

A requirement on the Government formally to explain the background, objectives and legal justification for any deployment of forces authorised to use force would on the other hand offer longer term advantages in terms of consistency and transparency.

If provision were made for a formal declaration by the Government of legal justification, judicial review should not be excluded, but the courts should be left to apply the common law doctrine of non-justiciability or judicial restraint. Whether a particular use of military force is justified will normally be a question which should be determined in an international forum and not in UK courts.

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PARLIAMENTARY CONTROL OVER THE ARMED FORCES IN GERMANY

1. The rules governing the deployment of the German Armed Forces (*Bundeswehr*), as well as the rules concerning Parliamentary control over such deployments, derive from three principal sources: the German Basic Law (*Grundgesetz*), the case-law of the German Constitutional Court (*Bundesverfassungsgericht*), and, since 18 March 2005, the Bundestag Participation Act (*Parlamentsbeteiligungsgesetz*). In addition, the practice of the German Parliament (*Bundestag*) over the past decade or so in applying the pertinent rules is also relevant.

I. The Basic Law

2. Several provisions of the Basic Law deal with or refer to the Armed Forces. The central provision is Article 87a, which reads as follows (unofficial translation):

Article 87a [Establishment and powers of the Armed Forces]

(1) The Federation shall establish Armed Forces for the purposes of defence. Their numerical strength and general organisational structure must be shown in the budget.

(2) Apart from defence, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law.

(3) During a state of defence or a state of tension the Armed Forces shall have the power to protect civilian property and to perform traffic control functions to the extent necessary to accomplish their defence mission. Moreover, during a state of defence or a state of tension, the Armed Forces may also be authorised to support police measures for the protection of civilian property; in this event the Armed Forces shall cooperate with the competent authorities.

(4) In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a Land, the Federal Government, if the conditions referred to in paragraph (2) of Article 91 obtain and the police forces and the Federal Border Police prove inadequate, may employ the Armed Forces to support the police and the Federal Border Police in protecting civilian property and in combating organised armed insurgents. Any such employment of the Armed Forces shall be discontinued if the Bundestag or the Bundesrat so demands.

3. Apart from the third and fourth paragraph of Article 87a, only Article 35 of the Basic Law does expressly permit the use of the Armed Forces for purposes other than defence. However, Article 35 sanctions only the domestic employment of the Armed Forces: it allows a *Land* to request the assistance of the Armed Forces in cases of natural disasters or emergencies in order to support the police in combating the disaster or emergency, and permits the Federal Government to deploy the Armed Forces in order to support the police where natural disasters or emergencies affect the territory of more than one *Land*.

4. No provision exists in the Basic Law which regulates in express terms the deployment of the Armed Forces abroad for purposes other than defence. However, the Armed Forces have traditionally carried out purely humanitarian activities both domestically and abroad on the basis that such activities do not involve the exercise of governmental authority, and therefore do not constitute an “employment” or “deployment” (*Einsatz*) within the meaning of Article 87a(2). In addition, the German Constitutional Court has interpreted Article 24 of the Basic Law to permit the deployment of the Armed Forces abroad in the context of a “system of mutual collective security”. The relevant part of Article 24 provides as follows (unofficial translation):

Article 24 [International organisations]

(1) The Federation may by a law transfer sovereign powers to international organisations. [. . .]

(2) With a view to maintaining peace, the Federation 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. [. . .]

II. The Case-law of the Constitutional Court

5. On 12 July 1994, the German Constitutional Court delivered a judgement (*Bundeswehreinsatz*, 90 BVerfGE 286, 106 ILR 320) in a case brought by two Bundestag parties against the German Government, alleging that the latter violated the Basic Law by committing German troops to military operations abroad under the auspices of NATO and the UN. Building on its earlier case-law, the Constitutional Court interpreted Article 24 of the Basic Law in the light of the legislator's intent and subsequent developments in state practice. First, it found, on the one hand, that the expression "system of mutual collective security" referred to in Article 24(2) of the Basic Law covers Germany's participation in the collective security systems established under the UN Charter, the North Atlantic Treaty and the Modified Brussels Treaty of 1954, and, on the other hand, that the authorisation granted by Article 24(2) to participate in a "system of mutual collective security" necessarily implies an authorisation to deploy the Armed Forces within the framework of such collective security systems, including their integration into multinational contingents as well as their use in military operations abroad. Second, the Constitutional Court also found that, notwithstanding the general authorisation granted in Article 24(2) to deploy the Armed Forces in the framework of collective security systems, "the deployment of armed military forces in principle requires the prior constitutive consent of the Bundestag" (*bedarf. . . der Einsatz bewaffneter Streitkräfte grundsätzlich der vorherigen konstitutiven Zustimmung des Bundestages*).

6. In the absence of an express rule in the Basic Law to this effect, the Constitutional Court based this second finding on the general principle of German constitutional law whereby the "deployment of armed military forces" requires the Bundestag's approval. The Court deduced this general principle (also expressed in the maxim "the German Armed Forces are a Parliamentary force") from the legislator's intent in drafting the Basic Law, German constitutional traditions since 1918, and the system of Parliamentary control over the Armed Forces and military matters set up under the Basic Law, including Parliament's role in proclaiming a "state of defence". Some commentators have strongly criticised this aspect of the *Bundeswehreinsatz* judgement, arguing that the Constitutional Court has ventured far into the field of law-making.

7. The *Bundeswehreinsatz* case left unanswered a number of key questions. In particular, the Constitutional Court did not specify the exact scope of the principle of Parliamentary consent, nor did it sufficiently clarify the meaning of the expression "deployment of armed military forces" coined in its judgement. Consequently, differences arose in academic circles and elsewhere whether, for example, the Bundestag's consent is required for every single deployment of the Armed Forces even where that deployment takes place on the basis of treaty obligations already approved by Parliament. According to some commentators, purely humanitarian operations not using military force are not caught by the principle of Parliamentary consent. A different view holds that the objectives and nature of the deployment are altogether irrelevant: as long as the military force is in fact "armed", the Bundestag's consent to its deployment is necessary. Another view suggests that the Bundestag's consent is required only where it is likely that the troops will actually make use of armed force.

8. The Constitutional Court has attempted to clarify some of these questions in its judgement of 25 March 2003 (*AWACS*, 108 BVerfGE 34). In that case, a Bundestag party petitioned the Court to issue a preliminary injunction to the effect that the deployment in Turkey of German crews manning AWACS aircraft pursuant to a decision of the North Atlantic Council was unconstitutional without the Bundestag's consent to the deployment. The Constitutional Court stated that it had to balance the principle of Parliamentary control over the Armed Forces against the executive's responsibility for the conduct of foreign and security policy. Since it could not be established that the Bundestag's rights clearly outweighed those of the Government under the present circumstances, the Court denied the petition. In doing so the Court declared, referring to its 1994 judgement in the *Bundeswehreinsatz* case, that the principle of Parliamentary consent to the "deployment of armed military forces" is premised on the historical concept of a state of war. However, in the light of the current political conditions where wars are no longer formally declared, the progressive entanglement in an armed confrontation must be deemed to be identical with a formal entry into war. Therefore, according to the Court, every deployment of armed German military forces is, in principle, subject to Parliamentary approval.

9. The Constitutional Court's judgement in the *AWACS* case has been understood to mean that the consent of the Bundestag is required for all those deployments where the Armed Forces are directly and actively involved in hostile confrontations or armed conflicts, or where it can be anticipated that they may be so involved during a particular operation. In its judgement, the Constitutional Court held that since it could not be anticipated from the facts known at the time that the German AWACS crews deployed to Turkey were likely to be directly involved in hostile activities, the petition for a preliminary injunction was not manifestly well-founded. Clearly, the abstract possibility that German soldiers could be the subject of an armed attack does not, as such, turn an operation into one which requires the consent of the Bundestag: the possibility of an armed attack against the State's military may be said to exist at all times. However, exactly what factors should be taken into account in anticipating whether a given operation may be involved in hostile engagements abroad is an open question. For some commentators the nature of the operation and its geographical

proximity to ongoing hostilities is decisive, while for others only a decision by the competent German authorities to participate in military confrontation triggers the need for the consent of the Bundestag.

10. Leaving aside these questions, it is generally accepted that, in line with the case-law of the Constitutional Court, the guarding of foreign military installations by armed German troops, the participation in manoeuvres and military exercises, the regular contribution of seconded German staff to the work of multinational military contingents and bodies within NATO, including participation in AWACS missions, are not subject to the principle of Parliamentary consent. It has been suggested that military liaison activities, humanitarian assistance missions armed for self-defence but lacking a robust mandate, and participation in fact-finding missions or military exchange programmes likewise do not require the consent of the Bundestag.

III. Parliamentary Practice

11. Between 1994 and 2003, the Bundestag approved the deployment of the German Armed Forces in 29 instances. More than half of these deployments took place in the period after 1999. In accordance with the Constitutional Court's decision in the *Bundeswehreinsatz* case, the Bundestag's control over the decision to deploy armed military forces is limited to the approval or rejection of a Government request. The Bundestag cannot introduce modifications to such requests. However, in recent practice the Bundestag has tied its consent to the insertion of a time-limit in its authorisation to deploy German forces abroad. Thus, its consent had to be renewed, where appropriate, at least every 12 months.

IV. The Bundestag Participation Act of 2005

12. As early as 1994, the Constitutional Court declared in the *Bundeswehreinsatz* case that it was the legislator's task to determine the manner and extent of the Bundestag's participation in decisions to deploy armed German military forces abroad. This task was eventually taken up by the main political parties in 2003. Although the parties were agreed on the need to regulate the Bundestag's participation in these matters by way of legislation, considerable differences arose as to how the principle of Parliamentary consent could best be reconciled with the principle of swift military action. The opposition parties, fearing that public discussions in the Bundestag could jeopardise the security and feasibility of planned military operations, proposed the establishment of a special Bundestag committee to consider Government requests to deploy German troops. Moreover, they suggested that operations undertaken within the framework of the EU and NATO should be approved by the Bundestag on a general, rather than a case-by-case, basis. Critics of this approach argued that it undermined the very principle of Parliamentary consent. Ultimately, the solution adopted in the final legislation, that is the Bundestag Participation Act of 18 March 2005 (BGBl. I, 775; for an unofficial translation into English, see the ANNEX), was to introduce an expedited procedure for obtaining the Bundestag's consent in certain circumstances.

13. The Bundestag Participation Act consist of nine articles. *Article 1* defines the purpose of the Act, and states the basic principle whereby the deployment of armed German military forces abroad requires the consent of the Bundestag. *Article 2* defines the expression "deployment of armed military forces" as a deployment where soldiers of the German Armed Forces are involved in armed engagements, or their involvement in an armed engagement is to be expected. Preparatory measures preceding such deployments and certain activities, such as humanitarian assistance, are excluded from this definition, and therefore do not normally require the Bundestag's consent. *Article 3* sets out when the Government shall submit its request for the consent of the Bundestag and what elements that request must contain; in addition, it affirms that the Bundestag may only approve or reject, but not modify, the request. *Article 4* creates a simplified procedure for obtaining the Bundestag's consent in the case of deployments of limited intensity and range. In essence, the Bundestag is deemed to have granted its consent to a Government request to deploy troops abroad unless within seven days of the distribution of the request as an official Bundestag document a plenary discussion of the Bundestag is called for. *Article 5* provides that deployments demanding immediate action do not need the prior consent of the Bundestag; however, the Bundestag shall be informed about the deployment in due course and its consent must be obtained subsequently. *Article 6* obliges the Federal Government to regularly inform the Bundestag about ongoing deployments. *Article 7* deals with the extension of the Bundestag's consent to deployments that have remained unchanged in substance since the Bundestag last authorised the deployment in question. The procedure formulated in the second paragraph of Article 7 applies at times when the Bundestag is not in session. *Article 8* declares that the Bundestag may recall its consent. *Article 9* is of a procedural nature.

14. The Bundestag Participation Act of 2005 has generally been welcomed by commentators. As the Act is largely based on the pertinent case-law of the Constitutional Court, its adoption has not fundamentally altered the existing legal position. Certain aspects of the Act have nevertheless been criticised. For some commentators, the definition of 'deployment of armed military forces' in Article 2, which is central to the

operation of the entire Act, represents a missed opportunity to clarify the case-law of the Constitutional Court. It is still unclear what considerations govern the anticipation of the involvement of German troops in an armed engagement abroad, and thus what level of military risk the Government may take before it is required to obtain the Bundestag's consent. Moreover, the exceptions to the definition of "deployment of armed military forces" are essentially indeterminate, and therefore potentially too broad. The simplified consent procedure under Article 4, which requires the Bundestag to take action within a relatively short period of time to rebut the presumption of Parliamentary consent, has been denounced by some as the Bundestag disfranchising itself, while the definition in Article 4 of a "deployment of limited intensity and range" has been considered too vague. These criticisms suggest that the adoption of the Bundestag Participation Act has not answered all of the questions surrounding the deployment of German troops abroad, and that the Act will have to be applied in the light of the Constitutional Court's case-law and the Bundestag's practice.

V. Literature

15. For further details, see D Wiefelspütz, 'Der Einsatz deutscher Streitkräfte und die konstitutive Beteiligung des Deutschen Bundestages', *Neue Zeitschrift für Wehrrecht* (2003) 133; W Weiß, 'Die Beteiligung des Bundestags bei Einsätzen der Bundeswehr im Ausland—eine kritische Würdigung des Parlamentsbeteiligungsgesetzes', *Neue Zeitschrift für Wehrrecht* (2005) 100. Both of these articles have been relied on in preparing the present note. For a treatment of the subject in English, see G Nolte and H Krieger, "Military Law in Germany", in G Nolte (ed), *European Military Law Systems* (De Gruyter, 2003) 337.

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ANNEX

[UNOFFICIAL TRANSLATION]

ACT CONCERNING THE PARTICIPATION OF THE BUNDESTAG IN THE DECISION ON THE DEPLOYMENT OF ARMED MILITARY FORCES ABROAD (BUNDESTAG PARTICIPATION ACT)

18 March 2005

(BGBl. I 775)

Article 1 (Principle)

- (1) This Act regulates the manner and extent of the participation of the Bundestag in the deployment of armed German military forces abroad. It is without prejudice to Article 115a of the Basic Law.
- (2) The deployment of armed German military forces outside the area of application of the Basic Law requires the consent of the Bundestag.

Article 2 (Definitions)

- (1) A deployment of armed military forces takes place when soldiers of the German Federal Armed Forces are involved in armed engagements, or their involvement in an armed engagement is to be anticipated.
- (2) Preparatory measures and planning do not constitute a deployment within the meaning of this Act. They do not require the consent of the Bundestag. The same applies to humanitarian aid services and assistance undertaken by the armed forces where weapons are carried merely for the purposes of self-defence, provided it is not to be expected that the soldiers will be involved in armed engagements.

Article 3 (Request)

- (1) The Federal Government shall submit the request for the consent of the Bundestag to the deployment of the armed forces in a timely manner before the start of the deployment.
- (2) The request of the Federal Government shall contain information, in particular, concerning:
 - the mandate of the deployment,
 - the operational area,
 - the legal bases of the deployment,
 - the maximum number of soldiers to be deployed,

- the capabilities of the armed forces to be deployed,
- the planned duration of the deployment, and
- the envisaged costs and financing.

(3) The Bundestag may consent to the request or reject it. Modifications to the request are not permissible.

Article 4 (Simplified consent procedure)

(1) In the case of deployments of limited intensity and range, consent may be given by simplified procedure. The Federal Government shall set out, giving reasons, the grounds as to why the impending deployment is one of limited intensity and range. The President of the Bundestag shall transmit the request to the Chairmen of the Parliamentary parties and to the Chairmen of the Foreign Affairs Committee and the Defence Committee, as well as to a representative (*Obleute*) designated by each of the Parliamentary parties represented in these Committees, and have the request distributed to all members of the Bundestag in the form of an official Bundestag document. Consent is deemed to have been granted unless within seven days following the distribution of the request a Parliamentary party or five per cent of the members of the Bundestag call for a plenary discussion by the Bundestag. Should a plenary discussion by the Bundestag be called for, the Bundestag shall decide.

(2) A deployment is of limited intensity and range when the number of the deployed soldiers is limited, the circumstances clearly indicate that the deployment is of limited significance and it does not entail participation in a war.

(3) In principle, a deployment is of limited intensity and range, where

- it constitutes a reconnaissance mission which carries weapons merely for the purposes of self-defence,
- it concerns individual soldiers who carry out their duties in allied armed forces on the basis of exchange arrangements, or
- individual soldiers are deployed in the framework of the UN, NATO, the EU, or another organisation implementing a UN mandate.

Article 5 (Subsequent consent)

(1) Deployments in cases requiring immediate action, which admit of no delay, do not require the prior consent of the Bundestag. The same applies to deployments aimed at rescuing persons from situations of special danger, provided that a public discussion by the Bundestag would endanger the life of the persons to be rescued.

(2) The Bundestag shall be informed, in an appropriate manner, before the start and during the course of the deployment.

(3) The request for consent to the deployment shall be submitted subsequently without delay. If the Bundestag rejects the request, the deployment shall be terminated.

Article 6 (Duty to inform)

(1) The Federal Government shall inform the Bundestag regularly about the course of the deployments and about developments in the operational area.

(2) In cases referred to in Article 4, paragraph 1 (simplified consent procedure), the Federal Government shall immediately inform the competent Committees and the *Obleute*.

Article 7 (Extension of employments)

(1) The procedure under Article 4 shall also apply to the extension of a decision granting consent where there are no changes to its substance.

(2) Where the Federal Government requests the extension of a deployment, the deployment shall be deemed authorised until two days, during which the Bundestag is in session, have passed following the distribution of the request as an official document. Should the request be submitted by simplified procedure under Article 4, it shall be deemed authorised until the expiry of the deadline defined in Article 4, paragraph 1, fourth sentence; should a plenary discussion by the Bundestag be called for before the expiry of the deadline, then it shall be deemed authorised until the end of the week, during which the Bundestag is in session, that follows the discussion by the Bundestag. The period of validity of the original authorisation remains unaffected by the regulations set out in sentences 1 and 2.

Article 8 (Right to recall)

The Bundestag may recall its consent to the deployment of armed military forces.

Article 9 (Entry into force)

This Act comes into force on the day following its announcement.

Memorandum by Humphry Crum Ewing⁶**Credentials**

1. The views set out in this submission are derived primarily from my practical experience in recent years as an adviser to Opposition defence spokesmen in Parliament and, for a period, as Special Adviser to the House of Commons Defence Committee on Defence Related Information for Parliament.⁷ The views also reflect my academic studies over many years—back to my time as an undergraduate student at Oxford in the later 1950s—and my active participation in recent years in the international Defence Studies community.
2. In advising successive Opposition Defence Spokesmen in the House of Lords.⁸ I have been regularly confronted with the issue of how to advise, from the point of view of an Opposition which is also an alternative government, on the question of how far Governments should properly be expected to take Parliament into their confidence in relation to military operations and, in particular, how far Governments should be expected to seek explicit Parliamentary support in respect of specific actions rather than simply accounting generally to Parliament for those actions.

Summary of Views Expressed⁹

3. Based on both my practical observations and my studies I am clear in my own mind that the engagement of United Kingdom Armed Forces in military operations should remain absolutely an exercise of Prerogative powers and should not be subject to statutory restrictions involving the approval of Parliament. I develop my reasoning for this conclusion at #11 below.
4. I am equally clear in my judgement that there is no place for intervention by the Courts in this process. I explain my reasons for this further conclusion at #23. At #12 to #22 I give a very brief view on the other points on which the Committee has invited submissions.

Need for Scrupulous Accuracy in Information Provided to Parliament

5. But at the same time as I am against procedural steps to restrict, by Parliamentary process, the power of the executive to deploy the UK's Armed Forces I believe that it would be in accordance with general concepts of democratic accountability if greater care were to be taken to adhere as far as possible to scrupulous accuracy in what is said to Parliament and to the public about the likely necessity for military operations and about their conduct.
6. In Kosovo, for instance, the gross exaggerations of battle damage claims by NATO air attacks was a matter of particular embarrassment, as much to the Minister answering Questions as it was to the Opposition spokesman asking them.
7. I will not repeat the observations of the Foreign Affairs Committee and of Lord Butler of Brockwell and his panel on the information provided to Parliament and the public in advance of the invasion of Iraq. Having carefully considered those observations and knowing much about the (unpublished) evidence that the Butler Inquiry received I entirely endorse the criticisms the Committee and the Inquiry have reported.
8. I wholeheartedly endorse the recommendation of the House of Commons Foreign Affairs Committee that papers presented to Parliament explaining and/or justifying decisions to take military action should be signed off by a Minister,¹⁰ who would, by Parliamentary convention, be responsible and accountable for the accuracy,

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⁷ It was during this period that pressure from the Defence Committee led to the Inquiry and Report by the Procedure Committee on Parliamentary Scrutiny of Treaties (HC 210 of 1999–2000).

⁸ The late Lords Burnham and Vivian and most recently and currently Lord Astor of Hever.

⁹ The views expressed in this memorandum are the writer's own and do not represent those of RUSI, the Conservative Party or any other organisation with which he is connected.

¹⁰ Recommendation 24 on p.5 and Para 141 of the Ninth Report 2002-03 of the House of Commons Foreign Affairs Committee The Decision to go to War in Iraq HC 813-I.