enjoys broad discretion concerning German participation in and consent to such measures, Article 24.2 and Article 59 of the Basic Law are observed.

[31] Oddly enough, the Court includes in its presentation of basic UN Charter law not only Security Council mandate(s) for States or regional organizations and individual or collective self-defence but also "intervention by request" (Paragraph 162/33) without defining that elusive concept any further. (41) The latter proposition seems to open up the possibility of far-reaching German interventions in internal conflicts abroad, a spectre usually abhorred in a Germany which is usually proud of its non-interventionist, multilateralist foreign policy. In addition, as a restatement of international law on the use of force, it is not unproblematic. In its *Nicaragua* judgment, the International Court of Justice seems to generally permit intervention at the request of a government. (42) However, many authorities argue against any intervention in civil wars, be it at the request of the government or the opposition. (43) Even those authors who generally support the concept of "intervention by request" have developed strict limits. Georg Nolte speaks of a grey zone (44) and calls for the recognition of "more complex and refined rules" (45). The reference is also problematic because it is doubtful whether Article 24.2 of the Basic Law may be construed as authorizing German involvement in such interventions. It is thus unfortunate that the Court seems ready to give an almost unconditional green light in an *obiter dictum* without a more profound analysis of the subject.

[32] The Court also declines the invitation by the applicant to more closely analyse the relationship between interventions and peace. It argues that Article 24.2 of the Basic Law requires Germany to enter a collective security system only if it aims at the maintenance of peace. As a matter of course, the Concept aims at the preservation of peace. The legal operationalization of the term "peace" is a questionable enterprise, though. Indeed, the Court does not venture into that area and is content with the fact that NATO has consistently maintained that its foremost aim is indeed the preservation of peace.

[33] In emphasizing the openness of the Concept at the very end of the judgment, the Court seems to indicate that it considers the Concept to be a political rather than a legal document. At the same time, the judgment clearly considers foreign policy mainly the prerogative of the executive branch. Thus, the executive may agree to the extension of the mandate of an international institution to the point where the founding treaty adopted by the *Bundestag* will be broadened beyond recognition. The main reason for this extremely broad construction of Article 24.2 of the Basic Law seems to be the necessity of swift reactions to situations of crisis. It may not be surprising, then, that the judgment was issued in the wake of the terrorist attacks against the United States on 11 September 2001. In times of crisis, it may well be that the executive is, and should be, in charge of foreign policy and international cooperation.

[34] This raises, however, questions concerning the role of the *Bundestag* in foreign policy. The judgment seems to confine the legislative branch to the consent to formal treaties and their explicit and formal amendments, including treaties constitutive of an international organization. The only means of parliamentary control concerning the further development of treaties and the tasks of international organizations, however, seem to be its rights of information or, ultimately, the change of government. (46) In that light, the combination of the decision of participating in the U.S.-led, so-called "War against terrorism" with a vote of confidence for the government was not accidental or unfortunate, but logical and strategic. The only alternative means of parliamentary control, application to the Constitutional Court, will often be too late or will not meet the (narrow) requirements for jurisdiction and standing. Thus, judicial control of the legality of the Kosovo intervention by the Court failed due to lack of standing. (47)

III.

[35] But does this conception conform to the Basic Law or rather to the exigencies of the day? In other words, does

the Basic Law really confine parliament in foreign policy to a largely symbolical role, comparable to the deist conception of a god Who has made the world but no longer plays a decisive role in it? If the Court is right, the *Bundestag* can prevent the executive from becoming a member of an international regime but is largely powerless regarding deviations from the original concept of the treaty, as long as this happens with the consent of the German executive branch. Modern international treaty-law with its soft law practices of amending treaties in the process of application is particularly prone to alterations of treaties without formal amendment. In the formalist interpretation of the Constitutional Court, however, parliament remains powerless as long as it does not overthrow the government. Governments have the means of making their course of action imperative under considerations of international standing and even by the assumptions of new international obligations without a great deal of choice left for Parliament if it does not wish to disregard international commitments.

[36] It is, of course, correct that the executive also enjoys a certain amount of democratic legitimacy. Nevertheless, the globalization of many central domestic policy issues has rendered traditional distinctions between separation of powers in domestic affairs versus executive prerogative in foreign affairs questionable. With the decision under review, the "trend to parliamentarization of will formation in foreign policy" which the Court itself had observed in 1984, (48) seems to be broken. And, at least as far as organizations of collective security are concerned, the Court seems to interpret Article 24.2 of the Basic Law as giving broad authority to those organizations and the executive branch representing Germany therein, not allowing for the involvement of the parliament in the day-to-day decision-making process.

[37] Actually, this may be a good thing. Times of crisis, in which peace and security of citizens are directly threatened, are the hour of the executive, being the only branch of government that possesses the means to counter these threats. However, at a time when globalization more and more requires inter-governmental cooperation at the international level, the question of democratic control is more acute than ever. An increasing involvement of domestic parliaments does not seem an effective means of control and renders international cooperation burdensome and ineffective. An alternative would consist in the strengthening of the involvement of quasi-parliamentary bodies or bodies composed of delegations of national parliaments at the international level. However, the (existing) NATO Parliamentary Assembly (49) is neither part of the constitutional structure of the North Atlantic Treaty nor has it exercised a discernible measure of democratic control over NATO affairs. Here, as elsewhere, the concept of multi-level democracy is both theoretically attractive and – at present – practically utopian. Before such structures are in place, a stronger involvement of national parliaments is the only viable alternative if the so-called foreign affairs, which have more and more domestic consequences, shall not entirely remain in the hands of bureaucrats and governments.

[38] Even if it probably reached the correct result in the case at hand, the Court's *Strategic Concept* decision, alas, does not display the necessary awareness of these problems. The judgment fails to strike an appropriate balance between effectiveness of international cooperation in light of new security threats, on the one hand, and the preservation of our cherished practice of divided government and checks and balances, on the other. It is to be hoped that the Constitutional Court will find the opportunity to take the matter up at a later stage. The Court has left a small window open in that the *Bundestag* and parliamentary groups represented therein may continue to challenge, before the Court, governmental action in foreign affairs. In the meantime, the *Bundestag* itself must learn to develop a more self-conscious approach to foreign policy by not allowing the executive to avoid effective parliamentary control by transforming debates on vital security issues into general policy debates on a vote of confidence.

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(1) See Bundesminister J. Fischer in: Bundestag, Official Record, 202nd meeting, Nov. 16, 2001, available at http://www.bundestag.de (last visited Dec. 27, 2001). .
(2) See G. Westerwelle, *ibid.*
(3) See *ibid.*
(4) BVerfG, 2 BvE 6/99, Nov. 22, 2001, para. 145/16, available at http://www.bverfg.de (last visited Dec. 27, 2001). In the following, the decision will be cited both according to the official German version and to the excerpted English translation provided by the Court *ibid.*, even if the latter is, at times, of questionable quality.
(5) *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936), at 319: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. … As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' Annals, 6th Cong., col. 613." The decision is frequently invoked by U.S. presidents for opposing Congressional involvement in foreign affairs. However, the case it dealt with did not concern any disagreement between Congress and the President.
(6) BVerfGE 90, p. 286, Jul. 7, 1994.
(7) The Alliance's Strategic Concept, Press Release NAC-S(99)65, Apr. 24, 1999, available at http://www.nato.int

https://doi.org/10.1017/S2071832200014711 Published online by Cambridge University Press

(last visited Dec. 27, 2001).
(8) See only B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 EJIL 1 (1999).
(9) North Atlantic Treaty, Apr. 4, 1949, UNTS 34, p. 244, amended by the Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey, Oct. 22, 1951. For the texts, see http://www.nato.int (last visited Nov. 30, 2001).
(10) English translation by Blaustein/Flanz, Constitutions of the Countries of the World, vol. 6 (1991): "Treaties which regulate the political relations of the Federation or relate to matters of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies competent in any specific case for such federal legislation."
(11) G. Ress, 'Verfassungsrechtliche Auswirkungen der Fortentwicklung völkerrechtlicher Verträge. Überlegungen zum Verhältnis des Grundgesetzes zur Europäischen Wirtschaftsgemeinschaft und zur Europäischen Menschenrechtskonvention', 2 *Festschrift für Wolfgang Zeidle*r 1775 (1987), at 1779.
(12) ICJ Reports 1996, p. 24.
(13) BVerfGE (Decisions of the Federal Constitutional Court), vol. 90, p. 286, July 12, 1994.
(14) BVerfGE 100, p. 266, March 25, 1999, one day after the attacks had begun.
(15) In its relevant parts, Art. 24 para. 2 reads: "Der Bund kann sich zur Wahrung des Friedens einem System gegenseitiger kollektiver Sicherheit einordnen ... ." (English translation in Blaustein/Flanz, supra note 10, at 91: "For the maintenance of peace, the Federation may enter a system of mutual collective security ...".)
(16) In the established jurisprudence of the Federal Constitutional Court, NATO is to be considered a "system of mutual collective security" in the sense of Art. 24 para. 2 GG. For an extensive discussion, see BVerfGE 68, p. 1, at 347-51. Even if the present reviewer disagrees with this interpretation of Art. 24, it would have been naïve to expect the Court to change its established jurisprudence on the matter.
(17) *Cf. Supra*, note 17.
(18) BVerfGE 90, p. 286, at 363 *et seq*.
(19) BVerfGE 89, p. 155, Oct. 12, 1993, English translation in [1994] CMLR 57.
(20) BVerfGE 89, p. 155, at 188.
(21) *E.g.*, para. 31.
(22) See North Atlantic Assembly (now NATO Parliamentary Assembly, see http://www.naa.be, last visited Dec. 27, 2001), Resolution on Recasting Euro-Atlantic Security, NATO Doc. AR 295 SA (1998), discussed in Simma, supra note 8, footnote 30 and accompanying text.
(23) BVerfGE 100, p. 266, Mar. 25, 1999.
(24) See „Merely a Landmark or a Change of Course: The Federal Constitutional Court Hears Arguments in the NATO Strategic Concept Case", in: 2 GERMAN L.J. No. 11 (1 July 2001), available at http://www.germanlawjournal.com/past_issues.php?id=37.
(25) For an early exposition of the arguments, see W. Grewe, Die auswärtige Gewalt der Bundesrepublik, 12 VVDStRL 129 (1954); for the executive view and Menzel, ‚Die auswärtige Gewalt der Bundesrepublik', 12 VVDStRL 179 (1954) for the democratic view; for a more recent account see B. Kempen, Art. 59 MN 33 *et seq.*, in: Das Bonner Grundgesetz (v. Mangoldt/Klein/Starck eds., 4th ed. 2000) and the reports of K. Hailbronner and R. Wolfrum in ‚Kontrolle der auswärtigen Gewalt', 56 VVDStRL 7, 38 (1997).
(26) *Pershing II*, BVerfGE 68, p. 1, at 86-87, English translation from 1 II *Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany* 511 (1989), at 518-19.
(27) BVerfGE 90, p. 286, at 357.
(28) The main opposition of the time, the Social Democratic Party of Germany (SPD) group, and the junior partner of the governing coalition of the time, the Free Democratic Party (F.D.P.) group, had brought applications before the Court against the deployment of German troops under UN and West European Union mandates.
(29) BVerfGE 90, p. 286, at 360, 363.
(30) BVerfGE 90, p. 286, at 381 *et seq*.
(31) BVerfGE 90, p. 286, at 375.
(32) See *supra*, note 12.
(33) This is a very liberal translation. To the present author, this passage is almost intranslatable.
(34) BVerfGE 90, p. 286, at 375.
(35) *Ibid.*, at 373.
(36) BVerfGE 90, p. 286, at 357; BVerfGE 68, p. 1, at 85.
(37) See, *e.g.*, for unilateral acts Jarass, in Jarass/Pieroth, GG, Art. 59 MN 9, for subsequent practice *ibid.*, MN 9a; in favour of an extensive interpretation also Pernice, in: Dreier, GG, Art. 59 MN 44; Rojahn, in: v. Münch, GG, Art. 59 MN 44a; only for unilateral acts Streinz, in: Sachs, GG, Art. 59 MN 43; but see BVerfGE 68, 1 (84); against Art 59 in the case of soft law Streinz, in: Sachs, Art. 59 MN 40.
(38) See *supra*, note 20, and accompanying text.
(39) BVerfG, 2 BvL 1/97, Jun. 7, 2000, available at http://www.bverfg.de.
(40) Similarly already BVerfGE 68, p. 1, at 87.
(41) For a recent comprehensive account, see G. Nolte, *Eingreifen auf Einladung* (1999).
(42) See *Military and Paramilitary Activities in and against Nicaragua, Merits*, ICJ Reports 1986, p. 14, para. 246: "[I]t is difficult to see what would remain of the principles of non-intervention … if intervention, *which is already allowable at the request of the government of a State*, were also to be allowed at the request of the opposition." (Emphasis

added.)
(43) See, in particular, the resolution of the Institut de droit international, ‘Le principe de non-intervention dans les guerres civiles' (The Principle of Non-Intervention in Civil Wars), 14 Aug 1975, 56 *Annuaire* 544 (1975), Art. 2 para. 1: "Les Etats tiers s'abstiendront d'assister les parties à une guerre civile … ." (Third States shall refrain form giving assistance to parties to a civil war … . "). Similarly 1 *Oppenheim's International Law* 438 (9th ed., R. Jennings/A. Watts ed., 1992). For further comment on this – disputed – resolution, which was adopted by 16 to 6 votes against the counsel of the rapporteur, Dietrich Schindler (55 Annuaire 545 [1973]), see A. Verdross/B. Simma, *Universelles Völkerrecht* (3rd ed. 1984), §§ 499-504; Nolte, supra note 41, at 109-117.
(44) Nolte, *supra* note 41, at 603 ("Grauzone").
(45) *Ibid.*, at 639
(46) See BVerfG, *supra* note 4, para. 150/21; similarly BVerfGE 90, p. 286, at 364.
(47) See *supra*, note 15 and accompanying text.
(48) *Supra*, note 37 and accompanying text.
(49) *Cf. Supra*, note 23.