

The G8 Summit in Germany, the *Bundeswehr* and the German *Bundestag*

By Dieter Wiefelspütz *

A. Introduction

From 6–8 June 2007, the summit meeting of the Group of Eight (G8) leading industrialized nations was held in Heiligendamm, Mecklenburg-Western Pomerania, under Germany's presidency. In advance of the summit, the federal state (*Land*) Mecklenburg-Western Pomerania and the federal authorities agreed that the task of providing adequate security for the Summit would overstretch Mecklenburg-Western Pomerania's capacities unless assistance were provided by the Federal Government and other federal states.

Based on intelligence from the police, the security services anticipated that protesters would attempt to block the roads leading to Heiligendamm and Rostock-Laage Airport, build earth depots for tools and blockading equipment, and cause damage to the road system by digging or hollowing out the foundations. A decision was therefore taken to deploy reconnaissance systems on board Tornado aircraft in order to detect changes in soil conditions from the air. Between 3 May and 5 June 2007, Tornado aircraft carried out a total of seven flights and took photographs, although according to the Federal Government, the images were unsuitable as a means of identifying individual persons. During one flight over Camp Reddelich, where a great many protesters had congregated, the aircraft briefly flew lower than the minimum safe flight altitude of 500 feet. The Tornados' onboard cannons were not armed during any of the flights.

Nine *Fennek* spy systems were also deployed, each consisting of one armoured vehicle for ground reconnaissance. Their task was to monitor specific areas, roads and the approach routes of flights bringing delegates to the Summit. They were also to carry out reconnaissance and pass intelligence to the police.

In addition, three North Atlantic Treaty Organization (NATO) Airborne Warning and Control System (AWACS) aircraft were deployed to provide airspace security and produce an air situation picture. Before and during the Summit the German Air Force (*Luftwaffe*) also kept four Eurofighter and eight Phantom aircraft on standby, which ended up spending approximately twenty-three hours in the air.

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Furthermore, in order to safeguard the provision of emergency medical services during the Summit, the German armed forces, the *Bundeswehr*, set up a mobile field hospital in Bad Doberan. Areas of the Bad Doberan hospital site were therefore placed under the armed forces' jurisdiction. German military police were deployed to provide protection for army medical staff and exercise authority in the relevant areas of the site.

During this time an intense public debate ensued focusing on the question of whether the use of the *Bundeswehr* to protect the G8 Summit constituted a form of internal deployment of the armed forces, which would violate Germany's Basic Law.

The Alliance 90/The Greens parliamentary group in the German *Bundestag* initiated *Organstreit* proceedings (i.e. proceedings on a dispute between supreme federal bodies), arguing that the Federal Government had violated the rights of the German *Bundestag* under Article 87a, para. 2 of the Basic Law. They argued the Federal Government had violated this law because, prior to the deployment of the *Bundeswehr* at the G8 Summit, it had not submitted the issue of such deployment of the armed forces to the *Bundestag*.

In its decision on 4 May 2010, the Second Senate of the Constitutional Court dismissed the application on the grounds that it was manifestly unfounded.¹

B. The Bases of the Constitutional Provisions on the Armed Forces—Article 24, para. 2 of the Basic Law and the Requirement of Parliamentary Approval

The constitutional provisions on the armed forces, which are becoming increasingly significant in the context of Germany's international policy, are made up of, not only the small number of relevant norms contained in the Basic Law, but also the Federal Constitutional Court's crucial ruling of 12 July 1994 on deployment of the German armed forces "out of area."² With this ruling the Federal Constitutional Court finally provided clear and binding clarification of the key constitutional requirements governing the participation of the *Bundeswehr* in major military operations abroad.³ It could be argued that this clarification should have been provided by policy-makers and/or the architects of the constitution.

Since then it generally has been accepted that Article 24, para. 2 of the Basic Law allows the Federation to enter into a system of mutual collective security such as the United Nations and NATO and, in doing so, to consent to limitations upon its sovereign powers.

¹ Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 5/07, May 4, 2009, paras. 1–69, available at http://www.bverfg.de/entscheidungen/es20100504_2bve000507.html.

² 90 BVerfGE 286.

³ Otto Depenheuer, *Art. 87(a)*, in *GRUNDGESETZ*, m.n. 57 (Theodor Maunz & Günter Dürig, eds., 53rd ed. 2008).

This Article also provides the constitutional basis for assuming the typical tasks associated with such membership and, hence, for the deployment of the *Bundeswehr* in operations taking place within the framework of and in accordance with the rules of such a system.⁴

However, the Federal Constitutional Court also introduced the requirement for parliamentary approval under the defence provisions of the Basic Law. In doing so it established the general principle that the constitutive participation of the German *Bundestag* is required before German armed forces can be deployed abroad. Suddenly, the *Bundeswehr* had become “a parliamentary army,”⁵ much to the surprise of, and not in the least, Parliament itself. This not only means that the armed forces are fully integrated into the Federal Republic’s constitutional system, but it also means that there is a requirement for the constitutive participation of the German *Bundestag* in decisions concerning the external deployment of the armed forces. As a result, the German *Bundestag* has acquired decisive influence over the deployment of German troops abroad.

C. A Right of Participation for the *Bundestag* Does Not Remedy Allegedly Unconstitutional Deployment

The Alliance 90/The Greens parliamentary group in the German *Bundestag*, as the applicant in the *Organstreit* proceedings, contended that the subject of the application was an omission by the Federal Government, as it had failed to involve the German *Bundestag*. The applicant argued that due to the nature of the *Bundeswehr* as a parliamentary army, and on account of the provisions of Article 87a, para. 2 in conjunction with Article 35 of the Basic Law—which state that apart from defence, the armed forces may be employed only to the extent expressly permitted by the Basic Law—the participation of the German *Bundestag* is a constitutional imperative.

However, the requirement of parliamentary approval under the defence provisions of the Basic Law does not arise if the *Bundeswehr* is deployed under circumstances that (allegedly) violate the constitution. Conversely, a decision approving deployment does not remedy any deployment of the *Bundeswehr* that has taken place in breach of the constitution. The Heiligendamm decision states:

If in the present case it is assumed—as the applicant does—that a violation of Article 87 a, para. 2 of the Basic Law occurred due to the armed forces having been deployed for purposes other than defence within the meaning of this provision and without such deployment being expressly permitted by the Basic

⁴ 90 BVerfGE 286.

⁵ *Id.* at para. 382.

Law, the German *Bundestag's* prior consent, given in the form of a simple decision, could not have established conformity with the Basic Law. The German *Bundestag's* participation would not have remedied the alleged violation of the constitution described by the applicant; if anything, it would have reinforced it. In the event of the limits set by Article 87 a, para. 2 of the Basic Law being exceeded, a constitutional amendment would have been required to restore conformity with the Basic Law. Such an amendment cannot be achieved by a simple parliamentary decision.⁶

D. The Requirement of Parliamentary Approval Under the Defence Provisions of the Basic Law Applies Only to Operations Abroad

Since the "invention"⁷ of the requirement of parliamentary approval under the defence provisions of the Basic Law, it has been accepted that under the constitution, an (unwritten) general requirement of parliamentary consent applies, but only to an external, not internal, deployment of the *Bundeswehr*.⁸ This was also the assumption made by the

⁶ 90 BVerfGE 286, para. 2.

⁷ See Markus Heintzen, Lecture: Bezüge des Staatsrechts zum Völker- und Europarecht (Dec. 6, 2001), available at http://www.jura.fu-berlin.de/einrichtungen/we3/professoren/l_s_heintzen/veranstaltungen/archiv/0102ws/v_bezeuge_des_GG_heintzen/Die_Wehr__und_Notstandsverfassung.pdf; DIETER WIEFELSPÜTZ, DER EINSATZ BEWAFFNETER DEUTSCHER STREITKRÄFTE UND DER KONSTITUTIVE PARLAMENTSVORBEHALT 27 (2003); DIETER WIEFELSPÜTZ, DAS PARLAMENTSSHEER 198 (2005); DIETER WIEFELSPÜTZ, DER AUSLANDSEINSATZ DER BUNDESWEHR UND DAS PARLAMENTSBETEILIGUNGSGESETZ (2008); Udo Di Fabio, *Verfassungsstaat*, in II HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 647 (Josef Isensee & Paul Kirchhof eds., 3rd ed. 2004) (§ 27 fn. 152 insists that the requirement of parliamentary approval under the defence provisions of the Basic Law was not "invented" but "arrived at," as part of the further development of the German Bundestag's rights of participation under the defence provisions of constitutional law).

⁸ JÖRG PANNKÖKE, DER EINSATZ DES MILITÄRS IM LANDESINNERN IN DER NEUEREN DEUTSCHEN VERFASSUNGSGESCHICHTE 249 (dissertation, University of Münster) (1998); Karsten Nowrot, *Verfassungsrechtliche Vorgaben für die Mitwirkung des Deutschen Bundestages bei Auslandseinsätzen der Bundeswehr gegen den internationalen Terrorismus*, 45 NEUE ZEITSCHRIFT FÜR WEHRRECHT (NZWehrr) 65, 66 (2003); Norbert Riedel, *Die Entscheidung des BVerfG zum Bundeswehreinsatz im Rahmen der NATO-, WEU- bzw. UN-Militäraktionen. Anmerkungen zum Adria-, AWACS- und Somalia-Urteil des Bundesverfassungsgerichts*, (Anmerkung zu BVerfG, U. v. 12.07.1994 - 2 BvE 3/92, 5/93, 7/93, 8/93 - = BVerfGE 90, 286), 48 DIE ÖFFENTLICHE VERWALTUNG (DÖV) 135, 136 (1995); Wolfgang Schreiber, *Aufgaben und Befugnisse des Bundesgrenzschutzes auf neuer gesetzlicher Grundlage*, 14 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVWZ) 521, 524 (1995); Dieter Wiefelspütz, *Sicherheit vor den Gefahren des internationalen Terrorismus durch den Einsatz der Streitkräfte?*, 45 NZWEHRR 45, 63 (2003); Tobias Linke, *Innere Sicherheit durch die Bundeswehr? Zu Möglichkeiten und Grenzen der Inlandsverwendung der Streitkräfte*, 129 ARCHIV DES ÖFFENTLICHEN RECHTS (AÖR) 489, 536 (2004); Manfred Baldus, Art. 87(a), in III GRUNDGESETZ m.n. 119 (Hermann von Mangoldt, Friedrich Klein & Christian Starck eds., 5th ed., 2005); Manuel Ladiges, *Parlamentarvorbehalt für Sekundäreinsätze der Streitkräfte im Innern? (Zugleich Anmerkung zu BVerfG, U. v. 12.07.1994 - 2 BvE 3/92, 5/93,*

author of the Parliamentary Participation Act (*Parlamentsbeteiligungsgesetz—ParlBG*).⁹ Article 1, para. 2 of this Act merely states, “the deployment of armed German military forces outside the area of application of the Basic Law requires the consent of the *Bundestag*.” The hypothetical argument that the *Bundestag*’s consent could also be required for the internal deployment of the armed forces for the purpose of defence need not concern us here. This would be the case, for example, if, in exercise of its defence mandate under Article 87a, para. 1, first sentence of the Basic Law, the *Bundeswehr* were to avert a military attack within the area of application of the Basic Law, without a “state of defence” having first been declared.¹⁰

It is more likely that a “state of defence” would not be declared in the case of a small, limited attack on the Federal Republic of Germany. In the literature only a few unconvincing arguments are presented in favour of the German *Bundestag*’s constitutive right of participation in respect of internal deployments of the *Bundeswehr*.¹¹

The Federal Constitutional Court’s ruling of 12 July 1994 states:

To the extent that during a state of defence the Armed Forces may be granted the power or authority to protect civilian property and to perform traffic control

7/93, 8/93 -), 45 UNTERRICHTSBLÄTTER FÜR DIE BUNDESWEHRVERWALTUNG (UBWV) 73-74 (2008); MANUEL LADIGES, DIE BEKÄMPFUNG NICHT-STAATLICHER ANGREIFER IM LUFTRAUM 258 (2007) (dissertation, University of Greifswald, 2006); Bernd Grzeszick, *Art. 87(a)*, in BERLINER KOMMENTAR ZUM GRUNDGESETZ m.n. 46 (Karl Heinrich Friauf & Wolfram Höfling eds., 30th ed. 2010); Juliane Kokott, *Art.87(a)*, in GRUNDGESETZ m.n. 60 (Michael Sachs ed., 5th ed. 2009) (raises the question whether the requirement of parliamentary approval under the defence provisions of the Basic Law can also be extended to the case of an internal emergency under Art. 87 a, para. 4 of the Basic Law).

⁹ *Parlamentsbeteiligungsgesetz* [ParlBG – Parliament Participation Law], Mar. 18, 2005, BGBl. I. S. 775, available at <http://www.gesetze-im-internet.de/parlbg/BJNR077500005.html>.

¹⁰ WIEFELSPÜTZ, DER EINSATZ BEWAFFNETER DEUTSCHER STREITKRÄFTE UND DER KONSTITUTIVE PARLAMENTSVORBEHALT, *supra* note 7, at 23; Dieter Wiefelspütz, *Der Einsatz bewaffneter deutscher Streitkräfte und der Bundestag. Ein erster Gesetzentwurf*, 40 RECHT UND POLITIK 101, 102 (2004); Dieter Wiefelspütz, *Das Parlamentsbeteiligungsgesetz vom 18.03.2005* 24 NVwZ 496 (2005); Ferdinand Kirchhof, *Art. 87(a)*, in IV HANDBUCH DES STAATRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, AUFGABEN DES STAATES § 84, m.n. 49 (Josef Isensee & Paul Kirchhof eds., 3rd ed. 2006); Kokott, *supra* note 8, at m.n. 21. Christian Lutze, *Der Parlamentsvorbehalt beim Einsatz bewaffneter Streitkräfte*, 56 DÖV, 972, 976 (2003) (this is under a misapprehension; his view, apposite though it may be, is not new).

¹¹ Peter Dreist, *AWACS-Einsatz ohne Parlamentsbeschluss? Aktuelle Fragestellungen zur Zulässigkeit von Einsätzen bewaffneter Streitkräfte unter besonderer Berücksichtigung der NATO-AWACS-Einsätze in den USA 2001 und in der Türkei 2003*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 1001, 1034 (2004); Lutze, *supra* note 10; DANIEL ESKLONY, DAS RECHT DES INNEREN NOTSTANDES UNTER BESONDERER BERÜCKSICHTIGUNG DER TATBESTÄNDLICHEN VORAUSSETZUNGEN VON NOTSTANDSMAßNAHMEN UND IHRER PARLAMENTARISCHEN KONTROLLE 233 (2000) (dissertation, University of Hamburg); Martin Oldiges, § 23, in 2 BESONDERES VERWALTUNGSRECHT m.n. 34, 50 (Norbert Achterberg, Günter Püttner, Thomas Würtenberger eds., 2nd ed., 2000). An informative literature review can be found in Manuel Ladiges, *supra* note 8, 45 UBWV 73 (2008).

functions (Art. 87 a, para. 3 of the Basic Law), the participation of the legislative bodies follows from the prior determination of a state of defence made by the *Bundestag* with the consent of the *Bundesrat* under Article 115 a, para. 1 of the Basic Law. Possible employment of the armed forces in protecting civilian property and in combating organized armed insurgents under Article 87 a, para. 4, first sentence of the Basic Law must be discontinued if the *Bundestag* or the *Bundesrat* so demands (second sentence). The deployment of units of the armed forces to support the police in a natural disaster or accident which endangers the territory of more than one *Land* is considered by the Basic Law to be primarily an issue for the Federal Government; such deployment must be rescinded at any time at the demand of the *Bundesrat* (Article 35, para. 3, second sentence of the Basic Law).¹²

In view of the different modes of participation expressly ascribed to the German *Bundestag* and the *Bundesrat*, in relation to internal deployments of the *Bundeswehr* under Article 35, paras. 2 and 3 of the Basic Law and Article 87a, paras. 3 and 4 of the Basic Law, it is not possible to derive a general unwritten requirement of parliamentary approval for internal deployments of the *Bundeswehr*.

Without any detailed discussion of the literature, the Federal Constitutional Court's Heiligendamm decision now explicitly refers to the Senate's ruling of 12 July 1994:

A general constitutional right of consent for the German *Bundestag* in relation to specific internal deployments, whether armed or unarmed, of the *Bundeswehr* does not follow from the Senate's decision. This applies irrespective of whether or not a state of defence or state of tension has been determined, for Article 87 a, para. 3 of the Basic Law also does not state that the German *Bundestag's* consent is required for operational deployment of the *Bundeswehr*.

bb) According to the thinking behind the Federal Constitutional Court's Decision 121, 135 (*BVerfGE* 121,

¹² 90 BVerfGE 286, at para. 386.

135), too, the requirement of parliamentary approval under the defence provisions of the Basic Law is treated simply as an effective method of granting the German *Bundestag* a co-decision right in matters relating to foreign relations. Here, the Senate pointed out that the Basic Law grants the German *Bundestag* the right to decide on matters of war and peace in relation not only to the determination of a state of defence and a state of tension, but also to the deployment of armed forces in systems of mutual collective security within the meaning of Article 24, para. 2 of the Basic Law (cf. *BVerfGE* 121, 135 <153 f.>).¹³

E. No Rights of Participation for the German *Bundestag* Under Article 87(a), Para. 2 of the Basic Law

Article 87a, para. 2 of the Basic Law is one of those constitutional provisions concerning defence that continue to pose a conundrum. The main point of dispute is whether Article 87a, para. 2 of the Basic Law applies only to the internal deployment of the *Bundeswehr*,¹⁴ or whether this constitutional norm applies to external deployments as well.¹⁵ However,

¹³ *Id.* at para. 54.

¹⁴ Günter Dürig, *Art.87(a)*, in GRUNDGESETZ m.n. 32 (Theodor Maunz & Günter Dürig eds., 1971); Kokott, *supra* note 8, at m.n. 10 ("According to this, Art. 87 a II should be viewed solely as a norm governing the division of responsibilities between the police authorities of the *Länder* (federal states) and that which applies in an internal emergency."); Ferdinand Kirchhof, *Art. 87(a)*, in IV HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, AUFGABEN DES STAATES § 84 m.n. 57 (Josef Isensee & Paul Kirchhof eds., 3rd ed., 2006); ANDREAS THOMSEN, DER PARLAMENTSVORBEHALT FÜR DEN EINSATZ DER STREITKRÄFTE ZUR VERTEIDIGUNG 9 (dissertation, University of Bonn, 1988); Torsten Stein, *Die verfassungsrechtliche Zulässigkeit einer Beteiligung der Bundesrepublik Deutschland an Friedenstruppen der Vereinten Nationen*, in RECHTLICHE ASPEKTE EINER BETEILIGUNG DER BUNDESREPUBLIK DEUTSCHLAND AN FRIEDENSTRUPPEN DER VEREINTEN NATIONEN 17, 22 (Jochen Frowein & Torsten Stein eds., 1990); Torsten Stein & Holger Kröniger, *Die aktuelle Entscheidung: Bundeswehreinsatz im Rahmen von NATO-, WEU- bzw. VN-Militäraktionen*, 17 JURA, 254, 255 (1995); Albrecht Randelzhofer, *Art. 24.II*, in GRUNDGESETZ m.n. 63 (Theodor Maunz & Günter Dürig eds.); Josef Isensee, in FRIEDEN OHNE MACHT 210, 215 (Dieter Wellershoff ed., 1991); MARTIN LIMPert, AUSLANDSEINSATZ DER BUNDESWEHR 21 (2002); Ingo von Münch, STAATSRECHT I m.n. 866 (6th ed., 2000); Volker Röben, *Der Einsatz der Streitkräfte nach dem Grundgesetz*, 63 ZAÖRV 585, 591 (2003); HEIKE KRIEGER, STREITKRÄFTE IM DEMOKRATISCHEN VERFASSUNGSSTAAT 412 (dissertation, University of Göttingen 2004); WIEFELSPUTZ, DAS PARLAMENTSSHEER, *supra* note 7, at 71; Peter Badura, Der Verfassungsauftrag der Streitkräfte im Grundgesetz, 5 ZEITSCHRIFT FÜR STAATS- UND EUROPAWISSENSCHAFTEN (ZSE) 358, 359 (2007); Manuel Ladiges, *Reichweite des Verteidigungsbegriffs bei terroristischen Angriffen*, 13 HUMBOLDT-FORUM RECHT (HFR) 19, 28 (2009).

¹⁵ KLAUS STERN, DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND 1477 (1980); WOLFGANG SPETH, RECHTSFRAGEN DES EINSATZES DER BUNDESWEHR UNTER BESONDERER BERÜCKSICHTIGUNG SEKUNDÄRER VERWENDUNGEN 13 (1985); Christian Tomuschat, *Art. 24*, in BONNER KOMMENTAR m.n. 185 (Rudolf Dolzer & Hans Jürgen Abraham eds., 50th ed. 1985); NORBERT KARL RIEDEL, DER EINSATZ DEUTSCHER STREITKRÄFTE IM AUSLAND – VERFASSUNGS- UND VÖLKERRECHTLICHE SCHRANKEN 222 (1989); Joachim Wieland, *Verfassungsrechtliche Grundlagen und Grenzen für einen Einsatz der Bundeswehr*,

in its decision of 12 July 1994, the Federal Constitutional Court did not answer the question of whether one purpose of Article 87 a, para. 2 of the Basic Law is to protect powers, and whether it establishes a right of participation for the German *Bundestag*.¹⁶ The academic literature in the field of legal studies has not yet addressed this particular issue either. The Federal Constitutional Court has now provided authoritative clarification:

a) It does not follow from the text of this norm that a right is conferred on the German Bundestag within the meaning of Article 64, para. 1 of the Federal Constitutional Court Act [*Bundesverfassungsgerichtsgesetz—BverfGG*] here. Unlike Article 59, para. 2, first sentence of the Basic Law, for example, which makes explicit reference to the consent or participation of the bodies responsible in such a case for the enactment of federal law, Article 87 a, para. 2 of the Basic Law makes no reference to the German *Bundestag*.

b) Contrary to the applicant's view, the genesis and objectives of Article 87 a, para. 2 of the Basic Law also do not imply that in addition to the objective content of the norm, it may be assumed to have an effect in protecting the powers of the German *Bundestag*. Article 143 of the Basic Law as amended in 1956 (cf. Act to Amend the Basic Law of 19 March 1956, Federal Law Gazette I p. 111), which was the precursor norm to Article 87 a, para. 2 of the Basic Law, stated the

106 DEUTSCHES VERWALTUNGSBLATT (DVBL) 1174, 1175-1179 (1991); Claus Arndt, *Bundeswehreinsatz für die UNO*, 45 DÖV, 618, 619 (1992); BERND NÖLLE, DIE VERWENDUNG DEUTSCHER SOLDATEN IM AUSLAND 56 (dissertation, University of Bonn, 1973); ULRICH SCHOPOHL, DER AUßENEINSATZ DER STREITKRÄFTE IM FRIEDEN 130 (dissertation, University of Hamburg, 1991); MARK ZIMMER, EINSÄTZE DER BUNDESWEHR IM RAHMEN KOLLEKTIVER SICHERHEIT: STAATS- UND VÖLKERRECHTLICHE GRUNDLAGEN UNTER BERÜCKSICHTIGUNG DES BVERFG-URTEILS VOM 12.07.1994 49 (1995); Bodo Pieroth, *Art. 87 a*, in KOMMENTAR GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND m.n. 7 (Hans Jarass & Bodo Pieroth eds., 10th ed. 2009); Karl-Andreas Hernekamp, *Art. 87(a)*, in 3 GRUNDGESETZ m.n. 13 (Ingo von Münch & Günter Kunig eds., 4th/5th ed., 2003); Werner Heun, *Art. 87(a)*, in III GRUNDGESETZ m.n. 16 (Horst Dreier ed., 2nd ed., 2008); ANDREAS PAULUS, PARLAMENT UND STREITKRÄFTEEINSATZ IN RECHTSHISTORISCHER UND RECHTSVERGLEICHENDER PERSPEKTIVE 373 (dissertation, University of Munich, 2006); DANIEL SIGLOCH, AUSLANDSEINSÄTZE DER DEUTSCHEN BUNDESWEHR 40 (2006); Volker Epping, *Art. 87(a)*, in 6 BECK'SCHER ONLINE-KOMMENTAR, GRUNDGESETZ (GG) m.n. 18 (Volker Epping & Christian Hillgruber eds., 7th ed. 2010); DANIEL BECK, AUSLANDSEINSÄTZE DEUTSCHER STREITKRÄFTE. MATERIELL-RECHTLICHE BINDUNGEN AUS VÖLKERRECHT UND GRUNDGESETZ, INSBESONDERE ZUM SCHUTZ DES LEBENS 295 (2008); Andreas Fischer-Lescano, Die Bundesmarine als Polizei der Weltmeere?, 14 IURRATIO 17 (2009); MARTIN SESTER, DER PARLAMENTS BESCHLUS 236 (2007); JOEL GÜNTERT, DIE MATERIELLE VERFASSUNGSMÄßIGKEIT VON UNILATERALEN EVAKUIERUNGSMAßNAHMEN DER BUNDESWEHR IM AUSLAND 63, 68, 74 (2008).

¹⁶ 90 BVerfGE 286, at para. 356.

following: “The conditions in which it shall be permissible to deploy the armed forces in the event of an internal emergency shall be regulated by a law which must be compatible with the principles set out in Article 79.” This text also makes no reference to the establishment of rights for the German *Bundestag*. While it is certainly the case that the purpose of the second defence amendment in 1956 was to create an army “which is embedded in the state as a whole and in the democratic liberal order” (cf. speech by Dr. Arndt, Member of the Bundestag [SPD], German Bundestag, 2nd electoral term, 132nd session, 6 March 1956, p. 6825 B), the intention was to avoid any abuse of the *Bundeswehr* as an instrument of internal political power (cf. Dürig, in: Maunz/Dürig, GG, Art. 87 a, marginal note 28 [August 1971]). This was and is served by the constitutional proviso contained in Article 143 of the Basic Law as amended in 1956, as well as Article 87 a, para. 2 of the current version of the Basic Law, which does not allow the armed forces to be deployed, at least internally, without a constitutional basis. Nonetheless, this circumstance does not imply that the content of the norm has an effect in protecting the powers of the German *Bundestag* such that in *Organstreit* proceedings before the Federal Constitutional Court, the *Bundestag* could claim that a violation of this norm had occurred.¹⁷

Additional reasoning presented by the Federal Constitutional Court centres on the various potential risks associated with *Bundeswehr* operations:

Although under Article 59 a, para. 1 of the Basic Law as amended in 1956 and under Article 115 a, para. 1, first sentence in the currently valid version, it is the *Bundestag* which determines a state of defence, and under Article 80 a, para. 1, first sentence of the Basic Law, it is the *Bundestag* which determines that a state of tension exists, it does not follow that the content of Article 87 a, para. 2 of the Basic Law is intended to protect powers. Nor can any such conclusion can be

¹⁷ 2 BvE 5/07, *supra*, note 1, at para. 65.

drawn from the *Bundestag's* right to discontinue the employment of the armed forces under Article 87 a, para. 4, second sentence of the Basic Law. As already . . . explained, the aforementioned provisions cannot be generalized further in such a way as to imply that internal deployments of the *Bundeswehr*, such as those which are the subject of these proceedings and which were associated with far less potential risk, shall require the consent of the German *Bundestag*. Secondly, it does not follow that the possible absence of a constitutional basis for the deployment of the *Bundeswehr* which is the subject of these proceedings is a matter which can be brought to the attention of the Federal Constitutional Court by the *Bundestag* in *Organstreit* proceedings, especially not if—as is the case here—the deployment obviously did not take place in a situation analogous to any of the circumstances envisaged in the aforementioned provisions.¹⁸

The Federal Constitutional Court concludes by aptly summing up the problem at the heart of the matter. *Organstreit* proceedings are unsuitable as a means of providing judicial clarification of the complaints at hand:

Particularly in view of the circumstances described, it is apparent that the present complaint—namely that in the context of the G8 Summit, the armed forces were deployed under Article 87 a, para. 2 of the Basic Law without the requisite constitutional basis—is primarily intended to draw attention to violations of basic rights that may have occurred. The applicant's main priority is to establish that the flights by *Bundeswehr* Tornado aircraft over the protesters' camps, the aerial photography and the monitoring by *Fennek* spy systems violated the fundamental rights of protestors and summit opponents.¹⁹

¹⁸ *Id.* at para. 66.

¹⁹ *Id.* at para. 67.

F. Summary

The Federal Constitutional Court's Heiligendamm decision is convincing. However, as the grounds for the *Organstreit* proceedings were manifestly unfounded, it was very easy for the Court to dismiss the applications.

In consequence, there is relatively little to be gained from the decision as regards to the constitutional provisions concerning defence. It is self-evident that an allegedly unconstitutional internal deployment of the *Bundeswehr* does not create a requirement of parliamentary approval under the defence provisions of the Basic Law. Such a requirement applies only to external, not internal, deployments of the *Bundeswehr*. This has never really been a contentious issue. Nor has it ever really been a matter of controversy that Article 87a, para. 2 of the Basic Law does not protect powers. The question that continues to be relevant—did the deployment of the *Bundeswehr* to protect the G8 Summit at Heiligendamm violate the Basic Law?— cannot be resolved in *Organstreit* proceedings.

