

Kaleidoscope

Germans to the Front?*

OR

Le malade imaginaire

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I. Introduction

When Oskar Lafontaine, the candidate of the Social Democratic Party for the position of the Federal Chancellor in the last federal elections, was asked to comment on requests for a more active German participation in the Gulf War, he warned: 'Don't these foreigners understand that you can't offer brandy chocolates to a former alcoholic who has finally managed to stay on the wagon?'¹ Germans as potential 'waraholics'? More than 40 years of peace in Germany, a basically anti-militaristic education of the German youth and painful memories of a sabre-rattling and war-mongering Germany in the past have cultivated the breeding ground for a widespread distrust in the value of military force in international relations, especially on the left of the political spectrum.² Polls about possible deployments abroad of the *Bundeswehr* (German armed forces) have proved this critical attitude of large parts of the German population,³ and even in the conservative political circles of Germany, the use of the *Bundeswehr* abroad has been judged rather sceptically.

Both social-democratic and christian-democratic federal governments have repeatedly rejected an active participation of *Bundeswehr* units in UN peace-keeping operations or other military measures of the UN. All governments have so far insisted that such uses of the *Bundeswehr* outside

* 'The Germans to the front!' was the straightforward order of the British Commander-in-Chief Lord Seymour on 22 June 1900, when the attack on Fort Hsiku was initiated during the Boxer Rebellion in China.

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1 Quoted in Buruma, 'The Pax Axis', 38 *The New York Review of Books*, No. 8 (1991) 25.

2 According to a recent poll, 43% of young Germans found that the German armed forces were 'superfluous', and 11% thought they were actually 'harmful' (see Buruma, *ibid.*, 26). Fislér-Damrosch, 'Constitutional Control of Military Actions: A Comparative Dimension', 85 *AJIL* (1991) 92, at 99 detects that 'a basic antiwar philosophy continues to enjoy widespread public approval' in Germany.

3 These polls show that 79% of the Germans opposed the use of force after the expiration of the ultimatum contained in SC Res. 678 of 29 November 1990, para. 2 on 15 January 1991 in the Gulf War (see *TIME Magazine* No. 4/1991, 28 January 1991, at 29).

the NATO territory would not be authorized by the *Grundgesetz* (German constitution).⁴ In short, all German governments have adhered to the following motto: 'Politically (basically) willing, but (unfortunately) legally incapable.'⁵ The legal opinion of the Federal Government⁶ is opposed however by the majority of German scholars of Constitutional law, who do not find serious constitutional obstacles for participation by the *Bundeswehr* in UN operations, and consequently deny the necessity of a constitutional amendment.⁷

However, the German Government seems unimpressed by the constitutional experts' assertion that the *Grundgesetz* grants sufficient freedom of action for the *Bundeswehr*⁸ to contribute to UN security operations. Responding to a question in the *Bundestag* (German parliament)⁹ Ms. Adam-Schwaetzer, Undersecretary in the Ministry of Foreign Affairs, declared bluntly that: 'In order to form its own opinion, the Federal Government will not be directed by the majority opinion of jurists but will follow its own judgment ... and political necessities.'¹⁰ Although this discussion might turn out to be one more situation where the more convincing legal argument does not prevail in the political arena, lawyers are still called upon to draw the line between constitutional interpretations which are reasonably justifiable, and those merely put forward as a cover-up for the lack of political will.¹¹

After a brief survey of the scenarios for a participation of *Bundeswehr* units in UN operations¹² (*infra* II.), this article will attempt to provide a comprehensive presentation of the present debate about prohibitive constitutional restrictions.¹³

4 For a typical statement see Undersecretary Ms. Hamm-Brücher, 18 September 1978, Bundestag-Drucksache VIII/2115, para. 10, at 6: 'The *Grundgesetz* does not contain any provision which would explicitly authorize the participation of the Federal Republic of Germany in peace-keeping forces of the UN' (our translation).

5 See, e.g. Chancellor H. Kohl: 'We very much regret that our Constitution does not allow us at the present to assume our full responsibility in the area' quoted in 'Germany Pledges \$1.87 Billion to Aid Gulf Effort', *N.Y. Times*, 16 September 1990, at A 16, col. 3.

6 Recent statements indicate, however, that the Government is reconsidering its position. In his government policy statement of 30 Jan. 1991, Chancellor Kohl mentioned that a 'clarification of the constitutional basis' for a German participation in military UN operations is necessary (Bulletin der Bundesregierung No. 11/1991, at 76, our translation). This could be interpreted to mean that the demanded constitutional amendment would not introduce a substantive change of the *Grundgesetz* but would be of a merely declaratory character.

7 This is the clear result of a conference held under the auspices of the Max-Planck-Institut in Heidelberg on 17/18 August 1989, published in J. Frowein, T. Stein, *Rechtliche Aspekte einer Beteiligung der Bundesrepublik Deutschland an Friedenstruppen der Vereinten Nationen – Kolloquiumsbeiträge und Diskussion* [cited as Reports or Comments in the following] (1990).

8 Of course, any possible use of the *Bundeswehr* is limited by Art. 26 I *Grundgesetz*: 'Acts tending to and undertaken with the intent to disturb the peaceful relations between nations, especially to prepare for aggressive war, shall be unconstitutional. They shall be made a punishable offence.'

9 Interpellation by Ms. Geiger (CDU/CSU parliamentary group), *Bundestag-Drucksache* XI/5381.

10 *Deutscher Bundestag, Stenographische Berichte*, 11. Wahlperiode, 167th meeting (19 October 1989) 12,642 (our translation).

11 The former Minister of Defence Scholz now criticizes that legal excuses often served as an alibi which conveniently hid underlying political reservations, see Scholz, 'Deutsche unter blauen Helmen', *Die Neue Ordnung* (1991) 130.

12 This article focuses exclusively on the problem of potential uses of the *Bundeswehr* within the UN framework.

13 Considering the constitutional reservations advanced by German governments, the practice of using German armed forces abroad has not been consistent; for example, after the end of the Gulf War minesweepers of the German navy helped to clean up the Persian Gulf. For a critical opinion, see

II. Military Operations in the UN Context

Four different types of UN operations can be roughly distinguished in which the *Bundeswehr* could become involved. First, those measures involving the use of armed forces under the command of the Security Council which are envisaged in Chapter VII of the UN Charter but have never thus far been realized.¹⁴ Secondly, peace-keeping operations which have generally been accepted as a task of the United Nations despite the lack of an explicit regulation in the Charter.¹⁵ However Chapter VI of the UN Charter has been favoured as the legal basis for peace-keeping operations of this kind.¹⁶

Thirdly, one possible further scenario for a German participation would be the use of military force based on a mere authorization (with no subsequent supervision) by the Security Council.¹⁷ As for now, this scheme of enforcement actions might be the only one that will eventuate as there continues to be no agreements concluded pursuant to Article 43 UN Charter. However, the use of force justified only by Security Council authorization certainly does not fit the ideal programme envisaged by Chapter VII, and has faced serious criticism.¹⁸ Finally, most recent developments seem to indicate that peace-keeping operations can now be deployed in the absence of the consent of all parties involved.¹⁹

Leaving aside the question as to whether and to what extent the *Grundgesetz* permits participation in UN military action,²⁰ one should keep in mind that, even if the *Grundgesetz*

Randelzhofer, 'Commentary on Art. 24 II at para. 44 footnote 94', in T. Maunz, G. Dürig, R. Herzog, R. Scholz (eds), *Kommentar zum Grundgesetz* (1989).

14 One will recall that Korean War military operations were not executed by the Security Council. The latter merely issued a recommendation that member states should take steps to end the aggression. Cf. UN Doc. No. S/1511 (27 June 1950) and UN Doc. No. S/1588 (7 July 1950).

15 See the landmark opinion of the ICJ: 'Certain Expenses of the United Nations, Article 17, paragraph 2, of the Charter, Advisory Opinion', ICJ Reports 1962, 168.

16 For a discussion of the possible legal bases, see Bothe, 'Friedenserhaltende Maßnahmen', para. 38ff, in B. Simma (ed.), *Charta der Vereinten Nationen. Kommentar* (1991) (English edition forthcoming in 1992).

17 The prominent example is SC Res. 678 (29 November 1990) which authorized military actions of the allied forces against Iraq in the Gulf War: 'The Security Council ... Acting under Chapter VII of the Charter of the United Nations, ... Authorizes Member States ... to use *all* necessary means...'.
18 See also *infra* note 85.

19 SC Res. 687 para. 5 (observer mission to Iraq and Kuwait) and SC Res. 688 and 689 (protection of the Kurds in Iraq) offer problematic examples for such borderline cases of peace-keeping which are based somewhere in the twilight zone between Chapter VI and Chapter VII.

For discussion of these 'Chapter VI 1/2 or VI 2/3' operations, see Heinz, Philipp, Wolfrum, 'Zweiter Golfkrieg: Anwendungsfall von Kapitel VII der UN-Charta', 39 *VN* (1991) 128.

20 For the lively political and legal discussion about this question, see *inter alia* the following references: Blumenwitz, 'Der nach außen wirkende Einsatz deutscher Streitkräfte nach Staats- und Völkerrecht', 30 *Neue Zeitschrift für Wehrrecht* (1988) 133; 'Die Einsatzmöglichkeiten deutscher Streitkräfte nach Staats- und Völkerrecht', *Zeitbühne* (1991) 22; Brunner, 'Die internationale Verwendung der Bundeswehr', *Zeitschrift für Rechtspolitik (ZRP)* (1991) 133; Coridaß, *Der Auslandseinsatz von Bundeswehr und Nationaler Volksarmee* (1985); Fleck, 'UN-Friedenstruppen im Brennpunkt, Überlegungen zu einer Beteiligung der Bundesrepublik Deutschland', *Vereinigte Nationen (VN)* (1974) 161; Franke, 'Streitkräfte der Vereinten Nationen. Entwicklung und aktuelle Probleme', 18 *Archiv des Völkerrechts (AVR)* (1979/80) 149; R. Geiger, *Grundgesetz und Völkerrecht* (1985) 348ff; Giegerich, 'The German Contribution to the Protection of Shipping in the Persian Gulf: Staying out for Political or Constitutional Reasons?', 49 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (1989) 1, 37ff.; Ipsen, 'Commentary on Art. 87a', in *Bonner Kommentar zum Grundgesetz* (1969); Klein, 'Rechtsprobleme einer deutschen Beteiligung an der Aufstellung von Streitkräften der Vereinten

excluded the *Bundeswehr* from all UN initiatives, no violation of international law obligations would occur since UN member states are not obligated to provide their armed forces for UN military operations.²¹ This is generally recognized for both peace-keeping operations and (in the absence of any agreements pursuant to Article 43 UN Charter)²² the use of military force based on an authorization by the Security Council.²³

III. The Constitutional Discussion in Germany

The present constitutional debate about the deployment of the *Bundeswehr* abroad revolves around two articles of the *Grundgesetz* (GG): Article 24 I and II GG and Article 87a II GG. These provisions read as follows:

Article 24

- (I) The Federation may by legislation transfer sovereign powers to inter-governmental institutions.
- (II) For the maintenance of peace, the Federation may enter a system of mutual collective security; in doing so it will consent to such limitations upon its rights of sovereignty as will bring about and secure a peaceful and lasting order in Europe and among nations of the world.

Article 87a

- (II) Apart from defence, the Armed Forces may only be used to the extent explicitly permitted by this Basic Law²⁴

The above articles contain two fundamental and competing constitutional decisions. On the one hand, the *Grundgesetz* pledges Germany's dedication towards a concept of 'permeable statehood'²⁵ and allows for a far-reaching integration into the international community including the participation in systems of collective security (Article 24 II GG). On the other hand, the *Grundgesetz* restricts the deployment of the armed forces (Article 87a II GG). A functioning collective security system necessarily presupposes the readiness on the part of its members to use military force as a means

Nationen', 34 *ZaöRV* (1974) 429; Menzel, 'Die militärischen Einsätze der Vereinten Nationen zur Sicherung des Friedens', 15 *Jahrbuch für internationales Recht* (1971) 11; Mössner, 'Bundeswehr in blauen Helmen', in v. Münch (ed.), *Staatsrecht-Völkerrecht-Europarecht, Festschrift für Schlochauer* (1981) 97; Pechstein, 'Der Golfkrieg – Völkerrechtliche und grundgesetzliche Aspekte', *Jura* (1991) 461; Riedel, 'Bundeswehr mit "blauen Helmen"', *Neue Juristische Wochenschrift (NJW)* (1989) 639; Scholz, 'Deutsche unter blauen Helmen?', *Die Neue Ordnung* (2/1991) 130; Tomuschat, 'Commentary on Art. 24', *Bonner Kommentar zum Grundgesetz* (1985); Wechmar, 'Friedenserhaltende Maßnahmen – eine Herausforderung an die Bundesrepublik Deutschland', 30 *Vereinte Nationen (VN)* (1982) 12.

21 See, e.g., Fislser-Damrosch, *supra* note 2, at 103.

22 There is, however, an obligation to enter into negotiations for such agreements, see Frowein, 'Commentary on Art. 43', in B. Simma (ed.), *supra* note 16, paras. 9f.

23 If one regards these authorizations as a case of collective self-defence, Art. 51 does not create an obligation to participate in the defence efforts.

24 Translation by 'Press and Information Office of the Federal Government, Bonn'. See also A.P. Blaustein, G.H. Flanz, *Constitutions of the Countries of the World*, Vol. VI (issued December 1985), which includes a Constitutional Chronology 1945-1984.

25 The term *offene Staatlichkeit* (permeable statehood) was coined by Klaus Vogel who developed this

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of last resort in case of aggression of one member state against another.²⁶ Hence, an obvious tension develops between the integrationist programme of Article 24 II GG and the restrictive character of Article 87a II GG when the deployment of the *Bundeswehr* within the UN framework is at issue.

Crucial for an understanding of this tension between the two constitutional norms is the chronology of amendments of the *Grundgesetz*, because these articles were introduced into the constitution under markedly different historical and political circumstances. Whereas Article 24 I and II GG has been part of the constitution without any subsequent alterations since the adoption of the *Grundgesetz* in 1949, Article 87a GG was introduced into the *Grundgesetz* as part of the *Wehrverfassung* (defence constitution amendment) in 1956²⁷ and was altered again in the course of the *Notstandsverfassung* (state of emergency amendment) in 1968.²⁸ This later addition of constitutional provisions which established and regulated the armed forces is praised by some as a 'unique process without historical precedents.'²⁹ However, as is proved by the heated debate about the interpretation of the amendments, it is submitted that they cannot be applauded as a sample of brilliant constitutional drafting.

The meaning, scope and interrelationship of the two articles dominates the present constitutional debate, which is centred around four systematically different issues:

- A. Does Article 87a II GG exclusively cover the deployment abroad of the *Bundeswehr*, or does Article 24 overlap into this area?
- B. How far does Article 87a II GG, if at all, allow or prohibit a deployment abroad within the UN?
- C. What is permitted by the 'integrationist programme' envisaged in Article 24 GG?
- D. If Articles 24 and 87a II GG overlap, how can the conflict between the two provisions be resolved?

A. The Scope of Article 87a II GG and Article 24

The restrictive wording of Article 87a II GG ('may only be used') could prohibit a German participation in UN operations only if the provision covers both domestic uses *and* deployments abroad of the *Bundeswehr*.

More and more authors subscribe to noteworthy arguments which would strictly limit the scope of Article 87a II GG to domestic uses of the armed forces.³⁰ A first systematic argument is based on the position of Article 87a II GG in Chapter VIII of the *Grundgesetz*. Provisions in this chapter regulate the division of administrative jurisdiction between the Federation and the *Länder* thereby suggesting that Article 87 is only concerned with the internal problems of a federal system and not with external uses of the *Bundeswehr*.³¹ Secondly, the amendment of Article 87a in 1968

concept from an overall view of Arts. 24 to 26 and the Preamble of the *Grundgesetz*, see K. Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit* (1964) 42ff.

26 See the two leading commentaries on the *Grundgesetz*: Randelzhofer, *supra* note 13, Art. 24, para. 44, and Tomuschat, *supra* note 20, Art. 24, para. 171.

27 7th Constitutional Amendment (19 March 1956), Bundesgesetzblatt (BGBl.) (1956) part I, 111.

28 17th Constitutional Amendment (24 June 1968), BGBl. (1968) part I, 709.

29 Martens, *Grundgesetz und Wehrverfassung* (1961) 19.

30 See, e.g. Stein, in J. Frowein, T. Stein, *supra* note 7, at 22ff.; Scholz, *supra* note 20; Pechstein, *supra* note 20; Doehring, in J. Frowein, T. Stein, *supra* note 7, at 42.

31 For an in-depth study of competences in the foreign affairs area, see U. Fastenrath, *Kompetenzverteilung im Bereich der auswärtigen Gewalt* (1985).

replaced the former Article 143 GG, a provision exclusively directed at the use of the armed forces in internal states of emergency.³² The 1968 amendment aimed at a regulation of internal states of emergency which would grant sufficient guarantees to the Three Western Allied Powers so that they could give up emergency rights reserved in Article 5(2) of the General Treaty for the protection of the security of their armed forces stationed in West Germany.³³ Because of the federal constitutional structure and, more importantly, the disastrous experiences of emergency powers under the Weimar Constitution of the German Reich,³⁴ the State of Emergency Amendment of 1968 prohibited internal uses of the armed forces in general. The amendment allowed only a few strictly defined exceptions in emergency situations where the armed forces would basically perform police tasks.³⁵ In the view of some authors, the context of the 1968 amendment suggests that Article 87a II GG is similarly limited to internal uses of the armed forces.

The same authors also point out that the original 1956 version of Article 87a GG³⁶ did not contain any restrictions on deployments abroad of the *Bundeswehr*, and they conclude that there is no convincing evidence that the 1968 amendment intended to curtail this freedom of action. Such a constitutional volte-face with fundamental repercussions on Germany's foreign affairs seems doubtful to them especially because the drafting history of the 1968 amendment does not give any indication that this crucial issue had been discussed.³⁷ This would be astonishing indeed, since accession to the UN was a subject of political discussions in Germany at that time, and a possible deployment of the *Bundeswehr* under the command of the world organization was no longer utopian. In addition, if the amended Article 87a II GG also covered external uses and thereby restricted the scope of Article 24 GG, some believe that the 1968 amendment would not

32 After the 7th Constitutional Amendment of 1956, Art. 143 read as follows: 'The conditions under which it will be admissible to have recourse to the Armed Forces in case of a state of internal emergency, may be regulated only by a law which fulfills the requirements of Article 79 [i.e. constitutional amendments with a 2/3 majority in both houses].'

33 See Convention between the Three Powers and the Federal Republic of Germany, UNTS, Vol. 331 (1959) 327ff so-called General Treaty (*Deutschlandvertrag*).

34 See Art. 30 GG: 'The exercise of governmental powers and the discharge of governmental functions shall be incumbent on the Länder in so far as this Basic Law does not otherwise prescribe or permit.' For a brief survey of the drafting history of the 1968 amendment, see K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, Vol. II (1980) 1322ff.

35 See Art. 35 II and III GG (Armed forces assist the police forces of the *Länder* in cases of natural disasters and grave accidents), Art. 87a III GG (In states of defence or tension, armed forces may protect civilian property and regulate traffic where necessary to perform their defence mission or otherwise where authorized to support the police) and Art. 87a IV GG (In internal states of emergency, the Government may be authorized to protect property and fight insurgents in support of the police where the latter's forces are inadequate).

36 The 7th Constitutional Amendment (19 March 1956), *Bundesgesetzblatt* (1956), part I, 111 (so-called Defence Amendment) introduced the following Art. 87a GG: 'The numerical strength and organizational structure of the Armed Forces raised for defense of the Federation shall be shown in the budget'. In the course of the State of Emergency Amendment of 1968 this provision became Art. 87a I GG ('The Federation shall build up Armed Forces for defence purposes. Their numerical strength and organizational structure shall be shown in the budget') and Art. 87a II-IV GG was added (see *supra* III and note 35).

37 One sentence hidden in the final report of the Legal Committee of the *Bundestag* has been cited repeatedly by the opposite opinion, see *Bundestag-Drucksache* V/2873, 12: 'The Legal Committee proposes that all provisions about uses of the Armed Forces – except for assistance in cases of natural disasters – should be combined in one article. Art. 87a suits this purpose. Also included should be internal uses of the Armed Forces ...' (emphasis added: our translation). See however *infra* note 91.

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comply with the requirements for constitutional amendments established in Article 79 GG, or at least the spirit of this article would have been violated.³⁸

The opposing view postulates that Article 87a II GG should be interpreted extensively to cover both internal *and* external uses of the *Bundeswehr*. One argument suggested in favour of an extensive interpretation of the scope of Article 87a II GG is that the consequence of a narrow interpretation would be a situation where the *Grundgesetz* did not contain any regulation of external uses of the *Bundeswehr*.³⁹ However, constitutions usually do not contain an exhaustive regulation of all possible uses of the armed forces, and this can be deduced by making a comparison of the constitutions of different countries and also by reviewing earlier German constitutions.⁴⁰ Arguments which can be taken more seriously that support the application of Article 87a II GG to external operations are based on the article's express wording. Firstly, the particular phrase 'apart from defence' itself refers to potentially external uses outside the limited territory of Germany.⁴¹ Those that would apply Article 87a II GG to internal matters only would limit this phrase to military operations on German territory in a state of defence, and argue that, if external uses were meant to be regulated, a much clearer formulation could have been used (for example: 'The *Bundeswehr* may only be used for defence purposes.').⁴² On the other hand, probably still the strongest argument for an extensive interpretation of Article 87a II GG is that its wording clearly does not give any clue that the provision should be limited to the national territory.⁴³

Proponents of a restrictive interpretation might have to struggle with the questions whether the silence of the *Grundgesetz* would grant a 'blank cheque' for all external uses of the *Bundeswehr*, and which function could still be reasonably accredited to Article 24 II GG as regards deployments abroad.⁴⁴ Those, however, who advocate an extensive interpretation of the scope of Article 87a II GG have to tackle the interpretative problems of this provision as regards deployments of German troops for UN missions.

38 Art. 79 I sentence 1 GG reads as follows: 'This Basic Law can be amended only by laws which *expressly* amend or supplement the text thereof' (emphasis added).

39 See Riedel, *supra* note 20, at 640.

40 None of the constitutions of the Member States of the European Community restrict the participation of armed forces in military operations of the UN. Most constitutions mention the defence of the national territory as a task of the armed forces, but, nevertheless, do not regard this as an exclusive task (see, e.g., Art. 52 Constitution of Italy; Art. 8 Constitution of Spain; Art. 273 II Constitution of Portugal; Art. 98 I Constitution of the Netherlands).

41 Tomuschat, [Comment], in J. Frowein, T. Stein, *supra* note 7, at 46 emphasizes the interrelationship between Art. 87a II GG, the Preamble of the *Grundgesetz* ('to serve the peace of the world') and Art. 26 GG and views the restrictions on the defence task of the *Bundeswehr* as a deliberate decision of the *Grundgesetz*.

42 Cf. Stein, [Report], in J. Frowein, T. Stein, *supra* note 7, at 25. For a similar view, see Pechstein, *supra* note 20, at 466.

43 This argument is decisive for, *inter alia*, Tomuschat, [Comment], in J. Frowein, T. Stein, *supra* note 7, at 46.

44 A discussion of the more philosophical question of whether states have an inherent right to use armed forces or whether an express constitutional authorization is needed to this end, is outside the limited goals of this article. These questions were discussed extensively when the rearmament of the Federal Republic after WW II was at issue; Institut für Staatslehre und Politik Mainz (ed.), *Der Kampf um den Wehrbeitrag* Vol. 2 (1953).

B. Article 87a II GG and Deployment Abroad within the UN

However simple the wording of Article 87a II GG might appear at first sight, German constitutional scholars have managed to develop interpretive controversies around each element of this article: concepts of 'defence', 'use of the armed forces' and the criteria for an 'explicit permission'.

1. The concept of 'defence'

One narrow, one broad and one more widely accepted intermediate concept of 'defence' have been advanced. The narrow interpretation, on the one hand, equates defence with defence of the German territory ('territorial defence conception'), whereas the broader interpretation defines defence as the antonym of aggression ('international law defence conception').⁴⁵

Proponents of a narrow interpretation refer to the definition of the 'state of defence' in Article 115a I GG which is limited to attacks or imminent attacks on the Federal Territory.⁴⁶ They invoke the principle that constitutional terms should be interpreted uniformly throughout the entire constitution, and also point out that even the final drafts for the amendment of Article 87a GG used the term *Landesverteidigung* (national defence) which was finally changed to *Verteidigung* (defence) simply in order to achieve a uniform terminology.⁴⁷ On the basis of this narrow territorial conception of defence,⁴⁸ Germany could participate in hardly any of the UN missions outlined above (*supra* II.). Critics of this position do not accept the semantic argument as conclusive (i.e. defence is not necessarily identical with state of defence) and point to the markedly different rationale and context of Article 115a I GG as compared to Article 87a II GG: Article 115a I GG determines only the circumstances in which the special constitutional powers and legislative procedures of Chapter Xa GG for a state of emergency shall apply.⁴⁹ Since these emergency arrangements make sense only in case of an attack on the national territory,⁵⁰ the definition of the state of defence cannot develop any value as a precedent regarding military uses for defence purposes where the national territory is not endangered.⁵¹ Also, a strictly territorial concept of defence would render the Federal Republic incapable of fulfilling its NATO obligations whenever

45 For a detailed analysis of the two conceptions and their consequences, see Brunner, *supra* note 20, at 133.

46 Art. 115a I GG: 'The determination that the federal territory is being attacked by armed force or that such an attack is directly imminent (state of defence) shall be made by the *Bundestag* with the consent of the *Bundesrat*'.

47 See Stein, [Report], in J. Frowein, T. Stein, *supra* note 7, at 20.

48 Cf. Coridaß, *supra* note 20; for further advocates of this position, see Brunner, *supra* note 20, at 133.

49 For example, Art. 115c GG permits expropriations with only preliminary compensation and short-term detentions without immediate judicial review, actions which, in peace times, would be unconstitutional violations of Art. 14 III GG (Protection of property) and 104 III GG (Legal guarantees in the event of deprivation of liberty).

50 That the power of command over the armed forces shall pass from the Minister of Defence to the Federal Chancellor according to Art. 115b GG, for example, makes sense only in case of an attack on the national territory.

51 Randelzhofer, *supra* note 13. Art. 24, para. 46, emphasizes that the consequences of a determination of the state of defence according to Art. 115a I GG are strictly limited to a rearrangement of internal competences. For references to other critics of the territorial defence conception, see also Giegerich, *supra* note 20, at 26.

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an attack on a NATO member state, e.g. an Iraqi attack on Turkey, does not touch upon German territory.⁵²

The most extensive interpretation regards 'defence' as an antonym to the concept in international law of aggression. This contextual approach interprets Article 87a II GG as being in correlation with the Preamble and Articles 24 II and 26 GG and develops a constitutional authority for all uses of the armed forces which do not disturb international peace but are permitted under international law.⁵³ This broad concept of defence would authorize German participation in all forms of individual and collective self-defence,⁵⁴ military measures under Chapter VII, and operations merely authorized by the Security Council.⁵⁵ Opponents of this extensive concept of defence complain that this view is not supported by the natural understanding or the plain meaning of 'defence.'⁵⁶

For the sake of reconciliation between the narrow and the broader interpretation, an intermediate, and most widely accepted position interprets 'defence' in Article 87a II GG to cover both territorial defence *and* compliance with NATO obligations.⁵⁷

Ironically, all three approaches have difficulties in subsuming relatively harmless peace-keeping operations under their respective conception of defence.⁵⁸ Most authors do not acknowledge peace-keeping operations as measures of defence because they fear a further dilution of the concept of defence. Some however, find loopholes for peace-keeping operations by excluding them from the concept of 'use' (see *infra* III.B.2.) or accepting them as collective security measures in Article 24 II GG (see *infra* III.C.).⁵⁹

2. The concept of 'use of the armed forces'

The wording of Article 87a II GG restricts only the use of the 'Armed Forces'. According to a prevailing view, deployment of units of the *Bundesgrenzschutz* (Federal Border Guard) is not regulated by Article 87a II GG because the *Bundesgrenzschutz* is entirely independent of the *Bundeswehr* and fulfills mainly police functions.⁶⁰ For this reason, the Federal Republic occasionally

52 See the critique by Mössner, *supra* note 20, at 101.

53 Geiger, *supra* note 20, at 359; Bülow, *supra* note 50, at 62ff.

54 The *Grundgesetz* pledges an active participation in international efforts for a peaceful world order: see the Preamble ('The German People ... Animated by the resolve ... to serve the peace of the world'), Art. 24 II (*supra* text notes 23-24), and Art. 26 I ('Acts tending to and undertaken with the intent to disturb the peaceful relations between nations, especially to prepare for aggressive war, shall be unconstitutional ...').

55 For this broad defence conception it is irrelevant whether the authorization of the Gulf War by the Security Council can be summarized under Chapter VII or Art. 51 UN Charter.

56 Randelzhofer, *supra* note 13, Art. 24, para. 53; Klein, *supra* note 20, at 439f. The Federal Constitutional Court has repeatedly ruled that constitutional construction must respect the plain meaning of the language of the *Grundgesetz*, see, e.g., BVerfGE 8, 38 at 41. On the other hand, the Court has allowed for certain exceptions from this rule; for references see K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (17th ed. 1990) 22.

57 Tomuschat, 'Deutscher Beitrag zu den VN-Friedenstruppen', 36 *Außenpolitik* (1985) 272, at 278.

58 See, for example, Klein, *supra* note 20, at 429ff.; Mössner, *supra* note 20, at 97ff.

59 See, e.g., Brunner, *supra* note 20, at 135, who accepts that peace-keeping operations are permitted under Art. 24 GG.

60 However, neither the *Grundgesetz* nor the Federal Border Guard Statute (*Bundesgrenzschutzgesetz*) explicitly authorizes or regulates a deployment abroad.

sent *Bundesgrenzschutz* units to participate in peace-keeping operations which performed strictly police functions.⁶¹

As regards a participation of the *Bundeswehr* in UN operations, some argue that this would not constitute a 'use' in the sense of Article 87a II GG as long as these troops are assigned to the supreme command of an international organization. By way of assignment these units would become 'international' armed forces whereas Article 87a II GG regulates only the use of the 'German' *Bundeswehr*. The assignment act would be judged exclusively under the criteria of Article 24 GG⁶² with the result that the *Bundeswehr* could participate in all peace-keeping operations and strict Chapter VII measures conducted under a UN supreme command.⁶³ One argument advanced against this interpretation is that *Bundeswehr* units would still retain their character as national contingents insofar as, *inter alia*, internal staff regulations and disciplinary authority including disciplinary penalties would still be exercised according to German laws.⁶⁴ Even after an integration into international forces under the supreme command of the UN, the activities of *Bundeswehr* units would still be partly controlled by German Law. Article 87a I and II GG does not distinguish between armed forces under a German or a supranational supreme command.⁶⁵

Some authors have attempted to restrict the scope of Article 87a II GG by limiting the concept of 'use' to such incidents where *Bundeswehr* units would carry weapons.⁶⁶ This restrictive interpretation of 'use' would at least permit the participation in many traditional peace-keeping operations of a non-military, humanitarian character.

The prevailing opinion denies that the carrying of weapons is a relevant criterion for the concept 'use', and points first to the clear wording of Article 87a II GG which talks of uses other than for defence purposes. Secondly, the principle 'Einheit der Verfassung' (i.e. constitutional unity)⁶⁷ requires a uniform interpretation of 'use' throughout the entire constitution. Other provisions of the *Grundgesetz* regulate domestic uses of the *Bundeswehr* where troops would not necessarily carry weapons.⁶⁸ The drafting history supports this view because an earlier draft of Article 87a II GG distinguished between armed and unarmed uses of the *Bundeswehr* but it was deliberately abandoned in the final version.⁶⁹ The majority position favours a functional interpretation and defines 'use' as the performance of tasks by units of the armed forces within

61 Germany sent a unit of volunteers of the Federal Border Guard to Namibia to participate in UNTAG operations, see Brenke, 'Die Rolle der Bundesrepublik im Namibia-Konflikt', *Aus Politik und Zeitgeschichte* (1990) 24-32.

62 For a discussion of what is permitted under Art. 24, see *infra* text notes 76-86.

63 Bothe, [Comment], in J. Frowein, T. Stein, *supra* note 7, at 48; Bothe, 'Friedenserhaltende Maßnahmen', in B. Simma (ed.), *supra* note 10, para. 62; Brunner, *supra* note 20, at 133-138.

64 See, e.g., Model status-of-forces agreement for peace-keeping operations, in Comprehensive Review of the Whole Question of Peace-Keeping Operations in all their Aspects (Report of the Secretary-General of 9 October 1990), UN Doc. A/45/594 at 12.

65 Similar arguments were advanced in the discussion about the participation of the Federal Republic of Germany in the European Defence Community (EDC): The Federal Government seemed to argue that no explicit constitutional authorization was necessary since the troops assigned to the EDC by the Federal Republic would not be German but EDC forces; see Klein, *supra* note 20, at 434, n. 22.

66 See Giegerich, *supra* note 20, at 25. For similar viewpoints see Fleck, *supra* note 20, at 99; Hernekamp, in v. Münch, *Grundgesetzkommentar* Vol. 2 (2nd ed. 1983) Art. 87a, para 12; Nölle, *Die Verwendung des deutschen Soldaten im Ausland* (1973) 82.

67 See K. Hesse, *supra* note 57, at 11; for a critique of the principle of 'Einheit der Verfassung', see F. Müller, *Die Einheit der Verfassung* (1979), esp. 225ff.

68 Cf. Arts. 87a III and 35 II, III GG (For a brief summary of the content of these provisions, see *supra* note 35).

69 For the earlier draft, see *Bundestag-Drucksache* IV/891 (11 January 1963) 4 and 16.

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a military command structure.⁷⁰ On the basis of this broad interpretation, any direct participation of *Bundeswehr* units in UN operations would inevitably be qualified as 'uses' in the sense of Article 87a II GG.⁷¹

3. Other 'explicit' permissions in the Grundgesetz

If it were the case that Article 87a II GG was applicable to the participation of German forces within the framework of UN missions, their deployment would require an 'explicit' authorization in the Constitution. Some authors regard the authorization for Germany's integration into a system of mutual collective security, as provided in Article 24 II GG, as explicit enough.⁷² This interpretation is favoured especially by authors who accept that Article 87a covers *all* uses of the armed forces. As a consequence, all collective security measures covered by the integrationist programme of Article 24 II would become permissible.⁷³ However, in the view of the majority of constitutional scholars Article 24 GG does not clearly pass the test of 'explicitness'⁷⁴. Unlike in the other four 'explicit' authorizations in the *Grundgesetz*⁷⁵, one searches in vain for the terms 'armed forces' in Article 24 II. The declared purpose of the requirement of an 'explicit' authorization was to bar all attempts to establish implied authorizations.⁷⁶ Any implied authorizations would thus do violence to the plain and clear language of Article 87a II.

C. The Integrationist Program of Article 24 GG

Article 24 II GG authorizes the Federal Republic to 'enter a system of collective security'. It is undisputed that the United Nations establish the classical type of a collective security system based on the idea that 'a potential aggressor from within the system must either be deterred from aggression against another member State or be overcome in case of actual aggression.'⁷⁷ By becoming a member of the United Nations in 1973,⁷⁸ the Federal Republic entered the UN security system. An isolated interpretation of Article 24 II GG, disregarding Article 87a II GG for a

70 Randelzhofer, *supra* note 13, Art. 24, para. 62; Stein, 'Landesverteidigung und Streitkräfte im 40. Jahr des Grundgesetzes', in K. Hailbronner, G. Ress, E. Stein (eds), *Staat und Völkerrechtsordnung (Festschrift für Karl Doehring)*, (1989) 935, at 941.

71 A lively discussion has developed about borderline cases where German armed forces participated only indirectly in UN operations. For example, the *Bundeswehr* assisted, *inter alia*, in the peace-keeping operations UNEF and UNIFIL by providing air transportation, equipment and training to other national contingents of the peace-keeping forces. In 1991, minesweepers of the German navy helped to clean up sea mines in the Persian Gulf. The Government justified these actions by claiming that they were not deployments covered by Art. 87a II GG. For discussion see, e.g., Stein, [Report], in J. Frowein, T. Stein, *supra* note 7, at 22; Giegerich, *supra* note 20, at 23.

72 Coridaß, *supra* note 20, at 15ff.; Tomuschat, *supra* note 57, Art. 24, para. 174; Doehring, [Comment], in J. Frowein, T. Stein, *supra* note 7, at 42f and 60; Wolfrum, [Comment], in J. Frowein, T. Stein, *supra* note 7, at 70f.

73 Art. 24 see *supra* text notes 23 to 24.

74 Frowein, [Report], in J. Frowein, T. Stein, *supra* note 7, at 19; serious doubts in this respect were also articulated by Bothe, [Comment], in J. Frowein, T. Stein, *supra* note 7, at 68.

75 Arts. 87a III, IV and 35 II, III GG. For a brief summary of the contents of these provisions, see *supra* note 35.

76 Ipsen, *supra* note 20, Art. 87a, para 35; cf. *Bundestag-Drucksache* V/2873, 13.

77 Delbrück, 'Collective Security', in Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment 3 (1982) 104 at 106.

78 BGBl. (1973), part II, 431.

moment, clearly shows that Article 24 II GG establishes the constitutional basis for a German participation in such military operations which are an essential component of the UN security system.⁷⁹

The range of the authorization granted in Article 24 II GG is thus determined by the concept 'mutual collective security' which certainly includes such measures as were originally envisaged in Chapter VII of the UN Charter. A minority opinion restricts collective security measures to instances where the collective reacts in defence to an act of aggression of one of its members.⁸⁰ The overwhelming majority, however, accept peace-keeping operations as a new element of the UN collective security system. They are either regarded as preventive means for the preservation or maintenance of peace, or are justified with the help of an *a maiore ad minus* argument when compared to the significantly more intrusive military measures under Chapter VII.⁸¹ Even a participation in the more unorthodox new forms of peace-keeping (so-called 'Chapter VI 1/2' operations, *supra* II.) might be justified under the *Grundgesetz* with this line of argument.

A difficult case, however, would be military operations which are merely authorized by the Security Council as in the case of the Gulf War. Article 24 II GG would permit German participation only if such an unconventional procedure still constituted a measure of 'collective security'. The permission for integration granted in Article 24 II GG extends to those future developments of the United Nations which show a reasonable similarity⁸² with the collective security programme subscribed to when the Federal Republic joined the United Nations.⁸³ One could argue that the allied forces in the Gulf waited until SC Res. 678 granted the participating states a 'collective' authorization.⁸⁴ However, after SC Res. 678 the Security Council completely lost control over the military operation,⁸⁵ and in the absence of reasonable control exercised by the

79 This constitutional authorization must clearly be distinguished from the quite different question concerning whether the concrete deployment of German troops for UN purposes would require an additional authorizing statute because of Art. 24 I GG and Art. 59 II 1 GG ('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 legislation [i.e. in this case the *Bundestag*].')

80 Riedel, *supra* note 20, at 640 who misinterprets Mössner, *supra* note 20, at 110.

81 See, e.g. Tomuschat, *supra* note 57, Art. 24, para. 190; Randelzhofer, *supra* note 13, para 56; Mössner, *supra* note 20, at 110; Geiger, *supra* note 20, at 353; Frowein, [Report], in J. Frowein, T. Stein, *supra* note 7, at 12.

82 In the absence of special agreements (Art. 43 UN Charter) and strategic directions from the Military Staff Committee (Art. 47 III UN Charter), the crucial criterion for the 'collectiveness' of such military security measures could be how far the Security Council itself retains control over these operations.

83 This idea that the accession to an international organization constitutes the acceptance of an integration programme of the organization was first applied to the NATO-Treaty in the context of Art. 24 I GG (see Pershing-II decision of the Federal Constitutional Court, BVerfGE 68, 1 at 93ff.). Since the United Nations, too, are an 'intergovernmental institution' in the sense of Art. 24 I GG, the rationale of the concept could reasonably also be applied in the context of Art. 24 II GG. Cf. Klein, *supra* note 20, at 442, n. 64.

84 For a comprehensive documentation up to SC Res. 678, see E. Lauterpacht *et al.* (eds), *The Kuwait Crisis – Basic Documents* (1991).

85 For critical voices, see Weston, 'Security Council Resolution 678 and Persian Gulf Decision-Making: Precarious Legitimacy', 85 *AJIL* (1991) 514, at 516, 525ff.; Falk, 'La force au mépris du droit – Les Nations unies sous la coupe de Washington', *Le Monde Diplomatique*, February 1991, at 3; Deiseroth, 'Krieg im Namen der Vereinten Nationen? Eine Kurzstudie zur völkerrechtlichen Lage', *Blätter für*

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Security Council, this is a doubtful borderline case which is not easy to square with the concept of 'collective' security in Article 24 II GG.

D. The Interrelationship between Article 87a II GG and Article 24 II GG

In the constitutional debate presented above, two camps can roughly be distinguished. One restrictive approach insists that Article 87a II contains a comprehensive regulation of *all* uses of the *Bundeswehr* and advances a narrow interpretation of all elements of Article 87a II GG.⁸⁶ Since Article 87a II GG is regarded as an all-embracing norm, Article 24 II GG could not even claim partial priority as a *lex specialis* or would at least be suppressed by the later Article 87a II GG as *lex posterior*. In the opposite camp gather those authors who restrict Article 87a II GG to internal uses⁸⁷ and those who accept the comprehensive nature of this article, but find loopholes in the interpretation of elements of Article 87a II GG to justify German participation in military UN operations.⁸⁸

The semantic, contextual and teleological arguments presented by both camps cannot be easily discarded, nor are they perfectly conclusive. A final judgment is difficult especially because no general agreement exists about a hierarchy of the different methods of constitutional interpretation.⁸⁹ Guided only by these *topoi* of interpretation, a certain skill in legal rhetoric seems to enable one to emphasize either the internationalist or the pacifist character of the *Grundgesetz*.

One can trace the present constitutional dilemma back to the insufficiently thought-out and unfortunate amendment of Article 87a II GG in 1968. Clearly preoccupied with the uses of the armed forces in the domestic realm⁹⁰, the drafters of the 1968 amendment apparently assumed that previous amendments had properly regulated the external uses of the armed forces.⁹¹ The drafting process provides neither evidence that a restriction of the scope and content of Article 24 was intended, nor that the relation between Article 24 and Article 87a II received any attention at all.⁹² The possible conflict had simply been overlooked by the drafters of the constitutional amendment.

In case of an apparent conflict between two constitutional norms which cannot clearly be resolved with the help of semantic, contextual or teleological arguments, considerations based on

deutsche und internationale Politik (1991) 303ff. denies that a basis existed for the authorization of the Gulf War. Secretary-General Pérez de Cuéllar is reported to have remarked to the press on 10 February 1991 that the Gulf War was not 'a classic United Nations war in the sense that there is United Nations control of the operations, no United Nations flag, blue helmets, or any engagement of the Military Staff Committee'. Quoted in Doyle, 'Crisis in the Gulf: UN Has No Role in Running the War,' *Independent*, 11 February 1991, at 2.

86 Restrictive interpretation in this context would mean to adhere to a narrow concept of defence, *supra* note 45, a broad concept of 'use', *supra* note 70, and a strict standard of 'explicitness', *supra* note 74.

87 See *supra* note 30.

88 This is true especially for those authors who suggest that German armed forces assigned to UN operations would not fall under the concept of 'use' in Art. 87a II and those who believe that Art. 24 II fulfills the standard of 'explicitness' in Art. 87a II.

89 See, e.g. Alexy, *A Theory of Legal Argumentation* (1989) 246f.

90 For an overview of the extremely controversial discussion in the sixties, see K. Stern, *supra* note 34, at 1303ff.

91 The entire question of participation in NATO or in future UN peace-keeping or military activities was not even mentioned in the debate about the amendment.

92 See *supra* note 37.

drafting and general constitutional history acquire a critical relevance.⁹³ Reconsidering the historical account, Article 87a II GG cannot reasonably be interpreted to be comprehensive or designed to narrow Article 24 II GG. If this were the case the wording of Article 87a II GG would turn out to be a Trojan horse which unintentionally restricts Article 24 II GG.⁹⁴ Once the presumption of the overriding character of Article 87a II GG is rebutted, the tension between the two norms can be resolved under the guidance of the two general constitutional principles *Einheit der Verfassung* (constitutional unity) and *praktische Konkordanz* (practical coherence).⁹⁵ The principle of constitutional unity requires that provisions of the constitution should not be interpreted independently from other relevant provisions, but in their overall context. If a conflict between provisions cannot be solved the principle of 'practical coherence' advises that constitutional norms should be related to each other in such a way that each can be realized to the fullest possible extent.⁹⁶ From the rationale of these constitutional principles, it can be deduced that Article 24 II GG should not be restricted because Article 87a II GG does not clearly provide an all-embracing regulation. This approach would authorize German participation in UN activities permitted by Article 24 II GG, but would not subscribe to the view that the *Grundgesetz* permits all external uses of the *Bundeswehr*.

IV. Concluding Remarks

Lastly, due to rising expectations expressed in the international community, the Federal Government has come to realize that an increased international responsibility for the preservation and restoration of peace in the world might require that the German *Bundeswehr* takes an active part in UN operations.⁹⁷ The Government continues to insist on an amendment which would establish a clear constitutional authorization.⁹⁸ One reason behind this quest for an amendment (besides avoiding a loss of face after this political turn-around), is the fear that the Federal Constitutional Court might deny a constitutional basis for a German participation in military UN operations contrary to the majority view of constitutional scholars. But there are also prudent reasons in constitutional theory for an amendment. Whenever unclear constitutional provisions are the focus of a heated political and legal debate, the constitution loses its normative authority as the fundamental orientation for political life and needs clarification.

However, the path of constitutional amendment is not without risks. Since a 2/3 majority in the *Bundestag* (House of Representatives) and the *Bundesrat* (Chamber of the *Länder*) is required by Article 79 II GG, at least some part of the opposition will have to vote in favour of an

93 The Federal Constitutional Court has consistently favoured an 'objective', i.e. semantic or contextual, approach in the interpretation of the constitution, but recognized an auxiliary function of the subjective intentions of the drafters of the constitution especially when ambiguities needed to be resolved; see K. Hesse, *supra* note 57; BVerfGE 1, 299 at 312; BVerfGE 62, 1 at 45 (with further references).

94 See *supra* text notes 35-37.

95 For a brief description of these principles, see K. Hesse, *supra* note 56, at 26f. These constitutional principles influence the efforts of many authors who attempt to harmonize Arts. 24 II and 87a II GG, see, e.g., Tomuschat, *supra* note 57, at 280; Brunner, *supra* note 20, at 135.

96 Cf. P. Lerche, *Übermaß und Verfassungsrecht* (1961) esp. 125ff.

97 On 25 September 1991, the German Minister of Foreign Affairs Genscher promised in a speech at the General Assembly of the United Nations that Germany would amend the *Grundgesetz* in order to participate in all measures of collective security in the future, see 'Bundeswehr wird an UNO-Einsätzen teilnehmen', *Süddeutsche Zeitung* No. 223, 26 September 1991, at 1.

98 See *supra* note 5.

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amendment.⁹⁹ The opposition Social Democratic Party (SPD) has already protested strictly against German participation in any UN operation involving combat situations, and has presented drafts for constitutional amendments which would authorize only traditional forms of peace-keeping.¹⁰⁰ In light of this controversy between the government parties (CDU/CSU and FDP) and the parties in opposition, it seems doubtful that a declaratory amendment clarifying the constitutional position with regard to *all* uses of the *Bundeswehr* pursuant to Article 24 II GG would find the necessary majority. If such a declaratory amendment should be defeated, one could probably no longer argue that the *Grundgesetz* in its present form permits participation in all collective security measures. In that case the inevitable conclusion would be 'No Germans to the front', 'le malade imaginaire serait vraiment malade'.

99 Art. 79 II GG: 'Any such law [amending the *Grundgesetz*] shall require the affirmative vote of two thirds of the members of the *Bundestag* and two thirds of the votes of the *Bundesrat*.'

100 See the results of the last SPD Convention: 'SPD-Vorstand für Blauhelm-Einsätze der Bundeswehr. Militäraktionen außerhalb des NATO-Gebietes abgelehnt', *Süddeutsche Zeitung* No. 121, 28 May 1991, at 1.