

**Israel National Defense College**

**46th Class 2018-2019**

**Public Law :**

**German Bundestag 's approval -**

**Operation of German soldiers in NATO AWACS aircraft in Turkey 2003**

Lecturer and Academic Advisor: Prof. Suzie Navot

Leading Instructors: Col Yoni Sayada Marom

Submitted by: Col Klaus G. Harrer (Germany)

The views expressed in this academic research paper are those of the author and do not reflect the official policy or position of the Ministry of Defense, Germany, or that of the German Armed Forces.

2 Februray 2019

1. Introduction

For the first time in the early 1990s, the Federal Republic of Germany participated in armed international peacekeeping operations. Until then, there had only been humanitarian relief operations. With the end of the Cold War, security and foreign policy challenges had changed; violent conflicts between states or alliances became less likely. However, the number of domestic conflicts increased. Germany faced the growing international demand to play a more significant role in preserving and securing peace in global crisis areas. The first major missions led German soldiers to Cambodia and Somalia in 1991 and 1992, each under UN mandate, but without the prior approval of the Bundestag. Specifically, the deployment of a naval task force to the Adriatic Sea, designed to enforce an UN arms embargo against the then Serbia-Montenegro was accompanied by a domestic political dispute over the growing military commitments.

Whereas German armed forces were deployed solely for military deterrence and national and alliance defense purposes during the Cold War, the Bundeswehr was now to participate actively and worldwide in armed peacekeeping missions. Whether the Basic Law permits such deployments abroad in the first place and which rights the Bundestag, as the German Parliament, has with it, was disputed domestically.

While the former coalition government of CDU, CSU and FDP considered "out of area" Bundeswehr operations under UN mandate basically possible, the parliamentary parties of SPD and the Greens opposed it.

In 1992, the SPD carried out a programmatic reorientation in foreign policy and declared its approval of Bundeswehr missions under the UN mandate possible. The dispute over the interpretation of the Basic Law, however, was not settled. While Article 87a states that Germany shall establish Armed Forces for the purposes of defense, Article 24 (2) states with a view to maintaining peace, Germany may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.[[1]](#footnote-1) Whether military operations under UN and NATO mandates were equally permissible, and whether the Bundestag would have to decide on such missions, remained unclear.

Since the first Federal Constitutional Court ruling 30 years ago, the number of armed foreign deployments of the Bundeswehr have risen sharply. In particular, the regularly required renewal of the Afghanistan mandate by the Bundestag were the occasion for public-media debates on German military involvement abroad. Most recently, the Bundestag approved Bundeswehr missions in Mali, the Central African Republic and the destruction of Syrian chemical weapons in the Mediterranean.[[2]](#footnote-2)

2. Background

With the so-called Somalia-verdict, also known as the "Out of area verdict" (July 12th 1994), the Federal Constitutional Court has opened a broad constitutional framework for the deployment of German soldiers in the context of systems of mutual collective security.

However, this ruling also left open questions clarifying the authorities and powers of the Bundestag and the Federal Government in approving the deployment of German soldiers on missions abroad. For more than a decade, the Federal Constitutional Court's opinion was the only standard for the question of Bundeswehr deployments abroad and the way how the Bundestag and the Federal Government cooperate on this issue.

The Federal Constitutional Court ruled on 12 July 1994 that "out of area" operations are constitutional - if the Bundestag agrees beforehand. The so-called Bundestag constitutive approval was born. According to the Federal Constitutional Court, the Basic Law not only entitles the Federation to enter into a system of collective security, but also provides the constitutional framework for the subsequent Bundeswehr deployments abroad. Not only the UN, but also NATO embody such a system.

In some of the missions, however, the Federal Government had violated the constitutional requirement to seek the consent of Parliament before the deployment of armed forces. Only "imminent danger"[[3]](#footnote-3), so the judges, justifies waiving the Bundestag constitutive approval. However, the Bundestag must be consulted for approval afterwards. If in doubt, the armed forces would have to be called back if the Bundestag decides in contradiction to the Federal Government. [[4]](#footnote-4)

The constitutional AWACS ruling of 25 March 2003 to be discussed in this paper did little to alter the hitherto unanswered questions, since this ruling was primarily based on the foreign and security crisis in Iraq. In an urgent procedure, the constitutional court of Karlsruhe ruled that the Federal Government could send German soldiers to Turkey for an airborne NATO surveillance operation without obtaining the prior consent of the German Bundestag.

3. The Appeal

Despite a clear position of the Federal Republic of Germany against the Iraq war led by the United States of America and Great Britain, the Federal Constitutional Court also had to deal with the issue of the Iraq war. Background was a decision of the NATO Defense Committee of 19 February 2003 in favor of Turkey. On 10 February 2003, Turkey requested consultations of the members of the North Atlantic Treaty Organization (NATO) pursuant to Article 4 of the NATO Treaty. Based on the subsequent consultations and planning, NATO's Defense Planning Committee approved the Alliance's military authorities on 19 February 2003 to deploy NATO AWACS aircraft and systems for the defense against missile attacks and attacks with chemical and biological weapons in Turkey.[[5]](#footnote-5) Consequently, two Airborne Warning and Control System (AWACS) aircrafts of NATO's Airborne Early Warning and Control Force, and two more of them about three weeks later, were deployed from their home base in Geilenkirchen, Germany, to Konya Airbase in Turkey. The crews consist of members of the forces of various NATO member states; soldiers of the Bundeswehr make up approximately one-third of the crews. The system offers control and command functions and serves to direct fighter aircraft; the AWACS aircraft themselves do not carry weapons. Since 26 February 2003 the aircrafts have been operating in Turkish airspace.[[6]](#footnote-6)

The then Federal Government refused military support for Turkey prior to the Iraq war, stating that it might be preparing for an attack on Iraqi territory, but approved based on NATO Military Committee decision to support the deployment of AWACS aircrafts. Following the Cabinet decision, the Federal Government viewed the approval given by the German Bundestag as no longer required. It considered the mission of the AWACS aircraft being purely of defensive character and considered that airspace surveillance over Turkish territory a routine mission.[[7]](#footnote-7)

Consequently, a dispute arose among the parliamentary groups of the Bundestag, whether such missions require a Bundestag constitutive approval. Immediately after the outbreak of the Iraq war, the FDP parliamentary group requested the Federal Government to seek parliamentary approval for such a deployment of the Bundeswehr.

The FDP, citing the 1994 Federal Constitutional Court Somalia ruling[[8]](#footnote-8), argued that, parliamentary approval would have been required. They argued, that this deployment was no longer a routine peacetime military exercise, but rather military action taken in the context of an armed conflict.

As a result of the parliamentary rejection of this claim, the FDP asked the Federal Constitutional Court, to oblige the Federal Government to obtain approval for the AWACS deployment through the Bundestag.

By a judicial decision taken by the Second Senate of the Federal Constitutional Court on 25 March 2003, the appeal to issue an injunction against the Federal Government was dismissed.

4. The Verdict

As already mentioned, the Second Senate of the Federal Constitutional Court rejected the petition of the FDP parliamentary group for an interim injunction against the Federal Government. In doing so, the Federal Constitutional Court fundamentally set a strict standard in the examination of the conditions in the proceedings for interim relief, which governed the FDP parliamentary group according to its previous political path in parliament. In the case of this review, these requirements increased significantly as a result of AWACS action being decided on a measure that had a significant external impact.

The ruling stated that in the present geopolitical situation, it cannot be excluded that the deployment to Turkey of parts of NATO's AWACS unit, which is made up, inter alia, of a considerable number of German soldiers, constitutes an operation that requires the Bundestag 's constitutive approval.[[9]](#footnote-9)

In addition, the constitutional judges referred to a main proceeding that are still pending. It was intended to clarify to what extent the parliament`s constitutive participation in constitutional law was still sufficient and that it was not necessary to adapt the political realities more closely. In concrete terms, the court stated: "Proceedings in the main action will have to ascertain the extent of the requirement of parliament's constitutive approval, which is directly valid by virtue of the Constitution and is set forth in the part of constitutional law that concerns defense. The reasoning for the requirement of parliament's constitutive approval stems from the historical image of an entry into war. Under the current political conditions in which wars are no longer formally declared, a gradual involvement in armed conflicts is equivalent to an official entry into war. Therefore, in principle, any participation of German armed forces in armed operations is subject to parliament's constitutive participation."[[10]](#footnote-10)

In view of the appeal, the Federal Constitutional Court continued to require clarification as to when" the use of armed forces "[[11]](#footnote-11) should be assumed especially when German soldiers are "involved in armed activities"[[12]](#footnote-12) and thus themselves become a “belligerent party”.[[13]](#footnote-13)

Specifically, it included the question from when on and to what extend the participation in operations in integrated into NATO units becomes a participation in armed operations, which will trigger the requirement of parliamentary approval, if such units survey the airspace of an Alliance member whose state territory directly borders on a territory that is involved in war, or if surveillance, apart from this, extends to the territory of a state that is involved in the armed conflict.[[14]](#footnote-14)

Apart from this, the question whether also an indirect involvement in armed operations will trigger the requirement of parliamentary approval might require investigation. In the present case, this applies if developments are possible that will lead to the partner in the Alliance whose territory is supposed to be secured becoming a belligerent power. Because the factual development of the situation, according to the Senate's present state of knowledge, and according to the federal government's submissions, does not yet provide any evidence of a direct involvement in combat action, the application is also not patently well-founded.

The Federal Constitutional Courts decision was a result of a weighing of consequences which led to a ruling against the issue of a temporary injunction.

On the one hand the requirement of parliament's constitutive approval carries much weight because the Bundeswehr is a so-called parliamentary army (Parlamentsarmee), integrated in the democratic constitutional system of a state under the rule of law and the obligation to guarantee legal certainty for the German soldiers involved and give them political support.[[15]](#footnote-15)

On the other hand, there is the executive’s responsibility for foreign policy, for which it has its own core area of discretion. To the extent that the requirement of parliament's approval does not apply, it is solely for the federal government to take to what extent the Federal Republic of Germany will participate in the implementation of the resolution of NATO's Defence Planning Committee. If the requested temporary injunction would have been issued, this would have resulted in the constraint of having to seek the Bundestag 's political approval in a current emergency situation in foreign policy, or of withdrawing the German soldiers from the integrated NATO AWACS units. Such constraint would constitute a considerable violation upon the core area of the federal government's responsibility in the fields of foreign and security policy.[[16]](#footnote-16)

In a critical situation in security policy, the federal government would be facing the alternative of either obtaining parliament's approval, which would be uncertain from the political point of view and possibly involve a great expenditure of time, or putting up with risks in its policy within the Alliance that would arise due to the withdrawal of German Soldiers from NATO's integrated AWACS and pocketing the reduction of the unit's capability of functioning that would result from the removal of the German crew members.[[17]](#footnote-17)

When the strict standard of review required is applied, it cannot be recognized that there is a significant predominance of the Bundestag 's rights. The result of the weighing of the positions is not determined from the outset. The federal government's undiminished capacity to act in the field of foreign policy in the area of competencies that is assigned to it by the Constitution carries special weight also in the interest, on the side of the state as a whole, in Germany's reliability in the fields of foreign and security policy.[[18]](#footnote-18)

4. Conclusion

The Bundestag constitutive or parliamentary approval was initially handled as parliamentary practice without a legal basis. In December 1998, the German Bundestag voted for NATO deployment of the German Luftwaffe in the Kosovo War, for which there was no UN mandate, in November 2001, the German MPs voted in favor of the participation of German soldiers in the war in Afghanistan contributing to a NATO operation.

The described 2003 verdict was a weighing of consequences for Germany´s reliability as a member in systems of mutual security on a trustworthy partner in the field of foreign and security policy against the requirement of parliament's constitutive approval and underlined the special character of the Bundeswehr as a parliamentary army, giving the German Bundestag a central role in decisions on deployments abroad of German armed forces. In 2004, a legal framework for parliamentary participation was created with the implementation of the “Act on Parliamentary Involvement in the Decision on the Deployment of Armed Forces Abroad”. This legal framework mirrored parliamentary practice which had been ongoing for years. Parliament does not have the right to mandate on its own initiative that a mission take place, however. It may only object to a mission or demand the termination of a mission which is already under way.[[19]](#footnote-19) The Parliamentary Involvement Act states today: "The use of German armed military forces outside the scope of application of the Basic Law requires the approval of the Bundestag."[[20]](#footnote-20)

The requirement of a parliamentary decision under the provisions of the Basic Law that concern defense is not limited to deployments of armed military forces within systems of collective security. It applies to all deployments of German armed military forces abroad, not depending on them having the character of concrete wars or of being war-like.[[21]](#footnote-21)

However, when the deployment of the Bundeswehr is considered an "armed” deployment, was still controversial. The Federal government argued in 2003 in the wake of the Iraq war, the use of German soldiers to secure the airspace over Turkey by NATO AWACS as not subject to approval, because the aircraft used are unarmed.

This argument challenged the Federal Constitutional Court in 2008. Already tangible evidence for the possible involvement of German soldiers in armed conflicts justifies a parliamentary approval. It is irrelevant whether military combat operations form the core of the deployment, for all that is relevant is whether the use of military force seems to be a concrete possibility. By the point of view of the Federal Constitutional Court the involvement of German soldiers in the aerial surveillance of Turkey was a deployment of armed forces which required the approval of the Bundestag.[[22]](#footnote-22)

Bibliography:

1. Basic Law for the Federal Republic of Germany,

https://www.gesetze-im-internet.de/englisch\_gg/

2. Bundeszentrale für politische Bildung, Vor 20 Jahren: Urteil zu Auslandeinsätzen, July 10th 2014,

https://www.bpb.de/politik/hintergrund-aktuell/188072/20-jahre-parlamentsvorbehalt-10-07-2014

3. BVerfG, Judgment of the Second Senate of 23 September 2015 - 2 BvE 6/11, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/09/es20150923\_2bve000611en.html

4. BVerfG, Judgment of the Second Senate of 07 May 2008 - 2 BvE 1/03 - paras. (1-92), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2008/05/es20080507\_2bve000103en.html

5. BVerfG, Urteil vom 12.7.1994 - 2 BvE 3/92 u. a. (BVerfGE 90, 286 = NJW 1994, 2207),

https://www.uni-saarland.de/fileadmin/user\_upload/Professoren/fr11\_ProfGiegerich/lehre/staatsrechtIII/StaatsRIII\_BVerfGWehrParlamVorb.pdf

6. BVerfG, Order of the Second Senate of 25 March 2003 - 2 BvQ 18/03 - ,

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/03/qs20030325\_2bvq001803en.html

7. Deutscher Bundestag, The influence of the Defence Committee on international missions of the Bundeswehr outside national and Alliance defence, https://www.bundestag.de/en/committees/aufg06/246186

8. Gesetz über die parlamentarische Beteiligung bei der Entscheidung über den Einsatz bewaffneter Streitkräfte im Ausland (Parlamentsbeteiligungsgesetz) §1, Absatz 2,

https://www.gesetze-im-internet.de/parlbg/BJNR077500005.html

9. NATO Update: NATO deploy defensive assistance to Turkey”, February 19th 2003, http://www.nato.int/docu/update/2003/02-february/e0219a.html

10. Schröder, Gerhard, March 19th 2003, http://www.bundestag.de/bic/plenarprotokolle/pp/2003/15043

1. Basic Law for the Federal Republic of Germany, Article 87a and Article 24 (2), https://www.gesetze-im-internet.de/englisch\_gg/ [↑](#footnote-ref-1)
2. Bundeszentrale für politische Bildung, Vor 20 Jahren: Urteil zu Auslandeinsätzen, July 10th 2014, https://www.bpb.de/politik/hintergrund-aktuell/188072/20-jahre-parlamentsvorbehalt-10-07-2014 [↑](#footnote-ref-2)
3. BVerfG, Judgment of the Second Senate of 23 September 2015 - 2 BvE 6/11 – reads “In cases of imminent danger where the Federal Government, by way of exception, decided upon the deployment alone, it must immediately involve the Bundestag after the deployment”, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/09/es20150923\_2bve000611en.html [↑](#footnote-ref-3)
4. Bundeszentrale für politische Bildung, Vor 20 Jahren: Urteil zu Auslandeinsätzen, July 10th 2014, https://www.bpb.de/politik/hintergrund-aktuell/188072/20-jahre-parlamentsvorbehalt-10-07-2014 [↑](#footnote-ref-4)
5. NATO Update: NATO deploy defensive assistance to Turkey”, February 19th 2003, http://www.nato.int/docu/update/2003/02-february/e0219a.html [↑](#footnote-ref-5)
6. BVerfG, Order of the Second Senate of 25 March 2003 - 2 BvQ 18/03 - paras. (1-41),

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/03/qs20030325\_2bvq001803en.html [↑](#footnote-ref-6)
7. German Chancellor Gerhard Schröder, March 19th 2003, http://www.bundestag.de/bic/plenarprotokolle/pp/2003/15043 [↑](#footnote-ref-7)
8. BVerfG, Urteil vom 12.7.1994 - 2 BvE 3/92 u. a. (BVerfGE 90, 286 = NJW 1994, 2207), https://www.uni-saarland.de/fileadmin/user\_upload/Professoren/fr11\_ProfGiegerich/lehre/staatsrechtIII/StaatsRIII\_BVerfGWehrParlamVorb.pdf [↑](#footnote-ref-8)
9. BVerfG, Order of the Second Senate of 25 March 2003 - 2 BvQ 18/03 - paras. (1-41), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/03/qs20030325\_2bvq001803en.html [↑](#footnote-ref-9)
10. ibid [↑](#footnote-ref-10)
11. BVerfG, Urteil vom 12.7.1994 - 2 BvE 3/92 u. a. (BVerfGE 90, 286 = NJW 1994, 2207), https://www.uni-saarland.de/fileadmin/user\_upload/Professoren/fr11\_ProfGiegerich/lehre/staatsrechtIII/StaatsRIII\_BVerfGWehrParlamVorb.pdf [↑](#footnote-ref-11)
12. Ibid. [↑](#footnote-ref-12)
13. BVerfG, Order of the Second Senate of 25 March 2003 - 2 BvQ 18/03 - paras. (1-41), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/03/qs20030325\_2bvq001803en.html [↑](#footnote-ref-13)
14. Ibid. [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)
16. Ibid. [↑](#footnote-ref-16)
17. Ibid. [↑](#footnote-ref-17)
18. Ibid [↑](#footnote-ref-18)
19. Deutscher Bundestag, The influence of the Defence Committee on international missions of the Bundeswehr outside national and Alliance defence, https://www.bundestag.de/en/committees/aufg06/246186 [↑](#footnote-ref-19)
20. Gesetz über die parlamentarische Beteiligung bei der Entscheidung über den Einsatz bewaffneter Streitkräfte im Ausland (Parlamentsbeteiligungsgesetz) §1, Absatz 2,

https://www.gesetze-im-internet.de/parlbg/BJNR077500005.html [↑](#footnote-ref-20)
21. BVerfG, Judgment of the Second Senate of 23 September 2015 - 2 BvE 6/11 - paras. (1-125), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/09/es20150923\_2bve000611en.html [↑](#footnote-ref-21)
22. BVerfG, Judgment of the Second Senate of 07 May 2008 - 2 BvE 1/03 - paras. (1-92), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2008/05/es20080507\_2bve000103en.html [↑](#footnote-ref-22)