

The (Non-)Judicialisation of War: German Constitutional Court Judgment on Rescue Operation Pegasus in Libya of 23 September 2015 (Part 1)

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Editor's Note: This is the first of two posts discussing the 'Rescue Operation Pegasus' Judgment of the German Federal Constitutional Court.

In the middle of the civil war in Libya in 2011 (before the start of the UN authorised military operation), the German Chancellor, following the proposals made by the Ministers of Foreign Affairs and of Defence, decided to evacuate 132 persons (German and other civilians) from an industrial camp in Nafurah, 400 km south of Benghazi. The operation – dubbed “Operation Pegasus” – succeeded without any combat action.

Subsequently, a group of members of the German *Bundestag* seized the German Federal Constitutional Court and argued that the constitutional and statutory division of powers among the Executive and the Legislative branch when it comes to deciding about military action not only demands parliamentary *ex ante* approval but also, in those urgent cases where the Executive is allowed to decide on its own, requires a formal *ex post* approval. This claim was rejected by the Court (judgment of the Second Senate, [23 September 2015, No. 2 BvE 6/11](#)).

1. The legal framework and background

Germany is probably the state with the most detailed legal regime on parliamentary involvement in decisions on the use of military force abroad. The allocation and division of the “war powers” in constitutional democracies between the Executive branch and Parliament reflects a tension between the need for swiftness, expertise, external unity, steadiness, and secrecy on the one hand, and a desire for democracy, accountability, and transparency on the other hand. In a simplified way, one could call this a tension between effectiveness and legitimacy. In state practice, the “war power” has traditionally been largely reserved to the executive branch. But concerns of democratic accountability and publicity have continuously gained weight, and have led – in democratic states – to an involvement of Parliaments (being the bodies enjoying the strongest democratic legitimacy) in that decision. Constitutional law is the basis of such parliamentary powers, for example, in the United States ([Art. I sec. 8](#) of the US Constitution); in [Art. 35\(3\)](#) of the French Constitution, as inserted in 2008, and in [Art. 102 lit. d](#)) of the Russian Constitution.

The German Constitution (Basic Law (*Grundgesetz*, GG)) contains two pertinent provisions, [Art. 24\(2\)](#) and [Art. 87a GG](#), which do not mention Parliament. But a constitutional requirement to seek authorisation of the first chamber, the *Bundestag*, was defined by the Federal Constitutional Court's “Out of area” Judgment ([BVerfGE 90, 286](#) of 12 July 1994), and in a second Judgment (“AWACS” – [BVerfGE 121, 135](#), of 7 May 2008).

The German Statute on Parliamentary Participation ([Parlamentsbeteiligungsgesetz](#) of 18 March 2005, BGBl. 2005 I, 775) is seen as codifying the prior constitutional case law. This means that the parliamentary “prerogative” is considered to flow directly from the Basic Law. And the constitution is what the Judges say it is.

This Statute requires approval of the first chamber (*Bundestag*) in form of a simple parliamentary resolution, adopted by simple majority for any “deployment of German armed forces outside the scope of the Basic Law” ([Paragraph 1\(2\) Parlamentsbeteiligungsgesetz](#)). [Paragraph 2\(1\)](#) of the Statute explains in more detail what “deployment of armed forces” means: “A deployment of armed forces is present when soldiers of the German army are involved in armed undertakings or when the involvement in an armed undertaking is to be expected.” In the AWACS decision, the German Federal Court specified that the expectation of involvement must be “concrete”.

[Paragraph 2\(2\)](#) of the *Parlamentsbeteiligungsgesetz* defines which activities do not qualify as deployment. These are: (1) preparatory measures and planning; and (2) humanitarian aid with arms carried only for self-defence if there is no (concrete) expectation of involvement in armed undertakings.

As in other states, the legal regime on parliamentary involvement foresees special procedures for situations of urgency or emergency. Under [Paragraph 5](#) of the *Parlamentsbeteiligungsgesetz*, Government may decide without Parliament in cases of imminent danger (“*Gefahr im Verzug*”), but needs to get approval later. Approval must be sought “promptly” (“*unverzüglich*”).

Finally, there is a simplified procedure for “deployments of low intensity and scale” which requires involvement of two parliamentary committees – the Foreign Affairs Committee and the Defence Committee ([Paragraph 4](#) of the *Parlamentsbeteiligungsgesetz*).

In 2014, a parliamentary committee was set up to explore amendments to the pertinent Statute in order to flexibilize the procedures. But the resulting *Rühe* report of 16 June 2015 ([BT Drs. 18-5000](#)) was rather in favour of strengthening parliamentary powers.

2. Facts and proceedings

For safety reasons, the evacuation of February 2011 was performed with military means and under military protection. Because the area in the Eastern part of Libya was already in the hands of the opposition’s armed forces with whom no diplomatic contacts existed, 22 Germans and 110 citizens of other states were flown out in two military transportation airplanes (Transall C-160), staffed with 21 soldiers, equipped with pistols and machine guns.

The command to start the operation was given by the Minister of Defence on the evening of 25 February 2011. The Minister of Foreign Affairs had, during the day, informed by telephone the chairpersons of the political factions sitting in the *Bundestag*, asking them to keep strict confidentiality. On the next evening, he again informed those MPs about the successful outcome of the operation.

Because no armed force was actually used, the public international law question whether *Blitz*-type military operations to rescue nationals form an exception to the general prohibition of the use of force under Article 2(4) of the UN Charter (maybe as a type of self-defence) did not arise.

In March 2011, some members of the *Bundestag* unsuccessfully tried to bring about a formal parliamentary resolution in which the Chamber would have formally requested the Government to seek *ex post* authorisation for the military operation. The *Bundestag* did not adopt such a resolution.

In August 2011, the political group “*Bündnis 90/Die Grünen*” then seized the Constitutional Court in a judicial procedure by which a specific number of members of the Parliament’s First Chamber (the *Bundestag*) can claim infringements of the legal status of that organ (“*Organstreit*” under [Art. 93 No. 1 Basic Law](#); [§ 13](#) and [§§ 63 et seq. of the Law on the Federal Constitutional Court](#)). The rationale of this proceeding is to protect the minority in Parliament by allowing that minority to vindicate parliamentary powers against the Executive branch, even when the majority in Parliament does not want to invoke these powers.

3. Holding

The German Federal Constitutional Court ruled that the German Constitution, the Basic Law (*Grundgesetz*), does not require that Parliament gives an *ex post* assent to a military rescue operation which is already terminated. However, the Executive branch must swiftly and fully inform Parliament.

The technical explanation for this eminently practical and commonsensical holding is that the Government’s lawful use of its urgency powers, while interfering with the prerogative of Parliament, has the same legal effect as a joint deployment decision of both institutions taken in normal situations. The governmental decision does not need a retroactive authorisation by Parliament but can stand alone.

While Parliament must be immediately informed, this type of involvement is no “authorisation” with any concrete legal effect. Any other understanding would lead to the legal consequence that – if Parliament *ex post* refuses to grant authorisation for such an urgent operation – the deployment would have to be qualified as having been unlawful from the beginning (para. 87). And, because this cannot be, the Court construes the governmental power to make urgent decisions as an (“auxiliary”) stand-alone power (para. 88) which “modifies” the principle of parliamentary co-decision in situations where – for purely factual reasons – Parliament cannot exercise its powers (para. 100).

The rationale of Parliament involvement as identified by the Court points against an *ex post* approval of operations which are already finished. The purpose of the parliamentary prerogative is that Parliament decides jointly with the Executive, and assumes co-responsibility. Once the situation is over, this function cannot be fulfilled anymore (para. 99). By contrast, the purpose of parliamentary approval is not to assess authoritatively the legality of an operation; this is incumbent upon the Court (para. 99). Political control by Parliament can be exercised through other types of instruments, e.g. parliamentary resolutions or even a motion of censure against Government (para. 101).

In order to allow Parliament to exercise these forms of political control, it is the duty of the Government to inform it in detail about the military operation. Parliament enjoys an “entitlement to information” (para. 104).

Applying these principles as a benchmark, the Court found that the rescue operation in Nafulah was indeed a “deployment” in the sense of the Basic Law and the relevant Act of 2005. Despite its minimal character, the operation held the “potential for military entanglement” (para. 114). The non-occurrence of actual combat activity did not alter the fact that there had been indeed a concrete expectation that German soldiers would be – during the evacuation – involved in an armed conflict (paras 105–117).

Normally, this situation would have triggered the Government’s obligation to seek parliamentary approval. However, it was undisputed that there was in fact a situation of imminent danger which entitled the Government to decide on deployment without waiting for the *Bundestag*.

The legal question here was only whether, when the parliamentary decision on the concrete deployment is no longer possible for factual reasons, the constitutional parliamentary prerogative requires the Government to seek *ex post facto* approval by Parliament. And this the Court answered in the negative: there is no such obligation. The Government’s refusal to seek *ex post* authorisation by the *Bundestag* was thus not unconstitutional.

(And because the MPs had not claimed that Government had, in the case of Nafurah, not properly informed Parliament about the operation, the legal details of the governmental obligation of “immediate and comprehensive information” to Parliament was not examined on substance by the Court).

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4. Assessment

The legal reasoning of the German Federal Constitutional Court in the *Rescue Operation Pegasus* Judgment is quite obviously inspired by the desire to avoid impractical results. It is somewhat in tension with the Court's insistence on an otherwise joint and unified power of Government and Parliament ("*Entscheidungsverbund*"; para. 83).

Still, I find the teleological argument fully convincing: On the premise that Parliament has the war power because it is supposed to co-decide in the face of political and military risk but not to assess the lawfulness of the operation an *ex post* "ratification" does not make sense.

Importantly, in the *different* factual situation of an ongoing operation, parliamentary approval would have to be sought, and its refusal would deploy its effect *ex nunc* and oblige Government to withdraw troops (para. 87).

It is also worth noting, that – like a counter-point to the actual holding against Parliament – the Court by way of *dicta* highlighted and strengthened parliamentary powers in numerous respects. For example, it clarified that the constitutional rule of parliamentary approval applies to all forms of military operations abroad, including unilateral ones, regardless of the operation's legal basis under public international law, and independently of whether the troops are authorized to take enforcement action under Chapter VII of the UN Charter (paras 71 and 81). The constitutional rule thus applies also to operations outside a system of collective security (which had been the matter of the previous Constitutional Court decisions). A parliamentary deliberation is even more needed in operations which have not been discussed with allies (para. 69). The legal threshold, i.e. at what point a "deployment" calls for parliamentary involvement, is identical in all cases (para. 77).

The Court also dismissed all additional defences of the Government. It highlighted that the executive branch does *not* enjoy a margin of purely military and political appreciation of the Executive branch which would be beyond the reach of Parliament and of the Constitutional Court. Such a margin does not exist, not even in situations of emergency (para. 70). The constitutional requirement of parliamentary approval does not depend on the military or political importance of the operation; the deployment may be minimal and it does not need to come close to a real "war" (paras 77–82). Finally, the Court explained for the first time that the key concept of "imminent danger" is a legal concept, too, which is fully reviewable by the Court and does not leave margin for political assessment to the Government (paras 91–98).

The Judgment is also noteworthy for its implicit rejection of the proposal of an *ex post* evaluation of deployments forwarded in the mentioned parliamentary committee report of June 2015 ("*Rühe report*").

Overall, the Judgment is a typical "German style" judgment, with a sophisticated technical legal reasoning employed to justify an eminently commonsensical outcome. It is also balanced and strategic in that, while denying Parliament power in the concrete instance (so that Parliament "lost" this case), in *obiter dicta* the Court underscored and maybe expanded parliamentary powers on questions which were not at stake in these

proceedings.

5. Outlook: war, democracy, and juristocracy

Since the 1990s, there is a trend (at least in Europe) to expand the involvement of Parliaments in decisions to use military force abroad. In Austria, a law to this effect was adopted in 1997. In Germany, the relevant case law began in 1994. A French constitutional amendment of 2008 grants the *Assemblée nationale* (the Parliament's first chamber) a power of approval of the decision to use military force. In the UK, the constitutional reforms, initiated in 2006, stopped short of a codification of parliamentary powers in 2013 (English House of Lords' Constitution Committee, 2nd Report of Session 2013–14, "[Constitutional arrangements for the use of armed force](#)" of 24 July 2013).

The reasons for the parliamentarization of war powers are of course heightened democratic sensibilities. Typically, controversies about parliamentary involvement have begun only once the issue presented itself concretely. In the USA, this was the Vietnam War of 1973; in the UK, it was the Kosovo war of 1999. As a rule, most other Western states only use military force abroad as part of collective security measures, and this happened first in the 1990s (if one discounts the 1950 Korean War). The adoption of statutes (Austria) and the emergence of case law (Germany) thus took place in the 1990s, when the Security Council for the first time authorised the use of military force and adopted economic sanctions which had to be monitored by military airplanes.

The need for a parliamentary decision for the deployment of military force is probably felt because ordinary people today are less ready to "sacrifice" young men and women for a public cause than in previous historic periods. The change of attitudes is exacerbated by the fact that military engagement is nowadays more often about "foreign" problems, not directly and immediately threatening the home state. The reluctance towards sacrifice (especially in foreign lands) has been met by some states with the abolishment or suspension of conscription-based armies and their replacement with professional armies (USA after the Vietnam War; Germany in 2011). All in all, the decision to deploy military force is nowadays perceived to be important and costly enough that it warrants public debate, deliberation and support by the most directly accountable body of a democratic state.

In a parliamentary system of government (such as the one that exists in Germany, but also in the UK), in which the Government emerges from the parliamentary elections, is elected by Parliament and accountable to it, the case for a parliamentary decision on the use of military force is strong. In contrast, in a presidential system such as the one that exists in the United States, the normative case for parliamentary involvement is weaker; the President, who decides on use of military force, enjoys independent democratic legitimacy through his election by the people. For example, US Presidents insist that the war power is incumbent by law on the President alone, but after the Vietnam War Presidents have regularly sought authorisation from Congress in order to bolster democratic legitimacy and effectiveness of the proposed action.

When a Parliament is entitled to participate in the decision to use military force, any disregard or neglect of that entitlement is a violation of the law. It is a different matter whether such violations are justiciable, then, and who has standing to file a complaint (members of Parliament (as in Germany), individual soldiers, or even members of the public?). In some if not most states, in order to avoid decisions on issues such as the "political question" doctrine, courts seem prone to resort to judicial techniques, such as the denial of legal standing and the ripeness doctrine. In Germany, however (and in contrast with France, for example), a seemingly complete "judicialisation" has taken place. The question whether German soldiers have been involved in armed activity (the situation which triggers the requirement of parliamentary approval) is "under full scrutiny of the courts", with no unreviewable margin of appreciation for the Government ([BVerfGE 121, 135, para. 82](#)). The same goes for the determination whether there was an imminent danger which allows the Government to proceed without prior parliamentary approval (BVerfG, 23 Sept. 2015, paras 91–94).

The German Constitutional Court's recent judgment is just one manifestation of the persisting conundrum of domestic democracy and domestic judicial review in an interconnected but multi-state world. From a *global* democracy perspective, a decision to wage war (or to abstain from it) made by the Executive alone does not seem to be much less democratic than a parliamentary vote on that very matter in one state. A "true" democratic decision would seem to require the formal representation of the views of *other states'* inhabitants, notably of

affected states (such as Libya or – currently – Syria). This leads to a quest for involvement of supra-national bodies such as the parliamentary assemblies of international organisations ranging from NATO to OSCE. But, even in these forums, the populations endangered by terror and civil strife have no say.

But does it really make sense to ask for global democratic decision-making, for the consent of those who are (transnationally) affected, for decisions on the use of force – and possibly on other policy issues? The answer is a cautious “rather no”, because the difference between making law (e.g. by concluding an international treaty) and deciding to use military force is that the latter decision is not (only) the expression of a political preference and an attempt to regulate, but an enforcement decision which involves extremely high costs, including sacrificing lives. The normative quest for taking into account global, other states’, and foreign citizens’ interests when making such a decision is less persuasive than in simple law/treaty-making. It is intuitively more acceptable that such a decision primarily concerns “us” and not “them”, and that solidarity with “them” and with “their” problems is only limited. It is true, to stick to the example of Syria, that the Syrian population incurs costs and suffers harm through the non-intervention of third states. But this is a different type of harm than the costs incurred by the acting states. Only if the Syrians were in principle *entitled* to military aid against their brutal and human rights abuser dictator (which is not the case, not even under a strict reading of R2P), a case for *their* democratic involvement in any decision on military action (or abstention from such action) in the region could be made.

By contrast, I submit that any decision of the polity which bears the costs of intervening with military means should be taken as democratically and openly as possible – on the domestic level. Such a democratisation does not inevitably lead to a judicialisation of war. And even when courts are involved, they can restrain themselves reasonably, as the recent German decision illustrates.

The **stalling-effect** of asking the citizens (through their Parliaments) about going to war (as predicted by Immanuel Kant in the Perpetual Peace) has materialised for example on 30 August 2013, when the [British House of Commons rejected](#) the British Prime Minister’s motion to deploy military force in Syria after a chemical weapons attack. But a “democratic” decision not to intervene and help may ultimately harm strangers – just as a decision to intervene. Can these tragic consequences be somehow “mitigated” or made more tolerable by the fact that these decisions have been taken in domestic democratic procedures? Not really. The most sustainable but at the same time seemingly far-away remedy would be that the conflict-stricken polities transform themselves into democracies.