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# GERMANY'S INTERNATIONAL INTEGRATION: THE RULINGS OF THE GERMAN FEDERAL CONSTITUTIONAL COURT ON THE MAASTRICHT TREATY AND THE OUT-OF-AREA DEPLOYMENT OF GERMAN TROOPS

Manfred H. Wiegandt\*

## INTRODUCTION

In both 1993 and 1994, within nine months of each other, the Second Chamber<sup>1</sup> of the German Federal Constitutional Court (FCC) in Karlsruhe delivered two eagerly expected and highly important judgments that clarified Germany's position in the international community. In the first judgment of October 12, 1993,<sup>2</sup> the Court decided that the obligations Germany entered into with its signing of the Maastricht Treaty on European Union (TEU)<sup>3</sup> did not violate the German Constitu-

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1. The Federal Constitutional Court (*Bundesverfassungsgericht*) is split into two chambers (*Senate*), each consisting of eight justices. Article 14 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*) determines which chamber is in charge of a case. Most cases on matters of foreign policy fall within the competence of the Second Chamber.

2. 2 BvR 2134/92, 2159/92, reprinted in 1993 NEUE JURISTISCHE WOCHENSCHRIFT (N.J.W.) 3047 (extracts), translated in [1994] 1 C.M.L.R. 57 (Brunner v. European Union Treaty). The decision has meanwhile also been published in 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 155. The translation of this case contained in the Common Market Law Reports does not always accurately interpret the FCC's special emphasis on describing the European Union as something different from a conventional governmental organization, but not yet a supranational organization with its own sovereign rights independent from its Member States. The author therefore relies on his own translation where necessary. For another liberal translation of this case, see 33 I.L.M. 388 (1994).

3. Treaty on European Union, Feb. 2, 1992, 1992 O.J. (C 1991) 109, [1992] 1 C.M.L.R. 719 [hereinafter TEU]. For an English text of the EEC Treaty as modified

tion and thereby removed the last obstacle for the ratification of the Treaty. With the deposit of the German instrument of ratification, the Maastricht Treaty, which provides a basis for the extended integration of the Community of originally twelve and currently fifteen European states now called the European Union (EU), could enter into force.

The second judgment, delivered on July 12, 1994,<sup>4</sup> concerned the deployment of German troops for peace-keeping missions in Somalia and the former Yugoslavia pursuant to United Nations (UN) Security Council resolutions. Commentators widely regard the decision as giving the green light for Germany's military engagement in such peace-keeping efforts, and therefore, as providing a basis for the assignment of a more important role in post-Cold War world politics to re-united Germany. The major impact these judgments may have on Germany's international status and its future foreign policy in general warrants an analysis of both rulings.

## I. THE MAASTRICHT RULING

### A. THE ISSUE BEFORE THE COURT

In the *Maastricht* case, the German Federal Constitutional Court, in deciding an individual constitutional complaint about the violation of voting rights, considered whether the German Constitution permitted the transfer of essential competencies from the *Bundestag*<sup>5</sup> to the European Union, as provided under the TEU, or whether this violated the democratic principle embodied in Article 20<sup>6</sup> of the German Basic Law

by the TEU see, [1992] 1 C.M.L.R. 573.

4. 2 BvE 3/92, 5/93, 7/93, 8/93, reprinted in 1994 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT [EuGRZ] 281; 1994 N.J.W. 2207 (extracts).

5. The author uses the term "parliament" for the German *Bundestag*. Anglo-American writings often apply the term "Lower House" to the *Bundestag*, and "Upper House" to the second legislative federal organ, the *Bundesrat*, in which the *Länder* (state) governments are represented. This terminology, however, is derived from the English system and insufficiently reflects the status of these organs under the German Constitution.

6. GRUNDGESETZ [Constitution] [GG] art. 20, translated in BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY 22 (Press and Information Office of the Federal Governmented., 1994) [hereinafter GG]. Article 20 of the German Constitution provides:

(1) The Federal Republic of Germany shall be a democratic and social federal state. (2) All public authority emanates from the people. It shall be exercised by the people through elections and referendums and by special legislative, executive, and judicial bodies. (3) The legislature shall be bound by the consti-

(*Grundgesetz*). While the democratic principle primarily serves to reaffirm the democratic character of the German Federal State, it also influences the scope of citizens' voting rights under Article 38(1).<sup>7</sup> Even though the newly amended Article 23 specifically authorizes the Federation to transfer sovereign rights to the European Union, a possible violation of the German Constitution was still an issue because Article 79(3),<sup>8</sup> in conjunction with Article 20, declares any constitutional amendment that infringes on the democratic principle inadmissible. Hence the *Maastricht* complaint asked the Second Chamber of the FCC to answer a basic question of national sovereignty in the broader context of European integration.

The *Maastricht* opinion was not the first time that the FCC made fundamental statements about the relationship between Community and German Constitutional law, and thereby defined Germany's borderline between European integration and national sovereignty. As early as 1974, the FCC questioned the supremacy of European Community law over German constitutional law in the human rights area. In a preliminary ruling under Article 177 of the EEC (European Economic Community) Treaty, the European Court of Justice (ECJ) held that national courts could not review community law under their national constitutional law.<sup>9</sup> Thereafter, in response to the ECJ ruling, the FCC, in its so-called *Solange I* decision,<sup>10</sup> ascertained that the FCC had the power to review alleged human rights violations by European instruments "as long as" the European integration process had not led to a catalogue of fundamental rights under community law "adequate in comparison" with the fundamental rights contained in the German Constitution.<sup>11</sup> In a conflict

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tional order, the executive and judiciary by law and justice.

*Id.*

7. GG, *supra* note 6, art. 38(1). Article 38(1) of the German Constitution states that "members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people; they shall not be bound by instructions, only by their conscience." *Id.*

8. *Id.* art. 79(3). Article 79(3) of the German Constitution provides that "[a]mendments to this Basic Law affecting the division of the Federation into Länder, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be prohibited." *Id.* This is the so-called "eternity guarantee."

9. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, *translated in* [1972] 1 C.M.L.R. 255.

10. Judgment of May 29, 1974, 37 BverfGE 271 *translated in* [1974] 2 C.M.L.R. 540. In English "solange" means "as long [as]."

11. *Id.* at 554.

between European norms and fundamental rights under the German Basic Law, the FCC found, the latter had to prevail.<sup>12</sup> Twelve years later, the FCC revised the *Solange I* decision in a ruling known as *Solange II*.<sup>13</sup>

In view of prior ECJ decisions, especially in the *Nold*<sup>14</sup> and *Hauer*<sup>15</sup> cases, which recognized that fundamental rights were an integral element of the legal order of the Community, the FCC in *Solange II* announced that it would "no longer exercise *its* jurisdiction to decide on the applicability of secondary Community legislation" as the legal basis for acts within the "sovereign jurisdiction" of the Federal Republic, at least as long as the Community safeguarded the "essential content of fundamental rights" regarded "as substantially similar" to the rights "unconditionally" protected by the German constitution.<sup>16</sup> The Court's language, however, revealed that the FCC did not renounce its own jurisdiction, but only chose a procedural solution to the problem of conflicting jurisdictions. Soon thereafter legal commentators called for a clarifying *Solange III* judgment.<sup>17</sup>

#### B. THE REASONING OF THE COURT

In the *Maastricht* decision, the FCC construed the voting rights provision of Article 38(1) of the German Constitution, which formed the legal basis for the constitutional complaint in this case, in manner similar to that of the complainant (*Beschwerdeführer*).<sup>18</sup> Finding first that

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12. *Id.* at 550-51 (noting that the fundamental rights under the German Constitution must prevail as long as the Community has not removed the conflict between Community law and part of the guarantees of fundamental rights in the German Constitution).

13. Judgment of Oct. 22, 1986, 73 BVerfGE 339, translated in [1987] 3 C.M.L.R. 225 (In Re the Application of Wünsche Handelsgesellschaft).

14. Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491, reprinted in 2 C.M.L.R. 338 (1974).

15. Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3227, reprinted in 3 C.M.L.R. 42 (1979).

16. [1986] 3 C.M.L.R. 225, 265 (emphasis added).

17. See Rupert Scholz, *Wie lange bis "Solange III"?*, 1990 N.J.W. 941, 943-46 (1990) (noting that the FCC has not provided adequate guidelines for resolving conflicts between Community and national law, and finding that a *Solange III* decision is necessary for this purpose).

18. [1994] 1 C.M.L.R. 57, 72 (summarizing the complainant's argument that insufficient democracy at the Community level violates Article 38 of the German Constitution); see also *id.* at 76-78 (discussing the merits of the complainant's allegations that the Maastricht Treaty violates the complainant's rights under Article 38(1)).

Article 38(1) extends to the democratic content of the electoral right, which includes the right of the German people to cooperate in the legitimation of state power, and second that this democratic principle is affected when the *Bundestag* relinquishes its legislative and controlling powers,<sup>19</sup> the FCC thereby opened for itself the possibility of scrutinizing whether the Treaty on European Union complies with the democratic principle as embodied in the German Basic Law.<sup>20</sup> The court declared that the allegation that the transfer of sovereign powers to the EU would likely diminish the basic rights protection of German citizens was inadmissible. The Court principally confirmed its *Solange II* decision by finding that the FCC still guarantees the applicability of basic rights protection to inhabitants "by its jurisdiction," but it exercises this power to review secondary Community law in a "relationship of cooperation" (*Kooperationsverhältnis*) with the ECJ. While the ECJ guarantees basic rights protection in any particular case for the whole territory of the European Communities, the FCC restricts itself to a "general guarantee of indispensable (*unabdingbare*) basic rights standards."<sup>21</sup> The language of the Court reveals a slight, but noteworthy change with respect to former rulings. By declaring that the FCC provides protection of basic rights "in Germany—in this respect not merely as against German state bodies" and by explicitly mentioning that it overrules its *Eurocontrol*

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of the German Constitution and noting that this allegation was the only admissible constitutional complaint in this case). The only complaint challenging the Maastricht treaty, which the FCC found partly admissible and reviewed on the merits, was that of a former high-ranking EC official. *Id.* at 72.

19. *Id.* at 77.

20. See, e.g., Volkmar Götz, *Das Maastricht-Urteil des Bundesverfassungsgerichts*, 1993 JURISTENZEITUNG 1081, 1082 (remarking that the Court found its way to the merits through an "eye of a needle" and that sole reliance on Article 38(1) of the Basic Law, which only speaks of the citizens' right to elect the Parliament, as an individual right that may potentially hinder shifting competencies from the Parliament to other organs, may cause problems by limiting the Court to a legislative analysis of German constitutional law while leaving Community law, or the effect of German constitutional law on community law, outside the scope of the decision); Christian Tomuschat, *Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts*, 1993 EuGRZ 489, 491 (pointing out that the legal argument that a German citizen has the right, beyond his or her voting right, to demand that the German *Bundestag* retain substantial decision-making authority leads to an *actio popularis* that was certainly not envisaged by the Court); Hans Peter Ipsen, *Zehn Glossen zum Maastricht-Urteil*, 1994 Europarecht 1 (making a similar argument). But see Judgment of Jan. 11, 1983, 62 BverfGE 397, 399 (denying construction of Article 38 as containing an individual right that can be violated by parliamentary measures).

21. [1994] 1 C.M.L.R. at 79 (emphasis added and translation slightly modified).

decision,<sup>22</sup> the Court seems willing to redeem part of its jurisdiction in the human rights area. The *Maastricht* ruling is thus more restrictive regarding the subsidiarity of the Court's basic rights protection.<sup>23</sup> In practice, this statement will have no major impact because only those cases in which the ECJ cannot provide human rights protection for procedural reasons, and where the European justices do not recognize a fundamental right guaranteed under German law, might qualify for subsidiary protection by the German High Court.<sup>24</sup> It is surprising though that the FCC apparently places less trust in the protection of human rights by the ECJ at a time when the Treaty on European Union, with Article F(2), sets the human rights standards in the member states as an orientation mark for the community standard of human rights protection.<sup>25</sup> Commentators, however, should not overestimate the practical impact of this move. It remains to be seen whether the FCC will attempt to exercise the functions of a super appeal entity in the human rights field.<sup>26</sup>

The FCC further ruled inadmissible any challenges to the second and third pillars of the *Maastricht* Treaty concerning cooperation in security, justice, and home affairs, because in the court's view these matters do not have immediate supranational effects.<sup>27</sup> According to the FCC justices, further action in such areas requires separate agreements.<sup>28</sup> Thus, basic rights violations arising out of the implementation of such agreements may constitute a new basis for proceedings before the ECJ or the FCC.<sup>29</sup>

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22. *Id.* at 79 n.15; see Judgment of June 23, 1981, 58 BverfG 1, 27 (stating that German courts have no "buffer" competence should legal protection against international institutions be inadequate).

23. See Götz, *supra* note 20, at 1083 (noting that the *Maastricht* decision limits the FCC's competence with respect to European human rights protection).

24. *Id.* at 1083.

25. See Tomuschat, *supra* note 20, at 490 (noting that the FCC should have recognized the, to date, progressed consolidation of human rights protection and expanded the scope of its *Solange II* decision particularly in light of the passage of Article F(2)).

26. See Meinhard Schröder, *Das Bundesverfassungsgericht als Hüter des Staates im Prozeß der europäischen Integration—Bemerkungen zum Maastricht-Urteil*, 1994 DEUTSCHES VERWALTUNGSBLATT 316, 323 (noting that future case law will determine the extent to which the FCC will make itself into the ultimate guarantor of human rights in the EU).

27. See [1994] 1 C.M.L.R. at 80-82.

28. *Id.*

29. *Id.*

On the merits of their unanimous decision on the Maastricht Treaty, the justices made a general statement about the openness of the German constitution for supranational integration. Even though Article 79(3) declares that the democratic principle is inalienable, this does not mean, as the Chamber points out, that the "people" (*Staatsvolk*) must produce the legitimation of state power on the supranational level in the same way as on the national level. Delegation of powers to a supranational organization, as already insinuated by the Basic Law itself in Articles 23, 24, and the preamble, necessarily entails that the exercise of these powers no longer depends on the will of one state alone. The supranational community finds its democratic legitimation in the national legislative act assenting the accession to that community. The inalienable democratic principle of the German Basic Law only requires "that the legitimation and influence which derives from the people will be preserved" in the "compound of states" (*Staatenverbund*).<sup>30</sup> The Court, however, indicates that delegation of even more sovereign powers to the

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30. *Id.* at 86. The translation uses the term "federation of States" for "Staatenverbund." This author believes that a literal translation of this term is necessary to reflect that the FCC, by using the word "Staatenverbund" instead of "Staatenbund," apparently infers that it views the EU as less than a federation, but also different than an alliance of states. See Matthias Herdegen, *Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union"*, 31 COMMON MKT. L. REV. 235, 236 (1994) (using the term "compound" as well). The choice of the term "Staatenverbund" originated in earlier works of the reporter in this case. See, e.g., Justice Paul Kirchhof, *Der deutsche Staat im Prozeß der europäischen Integration* in 7 HANDBUCH DES STAATSRICHTS DER BUNDESREPUBLIK DEUTSCHLAND 855, 879 (Josef Isensee & Paul Kirchhof eds., 1992) (discussing the establishment of a "Staatenverbund"); Tomuschat, *supra* note 20, at 491-92 (suggesting that this term was chosen because it has not yet been dogmatically employed); Schröder, *supra* note 26, at 320 (regarding the term as adequate because it reflects the status of European integration as a union still based on the sovereignty of the Member States); Albrecht Weber, *Die Wirtschafts- und Währungsunion nach dem Maastricht-Urteil des BVerfG*, 1994 JURISTENZEITUNG 53, 58 (stating that the term is meant to express that the Community more closely resembles a confederation than a supranational body). But see Ipsen, *supra* note 20, at 8, 21 (recommending against use of the term since, in the past, the term had a distinct meaning in the economic field). The Court's attempt to find a term specifically tailored for the European Union, and the scrutiny with which German scholars look at the term, resembles the German conceptional jurisprudence (*Begriffsjurisprudenz*) dominant in the 19th century. Instead of looking for the right conceptional term for European integration, legal experts on this topic would do better spending their energy analyzing more thoroughly the contents of the treaties as the legal basis of integration. If these scholars need a term, they could easily take it from the TEU itself and call the structure a "union."



EU would require the strengthening of the democratic basis of the EU itself. Momentarily it is still the (European) "peoples" (*Staatsvölker*), through their national parliaments, that convey democratic legitimation to the EU: "Each of the peoples of the individual States is the starting point for a power relating to that people." (*Jedes der Staatsvölker ist Ausgangspunkt für eine auf es selbst bezogene Staatsgewalt.*) The FCC emphasizes that the democratic principle requires each people to "develop and articulate itself in a process of political will-formation which it legitimates and controls, in order thus to give legal expression to what unites (*verbindet*) the people . . . (to a greater or lesser degree of homogeneity) spiritually, socially and politically." The Court thereby expresses its opinion that the "European people," as the basis for a "European state," still lacks the necessary degree of homogeneity. The Chamber concludes that the German *Bundestag*, therefore, must retain "functions and powers of substantial importance."<sup>31</sup> The FCC's insinuation about the lack of homogeneity of the European people can be looked at from two different angles. On the one hand, one may understand the FCC's viewpoint in a pro-integrationist way, i.e. once the European citizenry becomes more homogeneous, there will be a possibility of legitimizing the community powers through a European electorate. On the other hand, one may also interpret it more pessimistically as an indication of the FCC's belief that the achievement of such homogeneity is not likely in the near future. The majority of German scholars have adopted the latter interpretation.<sup>32</sup>

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31. [1993] 1 C.M.L.R. at 88-89 (translating "verbindet" as "binds together"). "Unite," however, seems to be the more appropriate translation. This becomes clear when analyzing the writing of Hermann Heller, to which the FCC refers to in the *Maastricht* decision. *Id.* at 88 n.23; see Hermann Heller, *Politische Demokratie und soziale Homogenität*, in 2 GESAMMELTE SCHRIFTEN 421, 427 (Christoph Müller & Martin Drath eds., 1971) (addressing the problem of national "unity" (*Einheit*)).

32. See, e.g., Götz, *supra* note 20, at 1082 (finding that the judgment is based on the principle of the last responsibility of the state); Herdegen, *supra* note 30, at 235-36 (noting that the *Maastricht* case recognizes "rather dramatic restraints upon the future development of the European Union" by its members and complaining about the Court's "rather static" concept of statehood that is unsuitable for European integration); Dominique Hanf, *Le jugement de la Cour constitutionnelle fédérale allemande sur la constitutionnalité du Traité de Maastricht. Un nouveau chapitre des relations entre le droit communautaire et le droit national*, 1994 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 391, 417 (noting that the German justices do not appear to believe in the possibility of enhancing the competencies of the European Parliament); Ipsen, *supra* note 20, at 7 (viewing the "Europeanization" of a European people very skeptically); Karl M. Meessen, *Maastricht nach Karlsruhe*, 1994 N.J.W. 549, 549-54 (claim-

The latter view may not be entirely warranted. This part of the judgment is distinguishable from other parts, to be discussed below, that are much less integration-friendly. Even though the FCC states that the national parliaments of the individual member states convey democratic legitimacy to the EU, the FCC at the same time moderates this statement by inserting in parenthesis "as [is true] at present."<sup>33</sup> The Court also insinuates that some of the conditions for the development of a European public opinion already exist, while others may be developed within the framework of the European Union.<sup>34</sup> The conditions the Court mentions, such as transparency of the decision-making process and the possibility of communicating with the sovereign power in the sovereign's own language,<sup>35</sup> are indispensable for democratic legitimacy and to a far extent do not yet exist at the European level. When the Court emphasizes that "[a]lready at the present stage of development the legitimation provided by the European Parliament has a supporting function, which could become stronger if it were to be elected by equivalent electoral rules in all the member States,"<sup>36</sup> it does not raise the stakes any higher but merely contemplates that the process of gaining democratic legitimacy is a dynamic and interactive one. In these passages, the Court's judgment is far more a comment on the democratic deficit of

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ing that the principle of compensation should be as valid for democratic legitimation as it is for human rights protection, and arguing that the Court opposes further integration because there is no such thing as a European people under the Court's anachronistic view of statehood); Schröder, *supra* note 26, at 318-19 (emphasizing that one cannot regard the European Parliament as a full democratic body and noting that this is a problem of the democratic legitimation of European integration through the national parliaments); Tomuschat, *supra* note 20, at 494 (arguing that the "eternity guarantee" of Article 79(3) of the Basic Law should not be regarded as an obstacle to European integration envisaged in the Constitution itself, and commenting that the *Maastricht* judgment has the effect of slowing down the process).

33. [1994] 1 C.M.L.R. 57, 88.

34. *Id.* at 87.

35. *Id.*

36. *Id.*; see Carl Otto Lenz, *Der Vertrag von Maastricht nach dem Urteil des Bundesverfassungsgerichts*, 1993 N.J.W. 3038, 3039 (pointing out the positive role the Court ascribes to the European Parliament in the integration process); see also Schröder, *supra* note 26, at 325 (commenting on the positive light in which the Court refers to the European Parliament and noting that the strengthening of parliamentary powers would deprive the EU of legitimation through the national parliaments). Schröder, however, is only correct if the process of strengthening the European Parliament is not also accompanied by a strengthening of the democratic environment in Europe with an aim toward shaping a European people.

the EU than some commentators realize. Nevertheless, it is correct to say that the decision's emphasis is not on this point.<sup>37</sup>

According to the justices, since at present the EU is not a European state but merely a "compound of states" (*Staatenverbund*), the EU's status as a European state remains dependent upon the authorization of the sovereign states.<sup>38</sup> In Germany, the *Bundestag* exercises the sovereign power to decide on the membership to and the further development of the EU. According to the Court, the democratic principle requires that the German people must be in a position to influence the exercise of sovereign power through elections to the federal parliament. Hence, a law transferring powers to supranational communities has to lay down the rights it transfers and the "intended program of integration" (*beabsichtigtes Integrationsprogramm*) with "sufficient certainty" (*hinreichend bestimmbar*). Thus, the German parliament is impeded from conferring on the EU a "general enablement" (*Generalermächtigung*).<sup>39</sup> The Court regards the transfer of power from the German Parliament to European institutions as somewhat comparable to the parliamentary authorization of the German government to issue decrees, which has similar limitations under Article 80(1) of the Basic Law. However, the FCC explicitly stresses that the requirements as to precision of such authorization in the international field cannot be as strict as on the national level.<sup>40</sup>

The Court's approach to the problem of democratic legitimacy of EU acts may seem convincing at first glance, but it neglects another facet of democratic legitimation—that of democratic control. Even though legislators have enhanced the *Bundestag's* rights toward the German government through the newly created "Europe" Article 23 of the German Constitution, the *Bundestag* is not able to exercise democratic control over the entire legislative process in the Community. Only a European Parliament is able to fulfill this task.<sup>41</sup> The FCC approaches the problem of democratic legitimacy of EU acts from the angle of the certainty

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37. Götz, *supra* note 20, at 1082 (noting that the structure of the EU and the impact of German law on such structure is not the primary focus of the Court's opinion).

38. [1993] 1 C.M.L.R. 57, 88. The translated text again incorrectly refers to a "federation of states" and not "compound of states." See *supra* note 30 (describing this distinction).

39. *Id.* at 88-89.

40. *Id.* at 89.

41. To date, this problem has not been addressed by many commentators. For one commentator's analysis of this problem, see Hanf, *supra* note 32, at 420.

of the national parliaments authorization of the Community. This approach cannot grasp the issue of democratic legitimacy entirely, as is revealed by the Court's struggle to justify the legitimacy of the majority principle on the European level.<sup>42</sup>

Based on the premise that democratic legitimacy on the European level is derived from the empowerment of the Community by the national parliaments, the Court reaches a conclusion that limits the supranational powers of the EU in a substantial way. Primarily, the FCC proposes to review "legal instruments" of European institutions or agencies to determine whether such instruments remain within the limits of the sovereign rights conferred on them.<sup>43</sup>

Most commentators have criticized this formula. First, commentators argue that the FCC has placed itself in a position of a super appeal entity for Community acts and ignores the exclusive jurisdiction of the ECJ to decide whether the Treaties cover acts of the European bodies or whether those organs transgress their powers.<sup>44</sup> Second, commentators

42. [1994] 1 C.M.L.R. 57, 86. In this opinion, the FCC derives the legitimacy of majority rule, not very convincingly, from the national act of accession. *Id.* It views the "requirement of mutual consideration entailed by loyalty to the community" (*Gemeinschaftstreue*) that makes the EU respect the "constitutional principles and basic interests of the Member States" as moderating that principle. *Id.* Such vague limits will probably not prevent the occurrence of Community acts in variance with the democratic will of one or the other national parliament.

43. *Id.* at 89. The FCC states:

[I]f European institutions or agencies were to treat (*handhaben*) or develop (*fortbilden*) the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession (*Zustimmungsgesetz*), the resultant legislative instruments would not be legally binding within the sphere of German sovereignty (*Hoheitsbereich*). The German state organs would be prevented for constitutional reasons from applying them in Germany. Accordingly, the Federal Constitutional Court will review legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred to them or transgress them.

*Id.*

44. See Meessen, *supra* note 32, at 552 (emphasizing that the FCC's claim of final appellate power jeopardizes the judicial system of the EU); Schröder, *supra* note 26, at 322-24 (providing a less harsh critique by pointing at the Court's lacking strategy for solving competence conflicts). Schröder argues that the preliminary ruling of the ECJ should have priority according to Article 177 of the EEC Treaty. *Id.* at 324; see also Weber, *supra* note 30, at 59 (indicating that the Court in its *Maastricht* opinion failed to include a provision granting the EC primary responsibility for ensuring that the European institutions stay within their areas of competence). The answer to Weber's query is that the Court probably did not intend to provide such a clarification and, thus, omitted it on purpose.

note that the FCC's language is broad enough to concede the right of non-recognition of EU *ultra vires* acts to *all* German authorities. If this analysis is correct, the whole EU system would be placed in serious jeopardy.<sup>45</sup> On the other hand, the FCC may only want to accrue to itself a final right of judgment on the validity of EU decisions for Germany.<sup>46</sup>

The FCC's discussion of the compulsory effects of EU decisions is not merely hypothetical, as is proven in the Court's further deliberations. Even though the Chamber concludes that the delegation of sovereign powers under the Maastricht Treaty does not violate the democratic principle of the German constitution,<sup>47</sup> the FCC only reaches this conclusion by choosing an interpretation of the Treaty that conforms with the German constitution (*verfassungskonforme Auslegung*). Under this strict constructionist approach, the treaty provisions are deemed constitutional only if one follows the FCC's interpretation of the treaty. One important point is the Court's interpretation of Article F(3) of the TEU, which states that "The Union shall provide itself with the means necessary to attain its objectives and carry out its policies."<sup>48</sup> The Karlsruhe justices do not understand this provision as a "*Kompetenz-Kompetenz*"<sup>49</sup> that would give the EU the power to allocate competencies or financial means in its own right. Rather, in their opinion the entire Treaty is characterized by the "principle of restricted specific empowerment" (*Prinzip der begrenzten Einzelermächtigung*).<sup>50</sup> Towards the end of the opinion, it becomes clear that this characterization is plainly a critique of the way the ECJ has used to interpret the provisions of the EC treaties.<sup>51</sup>

45. See Tomuschat, *supra* note 20, at 494 (stating that failure to respect the EJC's decisions jeopardizes the entire EU system).

46. See Ipsen, *supra* note 20, at 11 (interpreting the Court's language as limiting to itself final appellate power concerning EU decisions affecting Germany).

47. [1994] 1 C.M.L.R. 57, 89.

48. TEU, *supra* note 3, art. F(3).

49. The translated opinion uses the words "power to extend its powers" for *Kompetenz-Kompetenz*. In German legal doctrine, *Kompetenz-Kompetenz* more precisely means the power to accrue competencies. See CARL SCHMITT, *VERFASSUNGSLEHRE* 386-87 (6th ed. 1983) (discussing the meaning of the term "*Kompetenz-Kompetenz*").

50. [1994] 1 C.M.L.R. 57, 95.

51. *Id.* at 105. The Court states:

Whereas a dynamic extension of the existing Treaties has so far been supported on the basis of an open-handed treatment of Article 235 of the EEC Treaty as a "competence to round-off the Treaty" as a whole, and on the basis of considerations relating to the "implied powers" of the Communities, and of Treaty

Also relevant to the topic of European integration is the FCC's understanding of the procedure for creating a European monetary union. The justices express the concern that the points laid down in the "Protocol on the Convergence Criteria" may be "relaxed" (*aufgeweicht*).<sup>52</sup> Therefore, the Court interprets such convergence criteria narrowly and rejects any "automatism" towards a monetary union. Even though Article 109 j(3) & (4) mandate a qualified majority decision of the European Council, consisting of the heads of governments of all member states, for entering the third stage of the monetary union, in the Court's opinion this requirement does not establish a right of the European Council to detach itself from the criteria agreed on in the Protocol.<sup>53</sup> In an obiter dictum, the FCC even mentions that failure to achieve the envisaged "stability community" (*Stabilitätsgemeinschaft*) would, as *ultima ratio*, even provide a basis for legitimizing leaving the "Community" (*Gemeinschaft*).<sup>54</sup> Even though the context of this remark makes it quite clear that the Court only means the monetary union, many scholars have nevertheless emphasized that Germany does not have the right to withdraw from the European Community, respectively European Union, because even national sovereignty does not convey the right to retreat from obligations a state has voluntarily accepted.<sup>55</sup> After Germany enters into the monetary union, its membership in the union becomes irreversible under the respective Protocol signed without reservations by Germany, and thus unilateral withdrawal is not possible.<sup>56</sup>

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interpretation as allowing maximum exploitation of Community powers ("*effet utile*"), in future it will have to be noted as regards interpretation of enabling provisions by Community institutions and agencies that the Union Treaty as a matter of principle distinguishes between the exercise of a sovereign power conferred for limited purposes and the amending of the Treaty, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects for Germany.

*Id.* (footnotes omitted).

52. *Id.* at 100 (stating that the "convergence criteria" cannot be relaxed).

53. *Id.* at 99-101 (placing special emphasis on the ability of the German Parliament to influence a final decision on Germany's entrance into the monetary union).

54. [1995] 1 C.M.L.R. 57, 101 (stating that if a "community based on stability" fails to develop, the long term criteria imposing stability as the "standard of the monetary union" do not prevent withdrawal from the Community). The author relies here on his own translation of the original German text of the opinion. 47 N.J.W. at 3056.

55. See Tomuschat, *supra* note 20, at 494-95 (discussing the possibility of withdrawing from the European Union); see also Ipsen, *supra* note 20, at 16-17 (same).

56. Götz, *supra* note 20, at 1085.

## C. CRITIQUE OF THE MAASTRICHT RULING

Politically, the *Maastricht* ruling is important because through it the FCC opened the door for the German ratification of the Treaty on European Union. The FCC's argument, particularly its emphasis that European unity is not impaired by the German Basic Law, does not hinder further integration toward some kind of "United States of Europe".<sup>57</sup> From a democratic point of view, one must welcome the statement of an authoritative legal body that further European integration is not possible without the development of genuine democratic structures in the EU and a suitable democratic environment in Europe. The goal of supranational integration cannot support the failure to meet democratic standards in the European community that have been regarded as indispensable on national levels for a long time.

From a pro-integrationist angle, however, the judgment also has a downside. By giving the Treaty an authentic interpretation to which the European institutions must abide in order to avoid the risk that the FCC will declare EU acts void for Germany, the FCC sets itself up as a guardian of the constitutional framework of the EU. Even more than the Court's persuasive interpretation of Article F(3) of the Maastricht Treaty,<sup>58</sup> which is not explicitly entrusted to the ECJ either, because this provision is not an amendment to the EEC Treaty,<sup>59</sup> the FCC's authentic interpretation of the amended Article 109(j) of the EEC Treaty pres-

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57. See, e.g., *id.* at 1086 (referring to the possibility of expanding the European Community concept); Herdegen, *supra* note 30, at 249 (noting that the opinion leaves open the possibility of further integration beyond *Maastricht*); Ipsen, *supra* note 20, at 21 (stating that the opinion unequivocally lends itself toward the unlimited expansion of the Union); Lenz, *supra* note 36, at 3039 (stating that the FCC opened the way toward greater community integration); Schröder, *supra* note 26, at 325 (same); Tomuschat, *supra* note 20, at 496 (stating that the Basic Law already points toward European integration in its preamble). *But see* Meessen, *supra* note 32, at 554 (noting that some Member States may have reached their present limit on integration).

58. See Tomuschat, *supra* note 20, at 492 (noting that the Court's interpretation of TEU Article F(3) is persuasive); see also Herdegen, *supra* note 30, at 245 (analyzing the Court's interpretation of TEU Article F(3), though noting that one of the Court's arguments concerning this provision is "at least doubtful").

59. The EEC Treaty, as amended by the Treaty on European Union, does not confer jurisdiction to the ECJ over the interpretation of the Maastricht Treaty itself, but only over the amended EEC Treaty. TEU, *supra* note 3, art. L (extending the ECJ's power to the interpretation of other specific provisions of the TEU among which Art. F is not mentioned).

ents an outright challenge to the ECJ.<sup>60</sup> Although the ECJ has no explicit power to interpret amendments of the EEC Treaty before they enter into force, the ECJ is the only institution that may interpret an amendment with binding force thereafter. The FCC's attempt to impose, at least indirectly, its reading of the provision on other nations<sup>61</sup> therefore collides with the ECJ's monopoly in authoritatively defining the contents of the EEC Treaty. One might even argue that the *ratio legis* of Article 177 of the Rome Treaty required the FCC to ask for a preliminary ruling of the ECJ regarding the authentic interpretation of the amended EEC Treaty as a basis for deciding whether the German ratification of the Maastricht Treaty violates the Basic Law. The FCC's announcement that it will review acts of the EU to determine whether they comply with the limits the FCC has given to the Treaty's interpretation is an overt statement that it will deny the ECJ's interpretative monopoly on EC law even in the future. Even though the FCC's interpretation of the Maastricht Treaty is compelling in many respects, its ruling reveals that the EU, as a supranational organization with own rights, will continue to remain in a principal conflict with at least Germany's national sovereignty.

From a political point of view, however, the Court's ruling may also be regarded as a healthy warning against basing European integration to a far extent on an extensive interpretation of the underlying treaties by the ECJ, as has been done in the past. While European integration may be supported by pro-integrationist ECJ rulings, the European peoples in the last resort must decide how far and in which direction the integration should go. The architects of the EU often have forgotten this democratic imperative in the recent past. In Germany, for instance, there was quite a discrepancy between the pro-European statements of the major political parties and the popular mood, visible above all in the discussion about the European Monetary Union that proposes to replace the *Deutsche Mark* with a European currency. Though the resistance of many Germans to the idea of a European currency was motivated to a large extent by irrational fears, the politicians have not, or at least not sufficiently, responded to them. This lack of response may have politically motivated the FCC to address the question in its ruling.<sup>62</sup> Instead

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60. See Hanf, *supra* note 32, at 417 (noting that the judgment reveals a profound mistrust of the ECJ).

61. *Id.*

62. See Herdegen, *supra* note 30, at 249 (regarding the proceedings before the Court as a "substitute for a public debate on the monetary union before parliamentary



of conducting the debate on the European Union through a judicial body, it would have been more appropriate for the politicians to have discussed the Treaty and its implications with the electorate. One may like or dislike referenda as they took place in France and Denmark. In Germany, where the politicians did not ask the electorate itself for a popular vote on the Treaty, the lack of necessity to have to explain the Treaty on European Union to the citizens certainly contributed to the already existing public aversion against a bureaucratic system without sufficient links to the people it serves.

Despite the FCC's attempt to make up for some of the shortcomings in the democratic process toward European integration, it is highly debatable whether entering the third stage of the European Monetary Union, as the Court contends, touches the democratic *essence* of the German Basic Law. To date, monetary policy is already delegated to an independent body, the German Central Bank, that is almost entirely detached from democratic control by the German Parliament. Notably, the FCC justifies this type of delegation in *Maastricht* as a legitimate modification of the democratic principle tested both in the legal system and scientifically.<sup>63</sup>

## II. THE RULING ON THE OUT-OF-AREA DEPLOYMENT OF GERMAN TROOPS

### A. THE CASE BEFORE THE COURT

Unlike in the *Maastricht* case, the ruling on the out-of-area deployment of the German armed forces, the *Bundeswehr*, does not have any earlier court history. The motivation for this dispute between high federal organs (*Organstreit*), which the Social Democratic faction of the *Bundestag*, the opposition party, and the liberal FDP faction, the junior partner in the government coalition, initiated against the government,<sup>64</sup>

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approval").

63. [1994] 1 C.M.L.R. 57, 104.

64. The petition of the FDP faction was only directed against the deployment of German troops to survey and enforce the United Nations embargo against Serbia. Even though the FDP did not try to hinder the deployment of troops in the government or in the *Bundestag*, it initiated a constitutional dispute in order to clarify the legal qualification of those actions for the future. See Judgment of July 12, 1994, 1994 N.J.W. 2207, 2219 (dissenting opinion of Justices Böckenförde and Kruis) (viewing the FDP action as inadmissible because the FDP did not try to use the Parliament to avoid this outcome and thus is barred from alleging that rights of the Parliament have been violated, and further commenting that a mere opinion from the FCC

was exactly the lack of clarity in this field. Until Germany decided to send German troops to support peace-keeping operations in Somalia and the former Yugoslavia, Germany's political parties had uniformly agreed not to deploy armed forces other than for defensive purposes.<sup>65</sup> The ruling was expected to clarify whether Germany will be able to participate, without having to amend its Constitution, as an equal partner in UN peace-keeping activities and in NATO and West European Union (WEU) operations aimed at fulfilling respective UN Security Council resolutions.<sup>66</sup>

#### B. THE REASONING OF THE COURT

The first question the Chamber answered is whether Article 24(2) of the Basic Law,<sup>67</sup> which permits Germany, "[w]ith a view to maintain-

on the constitutionality of the deployment of troops, as sought by the liberal faction, is not a permissible action before the Court). The other six justices disregarded the underlying political motives of the complaint before the Constitutional Court as irrelevant and found the action admissible. *Id.* at 2208.

65. See Burkhard Hirsch, *Zur Entstehung des Art. 87 a II GG*, 1994 ZEITSCHRIFT FÜR RECHTSPOLITIK [Z.R.P.] 120 (noting that all previous governments of the German Federal Republic, regardless of their political affiliation, uniformly agreed to deploy troops of the *Bundeswehr* only for defensive purposes).

66. In two preliminary decisions, the Court had already considered two motions seeking preliminary injunctions against the deployment of German military personnel for NATO AWACS (Airborne Warning and Control System) units to supervise the UN no-fly order for Bosnia-Herzegovina and for the UNISOM II mission in Somalia. Focusing on the question of whether Germany's reputation would be damaged more if the Court would enjoin Germany from engaging in activities which might later be held constitutional or abstain from issuing an injunction on activities that later might be held unconstitutional, the FCC reached different decisions. Regarding the AWACS mission, the Court, in a five to three ruling, decided that Germany's contribution of more than 30% of the military personnel was important for the success of the mission, whereas the possible damage if the deployment turned out to be unconstitutional would be insignificant. Judgment of April 8, 1993, 88 BVerfGE 173, *extracts in* 1993 N.J.W. 1317, 1318. In the Somalia case, the Chamber by unanimous vote issued a preliminary injunction requiring an assenting vote of the *Bundestag* before the deployment of German troops could be continued. Judgment of June 23, 1993, 89 BVerfGE 38, *extracts in* 1993 N.J.W. at 2038. The reasoning behind this decision was that, without an injunction, the *Bundestag's* rights possibly could be foregone. The necessity of parliamentary approval, however, would not infringe overly upon the Executive's rights should the final decision be that the deployment was a prerogative of the government because the government generally is responsible to the Parliament anyway. *Id.* at 2039.

67. GG, *supra* note 6, art. 24(2). Article 24(2) of the German Constitution states:

ing peace," to enter into a "system of collective security," also permits the deployment of German troops to the operations in Somalia and the former Yugoslavia. With reference to the preparatory work of the *Grundgesetz*, the eight justices unanimously held that the constitutional authorization to enter into such a defensive system also constitutes the basis for fulfilling the tasks "typically connected with such a system," such as the deployment of troops. Member States of systems of collective security have to be prepared to help safeguard and restore peace even with military means.<sup>68</sup> Nevertheless, the Court did not regard Germany's membership in a system of collective security as constituting a transfer of sovereign rights to such a system. The integration of German troops into such an organization does not imply that the organization may exercise immediate sovereign rights within Germany.<sup>69</sup> On the other hand, it makes no difference to the Court whether the purpose of the system is to guarantee peace among the Member States or to provide collective support to Member States against attacks from the outside. Thus, the Court qualifies both UN and NATO as collective security systems in the meaning of Article 24(2) of the Constitution.<sup>70</sup> The FCC states that if the *Bundestag* has approved the accession to a system of collective security, this assent also covers sending troops into integrated units of the system and putting German troops under the system's command, as far as this is already implied by the charter or founding treaty of that organization.<sup>71</sup> Although the Court unanimously held that the UNISOM II operation in Somalia fell under the *Bundestag's* authorization through its law assenting the accession to the UN, only a five to three majority of the Chamber believed that the transfer of operational control for the action to the commander-in-chief of UNISOM II was also covered by the legislative act of assent.<sup>72</sup> In the unanimous opinion of the Chamber, the deployment of German troops in the framework

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With a view to maintaining peace, the Federation may become a party to 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 peaceful and lasting order in Europe and among the nations of the world.

68. 1994 N.J.W. 2207, 2208.

69. *Id.* at 2209.

70. *Id.* at 2209-10.

71. *Id.* at 2210.

72. *Id.* at 2210-19 (reporting the results of the votes in the Chamber). Although the judgment indicates that only a five to three majority reached a decision on the issue of transferring operational control, the Court's opinion does not indicate which justices dissented nor the reasons for their dissent. *Id.*

of NATO and WEU to enforce UN Security Council resolutions 713, 724 and 757 according to Chapter VII concerning the embargo against the rest of Yugoslavia, and resolutions 781 and 816 to enforce a no-fly zone over Bosnia-Herzegovina, was compatible with Article 24(1) of the Basic Law.<sup>73</sup> Seven of the eight justices also believed that the parliament-approved accession treaty to NATO covered the transfer of operational control to NATO command, even though in this case NATO acted on behalf of the United Nations.<sup>74</sup>

It is surprising that Article 87(a)(2)<sup>75</sup> of the Basic Law was not a major point of discussion for the Court. The systematic relationship between this provision and Article 24(2) was the focal point of scholarly discussions preceding the FCC decision.<sup>76</sup> Brushing all scholarly discussion about the genesis of this article aside, the justices pronounced that this provision, in any case, does not exclude the deployment of armed forces in the framework of a system of mutual collective security.<sup>77</sup> To deal with this highly controversial question in three paragraphs of the judgment seems a bit blunt. It is true, as the Court states, that Article 24(2) has been part of the Basic Law since it entered into force, where-

73. *Id.* at 2210-11.

74. *Id.* at 2211-19 (omitting which justice dissented and the reasons for his or her dissent).

75. GG, *supra* note 6, art. 87(a)(2). Article 87(a)(2) of the German Constitution provides that "[a]part from defence, the Armed Forces may only be used to the extent explicitly permitted by this Basic Law." (emphasis added.)

76. See, e.g., 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 (J.A. Frowein & T. Stein eds. 1990) (devoting majority of discussion to the scope of Article 87(a)(2) and the relationship between articles 24(2) and 87(a)(2)); Biner K. W. Bähr, *Verfassungsmäßigkeit des Einsatzes der Bundeswehr im Rahmen der Vereinten Nationen*, 1994 Z.R.P. 97, 103 (noting that Art. 24(2) gives no helpful guidance for the interpretation of Art. 87(a)(2)); Hans-Georg Franzke, *Art. 24 II GG als Rechtsgrundlage für den Außeneinsatz der Bundeswehr?*, 1992 N.J.W. 3075 (discussing whether Article 24(2) provides express authorization for the deployment of German troops as required under Article 87(a)(2)); Hirsch, *supra* note 65, at 120 (discussing creation and scope of Article 87(a)(2)); Axel Hopfauf, *Zur Entstehung des Art. 87 a II GG*, 1993 Z.R.P. 321, 324 (analyzing relationship of Article 87(a)(2) to Article 24(2)); Martin Kriele, *Nochmals: Auslandseinsätze der Bundeswehr*, 1994 Z.R.P. 97, 103 (discussing historical developments leading up to amendment of Article 87(a)(2)); Ulrich K. Preuß, *Die Bundeswehr- Hausgut der Regierung?*, 1993 KRITISCHE JUSTIZ 263, 267-72 (analyzing relationship of articles 87(a) and 24(2)).

77. 1994 N.J.W. 2207, 2211.

as Article 87(2) was only created in 1968 with the so-called "Emergency Constitution" (*Notstandsverfassung*), when provisions regulating the deployment of the *Bundeswehr* in domestic emergency situations amended the Basic Law. It also seems accurate that this article was not meant to regulate the use of armed forces in the international field.<sup>78</sup> Even if the historical interpretation of the FCC is correct, it is questionable to use this opinion easy-handedly for a teleological reduction and to ignore the clear wording of the provision. At the time of the amendment, no one considered the deployment of troops for purposes outside of the NATO area. Underlying the whole discussion about the use of the *Bundeswehr* in domestic emergency situations was the broad, but silent consensus that armed forces abroad may only be used for defensive purposes.<sup>79</sup> Since the Federal Republic was not yet a member of the UN at that time, and the Cold War made it impossible to think of UN operations like those now in place in Somalia or the former Yugoslavia, it seems more appropriate to interpret the words "except for defensive purposes" literally and to ask if the deployment of troops for UN missions can be understood as defensive within the meaning of the Basic Law. While it is doubtful the deployment of troops for UN missions falls under the literal interpretation of the term "defensive,"<sup>80</sup> the de-

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78. *Id.* The inapplicability of Article 87(a)(2) to the regulation of German armed forces outside of Germany, however, is not as clear as the Chamber declares. *See, e.g.,* Claus Arndt, *Verfassungsrechtliche Anforderungen an internationale Bundeswehreinsätze*, 1994 N.J.W 2197, 2198 (noting that amended Article 87(a) raises the threshold under which Germany can enter a system of collective security that entails a duty for the deployment of military forces); Bähr, *supra* note 76, at 98 (noting that legislative history clearly illustrates the legislator's intent to have Article 87(a)(2) cover the deployment of German troops both inside and outside of Germany); Hirsch, *supra* note 65, at 120 (stating that, even though a literal interpretation of Article 87(a) may be considerably broader, the intent of the drafters of Article 87(a) was not to authorize deployment of German forces outside of Germany); Hopfauf, *supra* note 76, at 323-24 (noting arguments made by commentators and in parliamentary debates on the applicability of Article 87(a) to the regulation of external as well as internal deployment of German troops).

79. *See* Bähr, *supra* note 76, at 100 (declaring that one could not imagine a defense situation not involving an attack on the alliance); *see also* Hirsch, *supra* note 65 (mentioning broad consensus of previous governments of the Federal Republic of Germany to limit deployment of troops solely for defensive purposes).

80. *See* Bähr, *supra* note 76, at 99 (stating that the participation of the *Bundeswehr* in military UN missions is not covered by the term "defense"); *see also* Preuß, *supra* note 76, at 266 (noting that while the term "defense" literally should cover only situations of imminent or actual military attack on the territory of the Federal Republic, the phrase should be understood in functional, not territorial terms).

ployment of troops for such purposes is not of an aggressive character<sup>81</sup> even though the deployment of troops in fulfillment of obligations entered into by accession to a system of mutual collective security is not *explicitly* permitted by Article 24(2)<sup>82</sup> as required under Article 87(a)(2). Nevertheless, the Court apparently chooses the easy way by avoiding this discussion and leaving the interpretation of Article 87(a)(2) open.<sup>83</sup> The justices commit a methodological error, however, by asserting that the general authorization to enter a system of mutual collective security makes the specific norm of Article 87(a)(2), which requires an explicit authorization for the deployment of troops, obsolete.<sup>84</sup>

The issue dividing the Court into two equally strong parties is whether the activities of the *Bundeswehr* in the NATO/WEU operations in the former Yugoslavia were still covered by the acts approving NATO and WEU accession of the Federal Republic of Germany. The legal dispute in the instant case concerns the interpretation of the first sentence of Article 59(2) of the German Constitution, which requires that treaties "regulat[ing]" Germany's "political relations" need parliamentary approval in the form of a federal act. The background of the legal controversy is that NATO and WEU members, with the participation of the representatives of the German government, might have tacitly extended the original purposes of these organizations, as laid down in the founding treaties, when they agreed to use the NATO and WEU structures for UN actions.

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as the prevention of an actual or imminent attack on the system of collective security under Article 24(2)).

81. See Kriele, *supra* note 76, at 104 (disregarding the non-aggressive character of UN missions and insinuating that Bähr regards UN missions as aggressive because they are not defensive).

82. See, e.g., Bähr, *supra* note 76, at 101 (noting that it is questionable whether the language of Article 24(2), through which the Federation consents to limitations on its rights of sovereignty, meets the requirement of 87(a)(2) for an "explicit" constitutional mandate for the deployment of troops); Franzke, *supra* note 76, at 3076 (stating that Article 24(2) only implicitly permits the deployment of troops outside of Germany, while Article 87(a)(2) requires that troops be deployed only "as explicitly permitted by this Basic Law"); Preuß, *supra* note 76, at 269 (stating that Article 24(2) does not "explicitly" permit the deployment of troops).

83. 1994 N.J.W. 2207, 2211 ("No matter how one may answer this question . . .").

84. Cf. Preuß, *supra* note 73, at 267 (arguing that in a state under the rule of law one cannot infer from a legally formulated goal that the remedies for its achievement are implicitly offered).

Justices Klein, Graßhof, Kirchhof, and Winter of the FCC adopted a strict reading of this provision under which only a formal amendment of an international treaty requires new parliamentary approval. These four justices find international treaties to be open to "dynamic interpretation" permitting their adaption to changing situations. In their opinion, such "treaty law-making by authentic interpretation" (*Fortbildung des Vertragsrechts durch authentische Interpretation*) is inherent in the preamble and the underlying goals of such treaties. According to them, the interpretative rules of Article 31(1) and (2) of the Vienna Convention on the Law of Treaties also support this viewpoint. When the Parliament approves an international treaty, the justices argued, it knows the goals and preamble of the treaty. Therefore, a dynamic interpretation is covered by this approval.<sup>85</sup> Even if the application of an existing treaty attains legally binding importance for its interpretation and amounts to an amendment of the treaty, the parliamentary authorization given through the treaty-assenting act remains valid. The Parliament does not have a right to require from the government the conclusion of a formal amendment to the treaty. In the opinion of these four justices, this result is a consequence of the balance of powers between the executive and legislative branch according to the Basic Law.<sup>86</sup>

Pursuant to the third sentence of Article 15(3) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*), a tied vote on matters involving an alleged violation of the Basic Law creates the presumption that there has been no constitutional infringement. Thus, the vote of these four justices prevails over that of the other half of the Court and supports the judgment.

The four "dissenting" Justices Limbach, Böckenförde, Kruis, and Sommer characterize the behavior of the Federal Government, such as the repeated political declarations about the modified purposes of NATO and WEU and the participation of the *Bundeswehr* in the actions in the former Yugoslavia, as an "extension" of the original NATO and WEU treaties which, though not yet legally qualified as a treaty amendment, threatens to undermine the rights of the Parliament. They emphasize that, according to their founding treaties, both organizations are defensive pacts. Peace-keeping measures for the United Nations in third countries have no basis in the text of the treaties and cannot be justified by either the preambles or the underlying goals. Although Article 12 of the NATO pact envisions future cooperation between NATO and the UN, it

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85. 1994 N.J.W. 2207, 2212.

86. *Id.* at 2213.

follows from the same provision that such an extension can only be the result of a treaty revision, not an automatic adaption. According to the four "dissenting" justices, the treaty parties do not have the power to draw the line between authentic interpretations and treaty amendments. Even if it were possible to modify essential parts of a treaty through authentic interpretation, such a consensus for modification is subject to parliamentary approval pursuant to Article 59 of the Basic Law.<sup>87</sup> For the "dissenting" justices, the necessity of securing parliamentary support for the politically risky extension of alliance obligations at such an early stage—prior to the conclusion of a formal amendment—is "self-evident" in a parliamentary democracy.<sup>88</sup>

With respect to the participation of German troops under UN command in the operation UNISOM II in Somalia, seven of the FCC justices found that parliamentary approval was not necessary. By accepting Germany's accession to the United Nations in 1973, the Chamber argues, the Parliament also gave the authorization for the *Bundeswehr's* participation in peace-keeping missions of the UN.<sup>89</sup>

Even though the judgment in question does not place the Federal Government under an obligation to seek parliamentary approval for a modification of the strategic concept of NATO and WEU, the Court holds that the *Bundestag's* approval of the deployment of German armed forces was required for another reason. In adherence with the constitutional tradition since Weimar, the Constitutional Court construes an implicit parliamentary proviso for the deployment of German troops. Article 45(2) of the Constitution of the German Reich of 1919 (Weimar Constitution) required a parliamentary resolution for the declaration of war and for a peace settlement. A similar parliamentary proviso was laid down in the former Article 59(a) of the Basic Law, which was introduced when Germany founded the *Bundeswehr*. Although this provision was repealed in 1968 as a number of provisions regulating the deployment of the *Bundeswehr* in emergency situations amended the Basic law, the Chamber does not view this repeal as an intentional abolition of the parliamentary proviso.<sup>90</sup> According to the FCC, the *Bundestag's* consent to the deployment of troops usually must be attained in advance. Unless the parliamentary organs have already declared a "state of defense" (*Verteidigungsfall*), parliamentary approval is necessary even when the

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87. *Id.* at 2215.

88. *Id.* at 2216.

89. *Id.*

90. *Id.* at 2217.



Federal Republic only complies with alliance obligations or when troops are deployed on the basis of UN Security Council resolutions. Only in the case of imminent danger may the federal government deploy armed forces without prior parliamentary consent. The federal government, however, must seek parliamentary approval immediately and must withdraw the troops if the Parliament so requires.<sup>91</sup> The proviso does not give the Parliament a right of initiative in this matter, although it is up to the *Bundestag* to decide how it wants to exercise its participation right regarding the deployment of troops. The Court insinuates a parliamentary procedure that differentiates according to the type of deployment contemplated, namely the degree to which the deployment is already anticipated by a program of military integration laid down in a treaty.<sup>92</sup> Since the Federal Government did not seek parliamentary approval, which the *Bundestag* can give by a simple majority, the Court concluded that the deployment of *Bundeswehr* units in Somalia and the former Yugoslavia violated the German Constitution.<sup>93</sup>

### C. CRITIQUE OF THE "OUT-OF-AREA" JUDGMENT

Although the FCC found that the German government's decision to deploy troops without asking for prior parliamentary approval was a violation of the Basic Law, in the end the ruling is favorable for the Federal Government. The most important outcome is that the deployment of the *Bundeswehr* for UN peace-keeping operations, be it in the framework of NATO or WEU or under UN command, does not require a constitutional amendment. The probability that the government will attain such approval if it considers the deployment of armed forces is considerably higher in a parliamentary system like Germany than in a presidential system like the United States. The German government can usually rely on a stable majority in the Parliament, although this majority has shrunken considerably in the last federal elections. Parliamentary disapproval of a military engagement that the government favored would in most cases equal a no-confidence vote. Thus, the ruling should enable the government in the future to order the deployment of German troops for peace-keeping purposes without the consent of the opposition. Such consent would have been necessary for the two-thirds majority required for a constitutional amendment. The Court, however, does not

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91. *Id.* at 2218.

92. *Id.* at 2218-19.

93. *Id.* at 2219.

even discuss in detail the apparent need to amend the *Grundgesetz* as a prerequisite for the out-of area deployment of German troops.<sup>94</sup>

The majority's interpretation of the approval requirement under Article 59(2) of the Basic Law is legally not compelling. The Parliament is denied important participation rights in foreign affairs through a formalistic reading of this provision. The statement that the Court's opinion furthers the constitutionally-mandated balance of powers in foreign affairs is a mere *petitio principii* rather than a determination based on a thorough investigation of the *ratio legis*.<sup>95</sup> In view of the many ways in which governments now can create legally binding international obligations, the prevailing justices give the Executive a *carte blanche* to exclude the parliamentary representatives from influencing important matters of foreign policy, as long as the Executive does not choose to act by concluding an international treaty.<sup>96</sup> With the same formalistic interpretation used by the Court in this case, one would have been able to undermine provisions embodied in many earlier Constitutions that required parliamentary approval for the declaration of war. The government would have had only to wage an undeclared war to be safe. As demonstrated by the fact that wars after World War I were usually undeclared wars, international behavior sometimes changes substantially. In order not to become worthless paper, a living Constitution must be able to adapt to those changes. This requires a dynamic interpretation of its text. The four justices whose votes support the judgment, however, deny their own Constitution the dynamic interpretation they grant, in the same judgment, to the NATO and WEU treaties.

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94. See Arndt, *supra* note 78, at 2198 (criticizing the Court for acting like a legislator in amending the Constitution by disregarding the real meaning of Article 87(a)(2)).

95. The Court's *Pershing II* decision illustrates the highly questionable method of drawing conclusions from the vague principle of division of powers embodied in Article 20(2) of the Basic Law for the interpretation of provisions specifically regulating the division of powers. Judgment of Dec. 18, 1984, 68 BVerfGE 1, translated in 1 FEDERAL CONSTITUTIONAL COURT, DECISIONS OF THE BUNDESVERFASSUNGSGERICHT 511 (1992) [hereinafter DECISIONS]. Justice Mahrenholz convincingly rebuts this argument as follows: "Art. 59(2) Basic Law is itself a means of making positive the Basic Law's principle of division of powers. The scope of this principle can therefore not be determined by some ideally imagined schema of division of powers." *Id.* at 536, 547 (dissenting opinion).

96. *Id.* at 546 (dissenting opinion of Justice Mahrenholz) (stating that "[t]he meaning of Art. 59(2) Basic Law would be missed were the Executive able to decide on the scope of the reservation as to enactment by choosing the legal form of its declaration").

Politically, the ruling clarifies the participation of German troops in UN missions and also allows Germany to participate in NATO and WEU operations bound to fulfill UN Security Council resolutions. Although the Court does not explicitly address the question of whether UN operations must be under UN chief command or whether the UN, as was the case in the Gulf War, may merely authorize actions, it seems a misreading of the judgment to assume that the latter case is not covered by the Court's statement that the accession to the UN encompasses military peace-keeping measures according to Article 42 of the UN Charter.<sup>97</sup> The FCC, therefore, seems to remove the obstacles standing in the way of Germany attaining a more important role in world politics, such as Germany's claim for a permanent seat in the UN Security Council.

What may be regarded as a positive outcome from an international perspective, however, might be less so from a German domestic view because the ruling dispenses the government from seeking a national consensus on Germany's future role in the international community, as would have been necessary had a constitutional amendment been required. It remains indeed somewhat strange that in a situation where all major political parties have already presented their proposals for a constitutional amendment to settle the problem,<sup>98</sup> the FCC virtually ended this constitutional debate.<sup>99</sup>

### CONCLUSION

With the exception of one member,<sup>100</sup> the composition of the FCC's

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97. 1994 N.J.W. 2207, 2210. *But see* Arndt, *supra* note 78, at 2199 (finding that only UN operations under UN chief command are permitted by the Court because the form of authorization to some states has been developed outside the UN Charter). Arndt, however, neglects to realize both that this seems to be a recognized UN practice now and that the FCC is willing to permit a dynamic treaty interpretation. *But see* Klaus Dau, 1994 NEUE ZEITSCHRIFT FÜR WEHRRECHT 177, 181 (stating that if this opinion were correct, the Court would have mentioned this in connection with the peace-keeping mission in the AWACS case because NATO exercised operational control in this case and not the UN).

98. *See* Preuß, *supra* note 76, at 272-76 (discussing the different political proposals).

99. *See* Dau, *supra* note 97, at 182 (remarking that the decision of the Court has made obsolete, in a not entirely unproblematic way, the still missing political consensus on the issue).

100. The term of Justice Mahrenholz, the Vice President of the FCC and the Presiding Justice over the Second Chamber, ended before the Court delivered the

Second Chamber remained the same in both cases. At the core of both rulings lies the question of where the borderline between the democratic rights of the Parliament and the transfer of sovereign rights to international bodies falls. It is discernible that the "dissenters" in the second case follow a strict line in defining the rights of the Parliament, a line that is consistent with the *Maastricht* ruling. On the other hand, there is an evident dissonance between the Court's reasoning in the *Maastricht* ruling and the prevailing justices' opinion in the decision on out-of-area deployment of German troops. While the *Maastricht* judgment draws a fine line between the parliamentary act approving a treaty and the authentic interpretation of that treaty, the four justices supporting the judgment in the "out-of area" case seem to have forgotten the Court's earlier reasoning. They do not explain their sudden change of opinion. Such an explanation would have been essential since the four prevailing justices paradoxically give an international organization like the EU, which has an emerging, though not yet sufficiently, democratic structure and a court entitled to interpret its treaty, less of a democratic reputation under a dynamic interpretation of its founding document than governmental organizations like NATO and WEU under a modified "authentic" interpretation on much looser textual ground of their founding treaties. The justices do not even consider whether such law-making through modified treaty interpretation might conflict with the democratic principle of the German Basic Law.

Such a double standard in the judgment on European integration, on the one side, and on international military/security cooperation, on the other side, has been evident before. In the *Eurocontrol* decision of 1981, the Second Chamber ruled that the future development of an international organization must be laid down with sufficient certainty in the founding document on which the national act of accession is based. The original parliamentary assent does not cover essential modifications of the integration program.<sup>101</sup> Two years later, when the same chamber had to decide on the constitutionality of the installation of NATO Pershing II and cruise missiles medium-range weapons in Germany, it found that parliamentary approval of such deployment was not required. The Court

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second judgment. He was replaced by Justice *Jutta Limbach*, who now presides over the Second Chamber and is the first woman to be appointed President of the Federal Constitutional Court. In this function, *Limbach* is the successor of *Roman Herzog*, who was elected President of the Federal Republic of Germany.

101. Judgment of June 23, 1981, 58 BVerfGE 1, 37, translated in 1 DECISIONS, *supra* note 95, at 37.

argued, for instance, that the special dynamics of defense require broadly formulated defense treaties that are adaptable to new situations.<sup>102</sup> Justice Mahrenholz, in his dissenting opinion in the *Pershing* case, denounced the Court's double standard in European integration and defense matters.<sup>103</sup>

It is not too speculative to say that the attitudes of the prevailing four justices in the out-of-area decision, which are hardly compatible with the *Maastricht* ruling, also have their source in an end/means approach. Apparently, the overwhelming support for Germany's integration in NATO and the UN has caused the justices to disregard whether their legal reasoning in support of such goal is at variance with their reasoning in other cases. Certainly, this is not the way constitutional court justices should act. Rather, it is a way to discredit their institution in the long run.

One can hypothesize as to the consequences of future Court decisions in foreign policy matters. Presumably, the FCC will not very soon be concerned again with the question of out-of-area missions by German troops because the out-of-area case provided the landmark decision on this subject. At some point in the near future, however, the FCC may be asked to decide whether acts of the EU are in compliance with the reasoning of the *Maastricht* decision. Such a case could come to the Court through different procedural ways.<sup>104</sup> It is doubtful whether the Court will then be as lenient with parliamentary and democratic rights in matters of national sovereignty as in the out-of-area case since the much stricter *Maastricht* ruling was unanimous. Even in the unlikely case that the prevailing justices in the out-of-area ruling should feel urged to harmonize their opinion with their reasoning in the judgment on the Treaty on European Union, it seems even less likely that all four justices will leave their stricter "sovereignty line" in European affairs.

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102. Judgment of Dec. 18, 1984, 1 DECISIONS, *supra* note 95, at 527-28.

103. *Id.* at 540 ("The constitutional content of Article 24(1) Basic Law has well nigh evaporated under the pressure of an end/means relationship: not the Constitution, but the object of the Treaty, is to decide how open provisions ought to be that are to serve as the empowerment basis for the transfer of sovereign powers.").

104. For example, such a case could come before the Court by way of an individual constitutional complaint (*Verfassungsbeschwerde*) at the time Germany should enter the third phase of the Monetary Union, by a dispute between high federal organs (*Organstreitigkeit*) or even by an abstract judicial review (*abstrakte Normenkontrolle*) initiated by a state government (*Landesregierung*).