ABHANDLUNGEN

The German Contribution to the Protection of Shipping in the Persian Gulf: Staying out for Political or Constitutional Reasons?

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I. The Setting[1]

One of the major crude oil supply lines for the Western industrialized nations, including Japan, runs through the Persian Gulf[2]. Japan buys approximately 60 per cent of its oil supply in the Gulf area, Italy 49 per cent, France 32 per cent, West Germany 10 per cent and the U.S. 6 per cent.

Despite the seemingly different dependency of the Western states on

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Abbreviations: AdG = Archiv der Gegenwart; AJIL = American Journal of International Law; BGBl. = Bundesgesetzblatt; BT-Drs. = Bundestagsdrucksache; Bull. = Bulletin des Presse- und Informationsamtes der Bundesregierung; BVerfGE = Entscheidungen des Bundesverfassungsgerichts; EA = Europa-Archiv; EPIL = Encyclopedia of Public International Law, ed. by Rudolf Bernhardt; FAZ = Frankfurter Allgemeine Zeitung; ICJ = International Court of Justice; ILM = International Legal Materials; NZWehrr. = Neue Zeitschrift für Wehrrecht; RdC = Académie de Droit International, Recueil des Cours; sec. = section; VN = Vereinte Nationen.

[1] For the factual background, see: A Report to Congress on Security Arrangements in the Persian Gulf, June 15, 1987, by the then Secretary of Defense Weinberger, ILM 26 (1987), p.1433; W.G. Lerch, Der Golfkrieg (1988); R. Lagoni, Gewaltverbot, Seekriegsrecht und Schiffahrtsfreiheit im Golfkrieg, in: W. Fürst/R. Herzog/D. C. Umbach (eds.), Festschrift für Wolfgang Zeidler, vol.2 (1987), p.1833; H.W. Maull, Die Internationalisierung des Golf-Krieges, EA 42 (1987), p.533; A. Hottinger, Der Dauerkrieg zwischen Irak und Iran, EA 43 (1988), p.141; C. Rousseau, Chronique des faits internationaux, Revue Générale de Droit International Public 92 (1988), p.140.

[2] 17 per cent of the West's oil consumption pass through the Strait of Hormuz (Weinberger, ibid., p.1444).

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Gulf oil, they would all feel more or less the same adverse effects from any serious interruption of the Gulf oil flow, because any supply shortage and ensuing price increases on the world oil market would lead to recession and inflation on a global scale[3].

Even though the importance of the Gulf shipping lanes has decreased somewhat due to the building of overland pipelines, they still play a vital role.

The two enemies in the eight-year-long Gulf War also depended on those shipping lanes for sustaining their war efforts. For them, Gulf shipping was of strategic importance. Oil exports provided Iran's major source of foreign currency revenues. Iraq did not itself ship its crude through the Gulf but received part of the revenue from Kuwait's oil shipments. Both adversaries were partly supplied with war materials via the Gulf. And finally, both relied heavily on foreign merchant vessels for all those shipments in their interest.

So it was not surprising that in March 1984[4] Iraq started the so-called "tanker war", using its air superiority to strike at Iranian oil terminals (Kharg Island) and at supertankers on their way to and from Iran[5]. Iraq allegedly pursued another objective besides crippling its enemy's war machinery, namely drawing the superpowers into the conflict, hoping their common interest to counter Iran's destabilizing influence in the region would work in its benefit.

Iran retaliated by employing its navy to stop and search ships of different nationalities bound for Kuwaiti and other Arab ports so as to prevent secret arms supplies from reaching Iraq by land via Kuwait[6]. Since May 1984, it had been indiscriminately launching sea and air attacks on all kinds of ships on their way to and from Arabian Gulf ports[7], thereby trying to build up international pressure on Iraq to end its attacks on Iranian ship-

[3] Statement by Under Secretary Armacost before the Senate Foreign Relations Committee, June 16, 1987, ILM 26 (1987), pp.1429–1430; Maull (note 1), pp.534–535.

[4] There had been some earlier attacks on neutral shipping (see Lagoni [note 1]), pp.1851–1852, 1855); see also U.N. Security Council Resolution 540 (31 October 1983), EA 43 (1988), D 533 (para.3).

[5] While from 1980 till 1984 there had been only 23 Iraqi and 5 Iranian attacks on merchant ships, the figures for 1984 alone were 37 and 17 (Maull [note 1], p.542 note 21); between January 1 and September 5, 1987, 85 vessels were attacked by both states (Rousseau [n.1], p.143).

[6] Lagoni (note 1), pp.1859–1860.

[7] Ibid., pp.1857–1858; see U.N. Security Council Resolution 552 (1 June 1984), EA 43 (1988), D 555.

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ping[8]. From September 1986, Iran concentrated its attacks on vessels serving Kuwaiti ports because it wanted to intimidate Kuwait, so as to end its support for Iraq[9]. In the spring of 1987, Iran began mining different areas of the Persian Gulf (especially the approaches to Kuwaiti ports) and the Gulf of Oman. The Iranian responsibility for the "war of mines" was proven when on 21 September 1987 the U.S. Navy seized the vessel "Iran Ajr" while it was engaged in minelaying. This tanker and mine war, brought to an end only recently, was the most serious threat to merchant shipping since World War II[10].

These developments prompted Kuwait in late 1986 to ask the United States, Great Britain, the Soviet Union and the People's Republic of China for help in protecting shipping to and from its ports[11], thus initiating the naval operations at issue here. Both the Soviet Union and the United States responded positively and rapidly.

In July 1987, the Soviets leased three small tankers to Kuwait and provided a navy escort which was reinforced in September[12]. But the United States assumed a much greater role in the protection of shipping in the Persian Gulf. The reason for both the U.S. and the Soviet Navy presence in the area was not only their apparently common interest in keeping the international waterway from the Gulf of Oman through the Strait of Hormuz into the Persian Gulf open for international shipping. Rather, they shared the interest in containing fundamentalist Iran, while at the same time opposing each other's influence in the region[13] and – seemingly paradoxically – wooing Iran as the main regional power[14].

One should not, however, underestimate the West's interest in guaranteeing the free flow of oil through the Strait of Hormuz which Iran

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[8] Statement by Iranian Parliament Speaker Rafsanjani on 3 May 1988, EA 43 (1988), Z 98.

[9] Weinberger (note 1), p.1445.

[10] Lagoni (note 1), pp.1835–1836.

[11] For an account see Weinberger (note 1), pp.1456–1457, 1461–1463, and AdG 57 (1987), p.31353; for Kuwait's reasons see Report to the Majority Leader by the Senate Armed Services Committee Chairman Nunn, June 29, 1987, ILM 26 (1987), pp.1464, 1467.

[12] Lerch (note 1), pp.121, 150; according to other reports, the first Soviet-leased ship arrived in Kuwait in early May (AdG 57 [1987], p.31355). The Soviet navy had been present in the Gulf earlier (see Assistant Secretary Murphy's statement, 19 May 1987, ILM 26 [1987], p.1425).

[13] The U.S.'s main stake was in reassuring the conservative Arab Gulf states friendly to it, after the Iran-*contra* scandal had shaken its credibility (see Murphy, ibid., pp.1423–1424).

[14] Maull (note 1), pp.537–539; see Weinberger (note 1), pp.1441–1445.

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with its Silkworm missile batteries positioned close to the Strait, and not Iraq, could have seriously impeded[15]. And, as a matter of principle, the U.S. has always supported the freedom of navigation affected by Iranian threats to close the Strait of Hormuz[16]. Though it may be true that the attacks by Iraq on merchant ships in the Gulf were more numerous, those were not directed at non-belligerent shipping[17]. So the Western naval undertaking was quite clearly intended to deter Iran and not Iraq[18]. As such, it had been approved by the Gulf Cooperation Council, even if the regional support was not whole-hearted[19].

The U.S. government policy towards the Gulf was challenged in Congress[20]. An attempt of over a hundred congressmen to force the President by way of a federal court order to comply with the War Powers Resolution failed[21].

II. Western Navy Escort Operations in the Persian Gulf

A. U.S. Commitment

The event that finally set off the U.S. commitment to protecting shipping in the Persian Gulf was the Soviet decision to comply with the Kuwaiti plea for help. The U.S., which has had some naval forces in the Gulf area ever since 1949, charged also with protecting U.S. shipping

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[15] Murphy (note 12), p.1424; statement on the Venice Economic Summit, 9 June 1987, ILM 26 (1987), p.1431; Weinberger (note 1), p.1446; but see Nunn (note 11), pp.1466–1467.

[16] Letters of Secretary of State Shultz to Congress, 20 May 1987, ILM 26 (1987), pp.1425–1426; Armacost (note 3), p.1429.

[17] Maull (note 1), p.538–539, neglects the distinction between belligerent and non-belligerent shipping (see Weinberger [note 1], p.1445); even though the neutrality of shipping from and to Kuwait could partly be called in question, the distinction remains valid under international law (see Lagoni [note 1], pp.1858–1859).

[18] According to Maull (note 1), p.538, it amounted to taking sides with Iraq against Iran. Armacost insisted, however, that the U.S. remained formally neutral (note 3, p.1430). But see Nunn (note 11), pp.1472–1473. The U.S. also provided military intelligence to Iraq (TIME, August 1, 1988, p.7).

[19] Weinberger (note 1), p.1445; but see Nunn (note 11), p.1473, and Lerch (note 1), pp.128–129.

[20] See Nunn, ibid. The 1988 Democratic Party platform, however, endorsed by the National Convention in Atlanta, called the freedom of navigation in the Gulf a desirable U.S. foreign policy objective (TIME, August 1, 1988, p.5).

[21] *Lowry* v. *Reagan*, 676 F.Supp.333 (D.D.C. 1987) (see AJIL 82 [1988], pp.596–597); see also *infra* note 41 and accompanying text.

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there[22], agreed in March 1987 to reflag 11 Kuwaiti ships meeting the formal requirements of U.S. law and, in accordance with a longstanding policy, extend the protection of the U.S. Navy to them[23]. The reflagging was completed on July 21, 1987, and the escort operations began on the following day.

After the accidental Iraqi air attack on the U.S.S. Stark on May 17, 1987[24], the U.S. increased its naval presence in the area. At the end of September 1987, it had 47 vessels with 25,000 men aboard either stationed in the Gulf area or on their way to it[25]. The force was somewhat reduced in February 1988. The ships provided escort for U.S. registered merchant vessels[26] and performed normal patrol duty. Later, and in contrast to earlier statements of intent[27], the U.S. announced its readiness to extend, upon request, the naval protection to other non-belligerent vessels not registered in the U.S.[28].

B. The General Question of Burden-Sharing inside and outside NATO

The United States had taken its decision in favor of an engagement without consulting its allies, and, quite in accordance with its world power role, considered it as an expression of a responsibility which it should and would assume alone, if necessary[29]. Nevertheless, the question of burden-sharing, a constant point of controversy also within the NATO alliance[30], came up in the early planning stages of the Gulf operations[31], which, as out-of-area operations, were kept outside the NATO framework. The area

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22 Armacost (note 3), p.1430.

23 Ibid.; see Weinberger (note 1), pp.1451–1452. Apparently, more Kuwaiti vessels were reflagged later (according to the FAZ, 2 May 1988, p.6, there were 22).

24 See ILM 26 (1987), pp.1423–1428.

25 AdG 57 (1987), p.31367.

26 But see Rousseau (note 1), p.143: not an actual escort system but simple accompanying.

27 See Armacost (note 3), p.1430.

28 Announcement of April 29, 1988 (see FAZ, 25 April 1988, p.2; 2 May 1988, p.1; 5 July 1988, p.2).

29 Weinberger (note 1), p.1459.

30 See FAZ, 19 March 1988, p.12; 4 May 1988, p.2; N. Hansen, Die NATO in der Bewährung, in: Festschrift für C. Stiefel (1987), pp.263, 279 *et seq.*; D. Aaron, Neubewertung der Atlantischen Allianz, EA 41 (1986), pp.481–487.

31 Armacost (note 3), p.1431; Nunn Report (note 11), p.1474; see also the statements in AdG 57 (1987), p.31358.

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of the North Atlantic Treaty[32] is defined in Art.6 as follows:

"the territory of any of the Parties in Europe or North America, ... the Algerian Departments of France [obsolete since July 3, 1962], ... the territory of Turkey ... the islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer ... the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area of Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer".

The problem of burden-sharing had indeed preceded the "tanker war" and even the Iraq–Iran conflict. After the Soviet invasion of Afghanistan, launched on 27 December 1979, the West, and especially the U.S., was concerned that the attack amounted to a first strike in a Soviet plan to gain access to the Persian Gulf and control over the oil fields in the region. Thus, in his State of the Union Address on January 23, 1980, the then President Carter, without prior consultation with the allies, pointed out that the U.S. would consider any attempt by the Soviet Union to bring the Persian Gulf area under its control as an attack on its vital interests which would be repelled by all necessary means, including military power. The President indicated that the U.S. naval presence in the Indian Ocean would be increased[33].

The United States then began to urge its allies to set aside troops for deterring or repelling a Soviet advance towards the Gulf. There were futile attempts to expand NATO's role beyond the area defined in Art.6 of the North Atlantic Treaty for the sake of protecting vital interests[34]. The then West German Chancellor Schmidt instead proposed a division of tasks according to the capabilities of each of the allies[35], meaning that some allies would not get directly involved in the Gulf region but rather increase their potential in Europe to set off any possible redeployment of U.S. forces in

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[32] Of April 4, 1949, as amended by the Protocol of October 17, 1951, United Nations Treaty Series vol.34, p.243; vol.126, p.350; vol.243, p.308; the Federal Republic of Germany acceded to the treaty on May 6, 1955, BGBl.II 1955, p.630.

[33] EA 35 (1980), Z 37–38 ("Carter Doctrine").

[34] H. Woopen, Dürfen die Europäischen NATO-Staaten ihre Streitkräfte außerhalb des NATO-Gebiets einsetzen?, NZWehrr. 1983, pp.201, 203–204; A. Coridaß, Der Auslandseinsatz von Bundeswehr und Nationaler Volksarmee (1985), pp.64–65.

[35] Statement on February 28, 1980, Bull. No.22, pp.177–178 (February 29, 1980); see also R.W. Komer, Die NATO und Krisen außerhalb des Vertragsgebiets, EA 40 (1985), pp.665, 668–669.

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other areas. This "division-of-labor formula" entered into numerous NATO communiqués[36] and was also included in the final documents of the Bonn summit in 1982:

> "Noting that developments beyond the NATO area may threaten our vital interests, we reaffirm the need to consult with a view to sharing assessments and identifying common objectives, taking full account of the effect on NATO security and defence capabilities, as well as of the national interests of member countries. Recognising that the policies which nations adopt in this field are a matter for national decision, we agree to examine collectively in the appropriate NATO bodies the requirements which may arise for the defence of the NATO area as a result of deployments by individual member states outside that area. Steps which may be taken by individual Allies in the light of such consultations to facilitate possible military deployments beyond the NATO area can represent an important contribution to Western security"[37].

The formula is a first and cautious expression of a very difficult, contentious and still ongoing process in the Federal Republic of rethinking its military role outside the NATO area[38].

C. Burden-Sharing in the Gulf

After the start of the Iraq–Iran war on September 22, 1980, the West immediately realized the potential threat to the oil flow through the Strait of Hormuz. The future necessity of naval operations to keep the Strait open was contemplated, and the question of a European role in cooperation with the U.S. was discussed. Especially France and Britain were considered as capable of providing ships and special forces for safeguarding the freedom of navigation in the Gulf[39]. The course which the war then took did not necessitate any concrete steps until the "tanker war" intensified in 1986.

So the groundwork was already laid for the burden-sharing debate in the wake of the U.S. Navy commitment in the Persian Gulf. At this time, however, besides a common Western interest, two additional factors were involved.

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[36] See only Minutes of the North Atlantic Council Meeting, Brussels, 11 December 1987, in: NATO Information Service (ed.), Text of communiqués and declarations issued after meetings held at Ministerial level during 1987, p.26.

[37] Document on Integrated NATO Defense (Bonn, June 10, 1982), ILM 21 (1982), p.907.

[38] See Woopen (note 34), p.202.

[39] FAZ, 3 October 1980, p.2.

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First, the U.S. forces assumed a commitment in an actual war zone, that is, a situation where, despite all statements to the contrary[40], "imminent involvement in hostilities [was] clearly indicated by the circumstances"[41]. Thus, for reasons of domestic[42] as well as foreign policy, a burden-sharing in the form of an actual and substantial involvement of allied forces seemed to be required.

Second, the U.S. lacked adequate minesweeping capabilities in view of the Iranian "war of mines". The U.S. Navy has only three rather old minesweepers in service[43], and the use of helicopters for that purpose apparently proved to be insufficient or inopportune. One of the reflagged Kuwaiti tankers, the "Bridgetown", struck a mine during the first escort operation already[44].

Unwilling to be drawn into the Gulf war, and probably also annoyed at the unilateral American move without prior consultation, the allies at first were not ready to participate in the Gulf escort operations. Finally, after a conference of the Western European Union in The Hague in August, during which it had been emphasized that the vital interests of Europe required that the freedom of navigation in the Gulf be maintained at all times[45], five Western European countries sent warships to the area:

– Great Britain reflagged at least two Kuwaiti tankers[46] and provided navy protection consisting of two frigates, one destroyer and a supply vessel[47]. On August 11, 1987, the British government decided to dispatch four minesweepers and an auxiliary vessel to support the British warships already in the Gulf; it denied any agreement with the U.S. on common minesweeping operations[48];

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[40] Murphy (note 12), p.1425. Shultz (note 16), p.1426; Weinberger (note 1), pp.1457–1458.

[41] Secs.3 and 4 (a) (1) of the 1973 War Powers Resolution, 87 Stat.555, Public Law 93–148.

[42] The allegedly inadequate burden-sharing commitment from European allies and Japan was a major point of criticism in the Nunn Report (note 11), pp.1474–1475; see also the statement by U.S. Ambassador to West Germany Burt, AdG 57 (1987), p.31365.

[43] Lerch (note 1), p.136. According to other sources, there are four (AdG 57 [1987], p.31365).

[44] On July 24, 1987 (AdG 57 [1987], p.31364). On April 14, 1988, the U.S.S. Samuel B. Roberts was damaged by a mine (AdG 57 [1987], p.32121).

[45] AdG 57 (1987), p.31483.

[46] Armacost (note 3), p.1431.

[47] AdG 57 (1987), p.31365 note 5. The Royal Navy had been engaged in the Gulf since 1980 for the protection of British ships.

[48] EA 42 (1987), Z 163; according to Rousseau (note 1), p.142, Britain in all had ten ships in the region at the end of September 1987.

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– on the same day, France, too, announced that it would send two minesweepers for the protection of French ships in the area, also adding a disclaimer concerning any agreement with the U.S.[49] Several French warships, including the aircraft carrier «Clemenceau» and two guided-missile frigates, had set course for the Indian Ocean earlier[50];

– on September 7, 1987, the Dutch defense minister told the press that two minesweepers would be sent to the Persian Gulf[51];

– the Belgians also sent two minesweepers and one supply ship[52];

– the Italian parliament on September 12 approved a government decision to dispatch a naval formation including three frigates and three minesweepers which set sail three days later[53].

The number of foreign warships either stationed in the Gulf itself or in the Arabian Sea, or on their way to the area amounted to 76 at the end of August 1987[54]. It was somewhat reduced later. In July 1988, there were still 26 U.S. Navy units deployed in the region. With a cease-fire between the warring nations holding since August 20, 1988, the withdrawal of a substantial number of those ships is under way[55].

The national naval forces in the Persian Gulf area each operated on their own. There was no joint command, apparently not even any multilateral coordination of moves[56]. The United States had earlier hoped to establish a "Western protective regime"[57]. There was, however, some cooperation on a bilateral level between France and Italy[58]. Belgium and The Netherlands had even formed a combined unit with British minesweepers under British command[59].

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[49] EA 42 (1987), Z 163.

[50] Rousseau (note 1), p.142, reports the presence of 17 French navy vessels for the end of September 1987. The «Clemenceau» had orders to operate in the Indian Ocean and not to enter the Persian Gulf. But France sent other ships, including four frigates, directly into the Gulf (AdG 57 [1987], p.31364).

[51] EA 42 (1987), Z 179.

[52] EA 42 (1987), Z 175. During a visit to the NATO political branch in Brussels, the author was told that Luxembourg bore half the costs of the Belgian participation.

[53] AdG 57 (1987), pp.31483–31484.

[54] AdG 57 (1987), p.31367.

[55] FAZ, 22 July 1988, p.4; 26 July 1988, p.3; TIME, 1 August 1988, p.9.

[56] Rousseau (note 1), p.144. But see AdG 57 (1987), p.31484, reporting an unofficial division of labor between the minesweeping flotillas.

[57] Armacost (note 3), p.1431.

[58] Rousseau (note 1), p.144.

[59] FAZ, 22 July 1988, p.4.

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D. The Special Problems of the Federal Republic of Germany and Japan

The Federal Republic of Germany and Japan invoked constitutional reasons for not sending any ships to the area[60]. Japan decided to contribute to improving the safety of shipping in the Persian Gulf by providing a navigation system for oiltankers. It also agreed to considerably increase its financial assistance to the Arab Gulf states and to give financial support to the U.N. efforts toward peace in the region[61].

The government of the Federal Republic of Germany announced on October 8, 1987 that it would, as a sign of solidarity, deploy warships in the Mediterranean to replace U.S. Navy vessels engaged in the Persian Gulf shipping protection plan. German ships could only operate in the NATO area because the Basic Law did not allow otherwise[62]. Accordingly, from October 1987 till June 1988, between three and five German navy ships were present in the Mediterranean[63].

III. Political Aspects of a West German Contribution to the Western Escort Operations in the Gulf

A. The Foreign Relations Power under the Basic Law

The overseas use of armed forces is a foreign policy matter. According to Art.32 Basic Law[64], the conduct of foreign policy is primarily assigned to the Federation. On the federal level, Art.59 of the Basic Law regulates the distribution of powers concerning the conduct of foreign relations. Aside from the treaty-making power, the foreign relations power is vested in the

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[60] Weinberger (note 1), p.1456; according to Japanese Cabinet Secretary Gotoda, the Japanese Constitution prohibits operations outside this country's borders (AdG 57 [1987], p.31358); Japanese Prime Minister Nakasone had reportedly been prevented from dispatching patrol ships to the Gulf by domestic pressure (TIME, 4 July 1988, p.9).

[61] EA 42 (1987), Z 200; TIME, 4 July 1988, p.9.

[62] EA 42 (1987), Z 199; Rousseau (note 1), p.144, is mistaken in reporting that Germany sent three minesweepers to the Persian Gulf. On the question whether this "Mediterranean option" was constitutional see *infra* note 181.

[63] The German unit consisted of destroyers, frigates and supply vessels exchanged in regular intervals.

[64] Of May 23, 1949, BGBl. 1949, p.1. English translation published by the Press and Information Office of the Federal Government, on which I heavily relied. See also the translation in U. Karpen (ed.), The Constitution of the Federal Republic of Germany (1988), p.223.

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executive branch of government[65]. The Federal President, named in Art.59 (1) of the Basic Law, has a largely ceremonial role as, according to Art.58 of the Basic Law, nearly all his acts are only valid when countersigned by the Federal Chancellor or a Federal Minister. The executive power is thus almost exclusively exercised by the Federal Government[65a].

Art.87a (1) of the Basic Law which deals with the build-up of federal armed forces was inserted in the constitution's chapter on the federal administration, thus showing that those forces are organs of the federal executive. In the absence of any provision to the contrary, this seems to indicate that their use is a matter of executive power.

Art.62 of the Basic Law determines that the Federal Government (cabinet) consists of the Federal Chancellor and the Federal Ministers. The distribution of responsibility among them is governed by Art.65 of the Basic Law. It accords the Federal Chancellor the power to determine the general policy guidelines, but at the same time reserves to the Federal Ministers the autonomy to conduct the affairs of their departments within the limits set by these guidelines. Pursuant to sec.15 (1) of the Rules of Procedure of the Federal Government[66], which are based on Art.65 fourth sentence of the Basic Law, all foreign policy matters of general importance have to be submitted to the cabinet for deliberation and decision. The Federal Chancellor's general guideline power is limited thereby[67].

There is no doubt that the direct or indirect participation of West Germany in any shipping protection scheme raised the kinds of questions reserved to the cabinet[68]. The fact that under Art.65a of the Basic Law the

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[65] C. Tomuschat, Der Verfassungsstaat im Geflecht der internationalen Beziehungen, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, vol.36 (1978), pp.7, 26–37, and U. Fastenrath, Kompetenzverteilung im Bereich der auswärtigen Gewalt (1986), p.215, speak of a preponderance of the Executive with regard to the foreign relations power; see also BVerfGE 1, 372 (394); BVerfGE 2, 347 (379); 68, 1 (83 *et seq.*).

[65a] See W.G. Grewe, Auswärtige Gewalt, in: J. Isensee/P. Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol.III (1988), pp.943–944.

[66] Of May 11, 1951 (as amended); Gemeinsames Ministerialblatt [GMBl.] 1951, p.137, last revised GMBl. 1987, p.382.

[67] N. Achterberg, Innere Ordnung der Bundesregierung, in: J. Isensee/P. Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol.II (1987), pp.629, 655; but see also H. von Mangoldt/F. Klein, Das Bonner Grundgesetz, vol.II (2nd ed. 1964), Art.65 note V.4 (p.1269).

[68] See K. Ipsen, Bündnisfall und Verteidigungsfall, Die Öffentliche Verwaltung 1971, pp.583, 587; *idem*, Der Einsatz der Bundeswehr zur Verteidigung, im Spannungs- und Verteidigungsfall sowie im internen bewaffneten Konflikt, in: K.-D. Schwarz (ed.), Sicherheitspolitik (3rd ed. 1978), pp.615, 626; D. Blumenwitz, Der nach außen wir-

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Defense Minister is the commander in chief of the armed forces is of no relevance in this context. The supreme command does not include the power to decide about the use of the military.

B. Political Decision-Making Process in Bonn

The three political options discussed in the Federal Republic when U.S. demands for burden-sharing in the Gulf had been voiced were, first, to assume neither a direct nor an indirect military role but at the utmost make a financial contribution[69]; second, not to get directly involved in the shipping protection plan but, in accordance with the position expressed on the Bonn summit, to dispatch a naval force to the Mediterranean for replacing U.S. Navy vessels operating in the Persian Gulf[70]; third, to send at least one German warship to the Persian Gulf, as a symbolic gesture of solidarity with the allies[71].

The Federal Government finally adopted the second option. The general question, however, whether and how the Federal Republic of Germany's defense policy should be redefined has not yet been settled.

C. Political Considerations Supporting the Federal Government's Decision

The U.S. decision to get involved in the tanker and mine war in the Gulf was prompted by several considerations: to limit Soviet influence in a region of great strategic importance to the West because of its oil wealth; to bolster the security and stability of the moderate Gulf states; to guarantee the unimpeded flow of oil through the Gulf for the sake of economic stability of the Western industrialized nations; and, as a matter of principle, to ensure the freedom of navigation[72].

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kende Einsatz deutscher Streitkräfte nach Staats- und Völkerrecht, NZWehrr. 1988, pp.133, 145, proposes an analogy to Art.87a(4) of the Basic Law. On the necessity of parliamentary authorization see *infra* text accompanying notes 137 and 143.

69 This was, by and large, the position at first taken by the Foreign Ministry (AdG 57 [1987], p.31484) and of the opposition Social Democrats (AdG 57 [1987], p.31365).

70 See statement by the then Defense Minister Wörner on 3 August 1987, AdG 57 (1987), p.31365.

71 This was the position taken by some Christian Democrats (AdG 57 [1987], p.31365). For further details, see the debate in the Federal Diet on 16 Oct. 1987 (Verhandlungen des Deutschen Bundestages, 11. Wahlperiode, Stenographische Berichte, vol.142, Plenarprotokoll 11/34, pp.2297–2310).

72 Weinberger (note 1), p.1441; statement by President Reagan on 29 May 1987, EA 43 (1988), D 557.

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West Germany has a stake in all these aspects[73]. But there were some political considerations which made the Federal Government reluctant to come up to U.S. expectations.

First, in summer 1987, two West Germans were held hostage in Lebanon by pro-Iranian Shiite militiamen. Second, the West German armed forces had never been engaged in any hostile situation since their establishment in 1955. The navy has not been assigned a worldwide mission. In times of war, together with the allied navies, especially the Danish Navy, it would have to close the Danish Straits to Warsaw Pact fleets. It would also be used for coastline protection and for defending parts of the North Sea to guarantee the supply lines across the Atlantic[74]. Though it could accomplish small-scale missions in other parts of the world, especially concerning mine warfare, the government was unwilling to send German warships on an actual combat mission for the first time since World War II. Third, and most importantly, the Federal Republic of Germany, as the only major Western country with a rather good relationship to both Iran and Iraq, did not want to jeopardize its ties with Iran at a very delicate moment when for the first time in seven years there was some hope of bringing the whole Iraq–Iran war to an end.

The U.N. Security Council, on July 20, 1987, unanimously passed the resolution 598[75], acting on the basis of Arts.39 and 40 of the U.N. Charter. The Council demanded that Iran and Iraq observe an immediate cease-fire, and decided to meet again as necessary to consider further steps to ensure compliance with the resolution, the latter point referring to enforcement action like an arms embargo under Art.41 U.N. Charter. At this time, the Federal Republic of Germany was a member of the Security Council. In August, it held the chair. Foreign Minister Genscher had tried to obtain a resolution as evenhanded as possible that would be acceptable to both parties[76], and this meant Iran in particular, which had rejected all earlier cease-fire offers, vowing to continue the war to topple the Iraqi government and punish Iraq for its aggression[77].

The Foreign Minister personally enjoyed a high degree of credibility in

[73] See statement by government spokesman Ost (AdG 58 [1988], p.32122).

[74] Militärgeschichtliches Forschungsamt (ed.), Verteidigung im Bündnis (1975), pp.145–146.

[75] ILM 26 (1987), p.1479.

[76] AdG 57 (1987), p.31362.

[77] Iraq quickly accepted the resolution (ILM 26 [1987], pp.1485–1487). Iran took a negative position without outrightly rejecting it (ibid., pp.1481–1484); on July 18, 1988, Iran declared its readiness to accept Resolution 598 (FAZ, 19 July 1988, p.1; 21 July 1988, p.2).

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Teheran. His position was considered well-balanced by the Iranian government[78]. This Iranian impression was not the least due to the fact that he, on July 24, 1987, after a visit by Iranian Foreign Minister Velayati to Bonn, had in an interview accused Iraq of having started the war and used poison gas[79].

During the weeks in which the escort operations began and the other Western states committed themselves to participate in them, German diplomats and the Foreign Minister personally tried to induce Iran to accept Resolution 598 or at least to take a more positive attitude toward it. At the same time, the U.N. Secretary-General was also engaged in a mediation attempt. These highly sensitive efforts would have been frustrated, if the Federal Republic of Germany had pledged to send minesweepers to Iran's shores[80].

After all, paragraph 5 of the Security Council resolution called upon "all other States to exercise the utmost restraint and to refrain from any act which may lead to further escalation and widening of the conflict, and thus to facilitate the implementation of the present resolution". One of Iran's objections to Resolution 598 had been that

> "[t]he United States *[sic]* increased presence and military provocations in the Persian Gulf which have led to further escalation of tension in the region constitute clear violation of paragraph 5 of resolution 598 (1987). As such, the United States is the first violator of the resolution whose formulation and adoption has been an American undertaking"[81].

One political consideration, which had been discussed in other contexts in Bonn, apparently did not play any role at this time, namely the resentments that could be evoked abroad by the presence of German military units in foreign territories[82].

D. Reaction in the United States

The reaction in the United States to West Germany's reluctance to participate militarily in the Persian Gulf was mixed. The U.S. government publicly expressed understanding for the German constitutional problems

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[78] Lerch (note 1), p.156.

[79] EA 43 (1988), D 562.

[80] In a July 25 newspaper article, Genscher emphasized the importance of all states concerned exercising the utmost restraint in the weeks to come so as not to jeopardize the mediation efforts of the U.N. Secretary-General (AdG 57 [1987], p.31476).

[81] ILM 26 (1987), p.1482.

[82] See Coridaß (note 34), p.3.

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involved[83] but was apparently not fully convinced that the Basic Law provisions concerning the deployment of the armed forces could not be interpreted more broadly[84]. Besides the lingering burden-sharing dispute, the much more sensitive question of "German credibility" was brought up[85].

IV. The Constitutional Law Concerning the Use of the West German Armed Forces

A. The Federal Government's Legal Position

The official position of the West German government on the deployment of West German military forces overseas was formulated in 1980. At that time, military contingency planning with regard to safeguarding the continuous oil supply of the Western industrialized nations seemed to be required in view of the Soviet intervention in Afghanistan and the Iraq–Iran war.

During the federal election campaign in fall 1980, the then Federal Chancellor Schmidt and Defense Minister Apel repeatedly stated that the Basic Law prohibited any deployment of the Bundeswehr [German Armed Forces] outside the NATO area[86]. In December 1980, a legal opinion was written in the Foreign Office on the overseas use of the German Armed Forces. It has neither been published nor made individually accessible. Based on this opinion, the Federal Government declined a request by the Lebanese foreign minister in 1983 to participate in the multi-national peace-keeping forces in Lebanon operating outside the U.N. system[87].

Not only the Foreign Office but also the Ministries of Defense, Justice and the Interior have long shared the view that the Federal Republic of Germany's military power is tied by the Basic Law to the NATO area[88].

When the U.S. sought allied participation in a shipping protection scheme in the Persian Gulf in 1987, the West German government reiter-

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83 Weinberger (note 1), p.1456.

84 FAZ, 19 March 1988, p.12.

85 See M. Stürmer, Kreuzungspunkt der Weltpolitik, FAZ, 10 May 1988, p.9.

86 See G. Gillessen, Das Grundgesetz sagt nichts über den Indischen Ozean, FAZ, 3 October 1980, p.6; this opinion had earlier been formulated by B. Nölle, Die Verwendung des deutschen Soldaten im Ausland (1973), pp.61–62.

87 Coridaß (note 34), p.89.

88 Woopen (note 34), p.213.

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ated its earlier opinion[89]. The government's legal position did not remain unopposed; the legal argument was sometimes considered as a cloak for a political choice[90]. There are indications that the government's view is in the process of review[91]. A mere eight years of constitutional practice in favor of the NATO area restriction since 1980 do certainly not limit the government's freedom to reassess the constitutional situation[92].

B. The Provisions of the Unamended Version of the Basic Law

The Basic Law has never made any express mention of NATO. There have, however, always been a number of pertinent provisions regulating the use of the armed forces by the Federal Government which are related to the Federal Republic's NATO membership.

The Preamble already, which has not only political weight but legal force[93], commits the German people to serve the peace of the world as an equal partner in a united Europe. In Art.1 (2) of the Basic Law, the German people acknowledge inviolable and inalienable human rights as the basis of peace and justice in the world. Art.24 (2) of the Basic Law allows the Federation to enter a system of mutual collective security for the maintenance of peace. Art.25 of the Basic Law incorporates the general rules of public international law into the federal law and gives them precedence over statutes. Art.26 (1) of the Basic Law says: "Acts tending to and undertaken with the intent to disturb the peaceful relations between nations, especially to prepare for aggressive war, shall be unconstitutional. They shall be made a punishable offense".

All these provisions were already part of the Basic Law when it entered into force on May 24, 1949 as a provisional constitution to give a new order to political life in the three Western Occupation Zones of Germany for a transitional period. This text, adopted by the Parliamentary Council (constituent assembly) on May 8, 1949, exactly four years after the uncon-

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[89] EA 42 (1987), Z 199; see also BT-Drs.11/1184, p.28 (no.57) (13 November 1987).

[90] Lerch (note 1), p.137; J. Kalisch, Member of the Federal Diet, Letter to the Editors, FAZ, 13 June 1988, p.8; H. Stercken, Chairman of the Foreign Relations Committee of the Federal Diet (see BT-Drs.11/1717, question 2 [26 January 1988]); A. Herkenrath, Member of the Federal Diet, AdG 57 (1987), p.31365: "The Federal Navy may be deployed anywhere in the world. There is nothing in the Basic Law restricting the use of the Federal Republic's armed forces to the NATO area".

[91] See *infra* note 124 and accompanying text.

[92] See statement by Defense Minister Scholz, Süddeutsche Zeitung, 25 August 1988, p.8.

[93] BVerfGE 5, 85 (127–128); 36, 1 (17) (concerning the reunification clause).

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ditional surrender of the German armed forces[94], did not contain any reference to the establishment of a new German military. On the contrary, the complete disarmament and demilitarization of Germany had been one of the major purposes of the allied occupation of the country[95], that was to continue through May 5, 1955[96]. The Three Western Military Governors had reserved the right to veto those parts of the draft Basic Law not in line with the general principles laid down by them to guide the work of the Parliamentary Council[97]. By Law No.16 of 16 December 1949, they re-codified earlier allied legislation to eliminate militarism[98]. The tacit understanding at that time was that defending the newly formed Federal Republic of Germany would be the task of the allied occupation forces[99]. So the framers proceeded from the belief that there would be no armed forces in Germany, at least for the foreseeable future[100].

Even Art.24 (2) of the Basic Law was based on the conviction that the envisioned system of mutual collective security was all the more important for the Federal Republic of Germany, as it would not have armed forces of its own[101]. The experience of the Nazi war of aggression nevertheless called for the incorporation of an express statement in the Preamble that the Germans were willing to serve world peace[102].

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[94] Act of Military Surrender, reprinted in I. von Münch (ed.), Dokumente des geteilten Deutschland, vol.1 (2nd ed. 1976), p.17.

[95] Report on the Tripartite Conference of Berlin (Potsdam Agreement), 2 August 1945, sec.III.A.3.I, reprinted in von Münch (note 94), pp.32, 35–36.

[96] Proclamation concerning the revocation of the Occupation Statute of 5 May 1955 by the Three Western Allied High Commissioners for Germany, Official Gazette of the Allied High Commission for Germany No.126 (5 May 1955), p.3272.

[97] Document One of the so-called Frankfurt Documents of 1 July 1948, reprinted in von Münch (note 94), pp.130–131.

[98] Official Gazette of the Allied High Commission for Germany No.7 (19 December 1949), pp.72–74, repealed by Law No.A-38 of 5 May 1955, ibid., No.126 (5 May 1955), p.3271.

[99] F.A. Freiherr von der Heydte, Das Experiment »Bundeswehr«, in: K. Löw (ed.), 25 Jahre Grundgesetz (1974), pp.55–56.

[100] The question of any future build-up of West German defense forces was left open (C. von Bülow, Der Einsatz der Streitkräfte zur Verteidigung. Eine Untersuchung zu Art.87a II GG [1984], pp.19–23).

[101] H. von Mangoldt, Das Bonner Grundgesetz (1953), Art.24 note 4 (p.164).

[102] The Constitution of the Italian Republic of 1 January 1948 was somewhat less strict. While Art.11 contained a renunciation of war, Art.87 sentence 9 provided for the set-up of armed forces (see also Arts.52, 78 and 103 [3]) (A.J. Peaslee [ed.], Constitutions of Nations, vol.II [2nd ed. 1956], p.482 *et seq.*); the Constitution of Japan of 3 November 1946 was even stricter in its Art.9 stating that "land, sea, and air forces, as well as other war potential, will never be maintained". (Peaslee, ibid., p.512); see R. Neumann, Änderung und Wandlung der Japanischen Verfassung (1982), p.13 *et seq.*

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After the cold war had begun, the question of a German contribution to the defense of the West came up, especially after the formation of NATO and the Korean War in 1950–1953[103]. The reaccordance of sovereignty to the West German state by the Western Allied Powers was tied to such a German defense contribution.

Negotiations in 1951/52 produced two treaties. The Treaty on the Establishment of the European Defence Community between the Federal Republic of Germany, Belgium, France, Italy, Luxembourg and the Netherlands was signed on May 27, 1952[104]. It provided the establishment of European Defence Forces, formed by merging national contingents. Member states were not allowed to have any sizable national armed forces (Arts.9,10). So the defense of Western Europe was to be internationalized[105].

The other treaty was the Convention on Relations between the Three Powers and the Federal Republic of Germany, signed on May 26, 1952 (so-called General Treaty)[106] which was intended to pave the way to West German sovereignty (Arts.1,2). According to Art.11 (2) (b), the entry into force of the latter treaty was made conditional on the entry into force of the former. When on August 30, 1954, the French National Assembly rejected the European Defence Community, the General Treaty had to be revised. The amended version was signed on 23 October 1954 and entered into force on 5 May 1955[107]. It was again linked to a West German contribution to the defense of Western Europe. The Federal Republic of Germany became a member of the Western European Union (Brussels Treaty) and of NATO[108]. The West German rearmament[109] required various amendments to the Basic Law.

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[103] von der Heydte (note 99), p.56 *et seq.*; T. Stein, Die Verträge über den deutschen Verteidigungsbeitrag, in: Deutschlandvertrag, westliches Bündnis und Wiedervereinigung (1985), pp.77, 78–83.

[104] BGBl.II 1954, p.343.

[105] The Treaty on the European Coal and Steel Community of 18 April 1951 between the same states parties (BGBl.II 1952, p.447 *et seq.*) had already internationalized the coal and steel industries considered as crucial for any war effort.

[106] BGBl.II 1954, p.61 *et seq.*; see W.A. Kewenig, Bonn and Paris Agreements on Germany (1952 and 1954), in: EPIL Instalment 3 (1982), pp.56–66.

[107] BGBl.II 1955, p.305.

[108] BGBl.II 1955, p.256.

[109] In Protocol No.III on the Control of Armaments of 23 October 1954 (BGBl.II 1955, p.266), the Federal Republic committed itself not to manufacture in its territory certain types of weapons, e.g., atomic, biological and chemical weapons, and major warships. The latter restriction was lifted in 1980 (BGBl.II 1980, p.1180).

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C. Amendments to the Basic Law of 26 March 1954 and 19 March 1956

The Act amending the Basic Law of 26 March 1954 gave the Federation the exclusive power to legislate in defense matters (Art.73 no.1 of the Basic Law)[110]. The major change came two years later, when the newly established armed forces as an important power factor were integrated in the constitutional system by the so-called defense amendment[111]. Two provisions were inserted in the Basic Law which dealt with the assignment of the armed forces. At this time already, the Basic Law distinguished between the external use of the troops against outside aggression and their internal use in states of emergency[112]. Only the external use of the armed forces is of interest in the present context. The newly-inserted Art.87a of the Basic Law, however, only touched on this issue. It said:

> "The numerical strength of the armed forces built up by the Federation for defense purposes and their general organizational structure shall be shown by the budget".

The legal history of this original version of Art.87a of the Basic Law does not provide any clues as to what was meant by "defense purposes"[113]. It seems that the legislature was more concerned with the parliamentary control[114] of the new formidable power instrument in the hands of the Executive than with the regulation of the ways in which it could be used externally, a question that was not debated at that time[115]. Probably Art.87a of the Basic Law was not at all meant to be a kind of authorization regulating the use of the armed forces.

The whole background of the defense amendment indicates that "defense purposes" were tacitly understood to be those for which the Western European Union and NATO had been founded, namely to deter and, if

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110 BGBl.I 1954, p.45. The introductory clause of the Act stated its purpose as "clarification of doubts about the interpretation of the Basic Law", thus indicating that even without an express provision, the Federation would have exclusive legislative authority in this field "from the nature of the matter" (see von Mangoldt [note 101], Art.73 note 2 [p.392]).

111 Of 19 March 1956, BGBl.I 1956, p.111; see W. Roemer, Die neue Wehrverfassung, Juristenzeitung 1956, pp.194–198.

112 Ipsen, in: Schwarz (ed.) (note 68), p.616.

113 von Bülow (note 100), p.49.

114 See Roemer (note 111), p.196; E. Jess, Bonner Kommentar, Art.87a note II.1 (first version 1956). According to Art.110 (2) of the Basic Law, the federal budget is passed in the form of a federal statute.

115 See A. Hamann, Über die verfassungsrechtlichen Grenzen einer künftigen Wehrgesetzgebung der Bundesrepublik, Recht im Amt 1955, p.145.

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necessary, repel an armed attack in the sense of Art.51 U.N. Charter[116]. This interpretation is supported by the ban on wars of aggression in Art.26 and the other above-mentioned commitments to peace contained in the Basic Law. As the German defense contribution from its beginning was intended to promote the security of the free part of Europe within the NATO framework *vis-à-vis* the military threat emanating from the Soviet block, the framers of Art.87a of the Basic Law may well have understood defense to mean nothing but defending the NATO area[117]. But this possible concept has not been introduced in the text of the Basic Law and cannot be certified from any express statement in the amending process.

D. The State of Emergency Amendment of 24 June 1968

The state of emergency amendment to the Basic Law[118] was framed to make provisions primarily for any future internal state of emergency. In this respect, it replaced a reservation made by the Three Western Allied Powers when reaccording sovereignty to the Federal Republic of Germany. In Art.5 (2) of the General Treaty, they had temporarily retained their rights relating to the protection of the security of armed forces stationed in West Germany until such time when the appropriate German authorities would have obtained similar powers under German legislation enabling them to take effective action to protect the security of those forces, including the ability to deal with a serious disturbance of public security and order. This reservation became obsolete when the state of emergency amendment entered into force[119]. But the amendment also dealt with the uses that could be made of the armed forces. As far as our topic is concerned, the rephrased version of Art.87a of the Basic Law as well as the new Chapter Xa "State of Defense" (Art.115a–l of the Basic Law) are of interest.

Art.87a of the Basic Law now has four paragraphs. The last two of them relate to the internal use of the armed forces and will therefore be left out of consideration. While paragraph 1 repeats the former Art.87a of the Basic Law in somewhat better style without any substantive change, paragraph 2 brings a clarification:

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[116] See Art.V Brussels Treaty and Art.5 NATO-Treaty.
[117] Woopen (note 34), p.212; Stein (note 103), p.94.
[118] BGBl.I 1968, p.709.
[119] See BGBl.I 1968, pp.714–716.

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"(1) The Federation shall build up armed forces for defense purposes. Their numerical strength and general organizational structure shall be shown in the budget.

(2) Apart from defense, the armed forces may only be used to the extent explicitly permitted by this Basic Law".

Art.87a (2) of the Basic Law clearly has the character of an authorization limiting the political discretion of the Federal Government on how to make use of the military instrument. Its formulation shows that the central issue of the 1968 state of emergency amendment was not the external use of the armed forces (their defense mission), addressed only by way of an exception ("Apart from ...), but their potential function in an internal uprising or a natural catastrophe. It was the regulation of this internal state of emergency that made the amendment, passed at a troubled time, the most hotly debated in the Federal Republic's history[120].

The legislative history of Art.87a (2) of the Basic Law nevertheless provides some indication that the legislators believed "defense" to mean defense of the Federal Republic of Germany within the NATO context. The formulation in the draft version of the section had been "Apart from the defense of the country ...". It was changed for purely cosmetic reasons to "Apart from defense ..."[121]. But this indication is far from being conclusive because "defense of the country" may be identical with "individual self-defense", a term without strict territorial reference.

The new Chapter Xa on the "state of defense" also concentrates on the internal consequences, such as additional legislative competences of the Federation, extension of legislative terms and terms of office, and power of command over the armed forces. It also contains a definition of "state of defense" in Art.115a (1), first sentence:

"The determination that the federal territory is being attacked by armed force or that such an attack is directly imminent (state of defense) shall be made by the Federal Diet [Bundestag] with the consent of the Federal Council [Bundesrat]".

The reason why the various pertinent amendments to the Basic Law directly say so little about the external use of the West German armed forces is probably due to the fact that any more detailed regulation was deemed unnecessary. The only conceivable case in the first twenty years of this state's existence was the armed attack on its territory by Warsaw Pact forces stationed a few miles across the eastern border. West Germany's

[120] K. Stern, Das Staatsrecht der Bundesrepublik Deutschland, vol.II (1980), p.1322–1328.

[121] See Woopen (note 34), pp.211–212.

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engagement in military power projection was beyond anybody's imagination.

Since 1968, there have been no textual changes of the relevant provisions. None were recommended by the 1976 special report on constitutional reform[122].

E. Findings

The Basic Law says little on the question in what way the West German armed forces may be committed abroad. What we have is the pledge to serve peace in the Preamble, the positive attitude toward a system of mutual collective security for the maintenance of peace in Art.24 (2), the incorporation of the general rules of public international law into federal law in Art.25, the prohibition of wars of aggression in Art.26 (1), the power of setting up armed forces for defense purposes in Art.87a (1), a basic statement on their use in Art.87a (2), and, finally, the definition of the state of defense in Art.115a (1), first sentence. There is no norm expressly restricting the engagement of the troops to the area covered by the NATO Treaty[123]. If this was the legislative intent when Art.87a was inserted into the Basic Law or rephrased, it would not bind present day application of the provision because it has found no expression in the text[124]. Accordingly, in two recent statements, the Federal Government declared: "The Federal Republic of Germany ... may, in conformity with the constitution, exercise its right of individual self-defense wherever it is the target of a military attack"[125]. This is reasonable, as effective self-defense does not permit a strict territorial limit to military operations.

The NATO Treaty itself does not prohibit defensive action outside the NATO area against an attack within this area[126]. And finally, the Basic Law's decision in favor of military defense[127] would not support an interpretation tending to render such defense ineffective.

But the official government position is not quite clear because there are

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[122] Schlußbericht der Enquete-Kommission Verfassungsreform, BT-Drs.7/5924 (9 December 1976).

[123] F. Kirchhof, Bundeswehr, in: J. Isensee/P. Kirchhof (eds.) (note 65a), p.991.

[124] See BVerfGE 11, 126 (130); but see Woopen (note 34), p.213.

[125] Statement by Parliamentary Under Secretary of Defense Würzbach on 9 November 1987 (BT-Drs.11/1184 [13 November 1987], p.28), and on 22 January 1988 (ibid., 11/1717 [26 January 1988]); see F. Kirchhof (note 123), pp.992–993.

[126] Blumenwitz (note 68), p.139.

[127] BVerfGE 48, 127 (159); 69, 1 (21).

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divergent new statements like: "The Federal Government have repeatedly made clear that any deployment of Bundeswehr units outside the area of the NATO-Treaty is out of the question. The Federal Government adhere to this opinion"[128]. These statements do not make certain whether they are legally or just politically motivated. They may also be strictly limited to troop deployments in other than self-defense situations, as they were made with regard to circumstances not warranting defensive action, and thus be in line with the two statements quoted earlier.

Of all the Basic Law provisions quoted, only Art.87a (2) contains a positive answer to the question in which situations the Federal Republic of Germany may use its armed forces abroad[129]. All the others only provide assistance in the interpretation of this basic authorizing norm. According to Art.87a (2) of the Basic Law, the military may be used for defense, and otherwise only to the extent expressly permitted by the Basic Law. This second alternative refers to the internal uses of the forces, e.g. under Art.35 (3) of the Basic Law (major natural disaster), or Art.87a (4) of the Basic Law (civil war situation). There is no explicit permission in the Basic Law to send troops abroad for other than defense purposes[130].

V. "Use" of the Armed Forces

The West German Navy has for many years regularly undertaken training voyages to many parts of the world[131]. Apart from this, the armed forces of the Federal Republic of Germany have fulfilled many kinds of missions outside the NATO area in their 30-year-history[132]. They have participated in many relief operations in areas of natural catastrophes (e.g.

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[128] Statement by Würzbach in December 1987 (BT-Drs.11/1586 [30 December 1987], p.25) and on 2 September 1988 (BT-Drs.11/2882 [7 September 1988], p.3); see Scholz (note 92).

[129] E. Klein, Rechtsprobleme einer deutschen Beteiligung an der Aufstellung von Streitkräften der Vereinten Nationen, ZaöRV 34 (1974), pp.429 (432).

[130] Art.24 (2) of the Basic Law may contain an implicit authorization but it does not apply to our case (see *infra* notes 152–153 and accompanying text); the question whether Art.87a (2) of the Basic Law is superseded by Art.24 (1) of the Basic Law will be discussed *infra* VII.

[131] E.g., from April to August 1980, the destroyers »Lütjens« and »Bayern«, the supply ship »Coburg« and the tanker »Spessart« sailed through the Suez Canal to Karachi (Pakistan), Bombay (India), Colombo (Sri Lanka), Diego Garcia (U.K.) and Mombasa (Kenia) (Bull. no.47, p.402 [30 April 1980]).

[132] See Nölle (note 86), pp.58–119; Coridaß (note 34), pp.74–75, 93–100, 107–109; W. Speth, Rechtsfragen des Einsatzes der Bundeswehr unter besonderer Berücksichtigung sekundärer Verwendungen (1985), p.161.

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Morocco 1960, Iran 1962). They have provided training and advice for numerous, mainly African, states of the Third World (Sudan, Guinea, Nigeria, Tanzania). Though West Germany has never assigned contingents to United Nations peace-keeping forces, it has indirectly participated by providing military air transport to other national contingents and supplying technical equipment and instruction in its use (UNEF 1973 [United Nations Emergency Force]; UNIFIL 1978 [United Nations Interim Force in Lebanon]).

All those assignments had one thing in common: they did not include any outright combat mission[133]. The dispatch of naval forces to the Persian Gulf would have brought them into an actual war situation so that the previous missions accomplished by West German troops overseas are not valid precedents.

While it may be questioned whether any of those missions constituted a "use" in the sense of Art.87a (2) of the Basic Law, as the forces did not and were not supposed to use military force[134], a naval operation for the protection of shipping in the Gulf certainly would have.

The different interpretations of the term "use" proposed in the German legal literature mostly refer to the internal use of the armed forces, the great point of controversy. As to the external use, if it is at all discussed, the application of armed force or the support of forcible actions by others, or a "military" as distinguished from a "non-military" use, is required by most scholars to make Art.87a (2) of the Basic Law operational[135].

The term "use" in Art.87a (2) of the Basic Law, as far as it refers to military activities abroad, should be interpreted in view of Art.2 (4) U.N. Charter as any action amounting to a threat or use of force within the range

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[133] The 1977 storming of a Lufthansa jet hijacked by terrorists in Mogadishu, Somalia, with the consent of the Somali government, was carried out by a special unit of the Federal Border Police, which is organizationally separate from the armed forces, so that Art.87a of the Basic Law does not apply (see Stern [note 120], p.862).

[134] Klein (note 129), pp.435–437; sometimes training and maneuvers are considered as "uses" in preparation of future defensive action authorized by Art.87a(2) of the Basic Law (see T. Maunz/G. *Dürig*, Grundgesetz Kommentar, Art.87a note 33); Ipsen, in: Schwarz (ed.) (note 68), p.624 also considers the air transport of U.N. peace-keeping forces as a "use"; see also Coridaß (note 34), pp.101–103 and J.M. Mössner, Bundeswehr in blauen Helmen, in: I. von Münch (ed.), Staatsrecht – Völkerrecht – Europarecht. Festschrift für Hans-Jürgen Schlochauer (1981), pp.97, 107–110.

[135] von Bülow (note 100), p.61; Klein, ibid., p.435–437; Nölle (note 86), pp.52–53; Coridaß, ibid., pp.80–86; Mössner, ibid., adds the criterion that there be an international conflict or tensions; for a broader interpretation see Blumenwitz (note 68), p.141.

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of this universally accepted prohibitory norm. Otherwise the qualification "defense purpose" would not be appropriate. Any activity not having the quality of a threat or use of force can from its very nature not be considered as "defensive" under any circumstances. It is inconceivable that, for instance, the rescue of earthquake victims or the transport of U.N. peacekeeping forces is a "defensive" action. The two notions of "use" and "use for defense" should be construed as concentric circles, the latter completely contained in the former whose diameter is larger, but with the potential of completely covering this wider area depending on the factual situation.

As will be shown later, the content of the term "defense" is determined by international law. Consequently, the term "use" should correspond to the international law concept of "defense". Only actions which from their quality can be deemed as defensive in the sense of international law, if the actual situation warrants this judgment, can at all constitute "uses". As the relationship between Art.2 (4) and Art.51 U.N. Charter shows, defense means the threat or use of armed forces which, though generally outlawed, is considered legal because of the exceptional circumstances prevailing in a particular situation. Accordingly, a "use" of armed forces "in defense" presupposes that they apply or threaten to apply military force.

This approach completely separates the external "use" of the military from its internal "use"[136] but follows the doctrine that the specific context determines the meaning of a legal term. Concerning the external use, this context is provided by its only permissible purpose, defense.

All deployments of troops abroad not coming within the range of Art.87a (2) of the Basic Law are certainly admissible in any case. They are covered by the general foreign relations power pursuant to Art.32 (1) of the Basic Law whose exercise, absent of any specific limitation in the Basic Law, lies within the Federal Government's discretion.

Thus a deployment of navy units in the Gulf, necessarily involving at least the threat of force, would have meant the first actual external "use" of the West German armed forces abroad. According to Art.87a (2) of the Basic Law it would have been prohibited unless undertaken for defense.

[136] But see Tomuschat, Bonner Kommentar, Art.24 note 185 (second version 1981–1985).

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VI. *The Defense Purpose*

A. Defense and State of Defense

The range of the Federal Government's power to commit troops abroad depends on the meaning of defense in Art.87a (2) of the Basic Law. One might be tempted to deduce this meaning from the definition of the "state of defense" given in Art.115a (1), first sentence of the Basic Law[137]. Proceeding on this basis, a use of the West German armed forces in defense would mean their use to repel an ongoing armed attack on the federal territory or their use to avert a directly imminent attack of this quality. At the same time, any external use of troops would require a prior parliamentary determination of the state of defense. But this solution is open to question in three respects:

First, in its second alternative, it would take the risk of overstepping the line public international law draws on the use of armed forces[138]. Art.51 U.N. Charter acknowledges every state's inherent right of self-defense as an exception to the now universally recognized prohibition of the threat or use of armed forces against the territorial integrity or political independence of any state (Art.2 [4] U.N.Charter). This right of self-defense, however, is conditional on a prior armed attack ("if an armed attack occurs"). The question, if and in what circumstances international law allows a preventive strike against a future armed attack (anticipatory self-defense), is a matter of controversy[139]. Any interpretation which might bring the Basic Law into conflict with international legal principles should be avoided in view of the obvious efforts of the framers, as shown by the Preamble, Arts.25 and 26 (1) of the Basic Law, to keep the German legal order in harmony with international law.

Second, the solution would misinterpret the function of Art.115a of the Basic Law. The determination of the state of defense under this provision is solely the lever for the quite far-reaching internal rearrangements of constitutional powers and procedures according to Art.115b-l of the Basic

[137] See Dürig (note 134), Art.87a note 39 (note 1); B. Rieder, Die Entscheidung über Krieg und Frieden nach deutschem Verfassungsrecht (1984), pp.334, 337–359; Coridaß (note 34), pp.42–44; for further references see Blumenwitz (note 68), p.135 note 4.

[138] Ipsen, Bündnisfall (note 68), p.586; *idem* (note 68), in: Schwarz (ed.), pp.617–618; see also Coridaß, ibid., pp.38–39.

[139] J.L. Brierly, The Law of Nations (6th ed. 1963), pp.416–421; S.M. Schwebel, Aggression, Intervention and Self-Defence in Modern International Law, RdC 136 (1972 II), pp.411, 478–483; B.-O. Bryde, Self-Defence, in: EPIL Instalment 4 (1982), pp.212, 214.

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Law. It has nothing to do with the external use of the armed forces[140]. There is no absolute rule that one term must have the same meaning in different provisions of the Basic Law. The meaning rather always depends on the function it has in the specific context[141]. Moreover, Art.87a (2) of the Basic Law ("defense") and Art.115a (1) first sentence of the Basic Law ("state of defense") arguably do not even use the same term[142].

Third, even though the decision about the external use of the armed forces may be a very important one, there is no rule of West German constitutional law saying that all important decisions are reserved for parliament[143]. Not even the War Powers Resolution attempts to restrict the U.S. President's power as commander in chief to introduce armed forces into hostilities in "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces"[144].

B. Self-Defense in Public International Law

The correct interpretation of the term "defense", as used in Art.87a (1) and (2) of the Basic Law, requires a thorough consideration of the other constitutional provisions enumerated *supra* IV.E in their entirety and their interdependence. The prohibition of wars of aggression and their preparation in Art.26 (1) of the Basic Law and the incorporation of the general rules of public international law by Art.25 of the Basic Law show that Art.87a (2) of the Basic Law has to be interpreted in conformity with the limits modern public international law imposes on the use of force. This is all the more true as any external use of armed forces necessarily enters the domain of international law, and the Basic Law should as far as possible be interpreted in conformity with it[145]. The ban on the use of armed forces in Art.2 (4) U.N. Charter with its exception in the inherent right of self-defense (Art.51 U.N. Charter) are among the general rules of public inter-

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[140] Ipsen, Bündnisfall (note 68), p.585–586; *idem* (note 68), in: Schwarz (ed.), pp.618–619; E. Klein, Letter to the Editors, FAZ, 6 November 1980, p.11; but see Coridaß (note 34), pp.18–44.

[141] BVerfGE 6, 32 (38); K. Larenz, Methodenlehre der Rechtswissenschaft (5th ed. 1983), p.307.

[142] Ipsen (note 68), in: Schwarz (ed.), p.617. Still, Defense Minister Scholz has recently used Art.115a (1) sentence 1 of the Basic Law to restrict the scope of Art.87a (2) of the Basic Law (note 92).

[143] BVerfGE 49, 89 (124–126); 68, 1 (86–87).

[144] Sec.2 (c) (3) (*supra* note 41).

[145] Ipsen (note 68), in: Schwarz (ed.), p.616.

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national law mentioned in Art.25 of the Basic Law[146]. They provide the framework within which Art.87a of the Basic Law must operate[147].

The right of self-defense has an individual and a collective aspect. Collective self-defense covers the use of force by a state to repel an armed attack on another state[148]. So, under international law the Federal Republic of Germany, on request, could send troops to any state in the world that was the victim of an armed attack by a third state, even if it had no prior defense alliance with the state attacked[149]. It may be, however, that the Basic Law restricts West Germany in the exercise of its international right of collective self-defense to prior existing systems of mutual collective security in the sense of Art.24 (2) of the Basic Law[150]. The Federal Republic is at present only party to three international systems that could be brought under Art.24 (2) of the Basic Law. One is the United Nations[151], which has not played any military role in the Persian Gulf. The other two are NATO and the Western European Union[152], which both – because of their strictly defined area of operation – were not involved either. As no collective security arrangement covered the Gulf navy operations, a West German participation could certainly not be based on Art.24 (2) of the Basic Law.

Whether Art.24 (2) of the Basic Law would really bar West Germany from entering a purely bilateral defense alliance is uncertain[153]. In any event it has not done so yet. At least there is an apparent consensus that without any prior treaty basis, the Federal Republic of Germany may not get militarily involved in the defense of some distant state on an *ad hoc* basis[153a]. This would seem to contradict its *raison d'état*. Besides this, in the

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146 Ibid., pp.616–617; Blumenwitz (note 68), p.133.

147 BVerfGE 48, 127 (160) (*obiter dictum*); Würzbach (note 128).

148 Whether collective self-defense includes the use of force by a state not itself attacked in support of another state victim of an aggression is controversial; see O. Schachter, The Right of States to Use Armed Force, in: The Art of Governance. Festschrift zu Ehren von Eric Stein (1987), pp.482, 500–501; the International Court of Justice has recently taken this wider approach – Case Concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Report 1986, pp.119–120.

149 A. Verdross/B. Simma, Universelles Völkerrecht (3rd ed. 1984), p.291.

150 Coridaß (note 34), pp.105–106; Ipsen (note 68), in: Schwarz (ed.), p.623 acknowledges only a political restriction of this kind.

151 Tomuschat (note 136), Art.24 note 173.

152 Whether defense alliances like NATO and the WEU are covered by Art.24 (2) of the Basic Law is controversial (see Tomuschat, ibid., Art.24 notes 126–137, 181–182; left open in BVerfGE 68, 1 [95–96]).

153 See Tomuschat (note 136), Art.24 note 124.

153a See Kirchhof (note 123), p.993.

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Persian Gulf context there was no request by any state made specifically to West Germany to help defend it against an armed attack by a third power.

As a result, it should be noted that Art.87a (2) of the Basic Law would have authorized a West German participation in the Persian Gulf naval operations only within the limits of the international right of individual self-defense.

VII. Transfer of Sovereign Powers according to Art.24 (1) of the Basic Law?

There might, however, be one other possibility. It is true that only Art.87a (2) of the Basic Law authorizes the overseas use of the military. But the Basic Law permits a departure from its rules even without a prior amendment in the exceptional case of Art.24 (1). Pursuant to this norm, the Federation may by ordinary legislation transfer sovereign powers to inter-governmental institutions. Art.24 (1) of the Basic Law allows the accession to international organizations having the power to issue legal acts which take direct effect in the member states without being subject to the Basic Law[154]. If, therefore, the Federal Republic of Germany were a member of an organization having the authority to decide about the use of the national armed forces of its member states, the restrictions imposed on the Federal Government by Art.87a (2) of the Basic Law would be inapplicable to such a decision, as it would not be an act of German sovereignty.

The North Atlantic Treaty Organization is an inter-governmental institution within the meaning of Art.24 (1) of the Basic Law; this statement is almost undisputed[155]. What has mostly been rejected is the second aspect of Art.24 (1) of the Basic Law, namely the transfer of sovereign powers to NATO[156]. In a recent decision concerning the deployment of intermediate-range nuclear missiles in Germany, the Federal Constitutional Court held otherwise. Because of the final decision-making power of the U.S. President on their use and the transition of the operational command to the Supreme Allied Commander Europe in crisis situations, the Court considered the specific West German consent to their deployment as a transfer of sovereign powers coming under Art.24 (1) of the Basic Law[157]. It is

[154] BVerfGE 58, 1 (28).

[155] BVerfGE 68, 1 (93).

[156] Tomuschat (note 136), Art.24 note 113.

[157] BVerfGE 68, 1 (91–96); 77, 170 (232); see Tomuschat, ibid., Art.24 notes 113a, 161.

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doubtful whether the general assignment of West German armed forces to NATO must be treated alike because the Federal Republic retains the final say concerning their use.

In any event, with regard to the Persian Gulf, Art.24 (1) of the Basic Law could no more than Art.24 (2) of the Basic Law enable the use of the West German Navy for the protection of neutral shipping beyond the authorization given by Art.87a (2) of the Basic Law. This is obvious from the simple fact that the navy assignment in the Gulf, as an out-of-area operation, was not and could not have been initiated by any NATO authority.

The right of the Federal Republic of Germany to transfer sovereign powers by law to an inter-governmental organization pursuant to Art.24 (1) of the Basic Law is not unlimited either. Like any other provision of the Basic Law, Art.24 (1) has to be viewed in the context of the whole of the Constitution. It does not pave the way for encroaching on the fundamental principles of the Basic Law[158]. As especially the Preamble, Arts.24 (2) and 26 show, world peace is the pervading tenet of the Basic Law, complemented only by the decision in favor of an effective military defense. The transfer of powers under Art.24 (1) of the Basic Law is therefore conditional on the firm guarantee that their exercise will by all means remain within the limits of self-defense so as to promote world peace to the utmost possible degree. Thus the powers of any international institution coming under Art.24 (1) of the Basic Law could not go further than those of the Federal Government according to Art.87a (2) of the Basic Law. If they did, the legislative transfer act would be void.

VIII. Art.87a (2) of the Basic Law and the Persian Gulf Operations

According to our previous findings, the dispatch of West German warships to the Persian Gulf to escort merchant ships and, if necessary, protect them against Iranian attacks would have been prohibited by the Basic Law, unless this indisputable "use" was supported by the international legal right of individual self-defense.This would have presupposed a prior armed attack by Iran on West Germany.

[158] BVerfGE 68, 1 (40); 73, 339 (375–376).

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A. The Meaning of "Armed Attack" in Art.51 U.N. Charter

For defining the term "armed attack", one may draw upon the U.N. General Assembly's Definition of Aggression[159], which was meant to provide guidance to the Security Council in applying Art.39 U.N. Charter. Though the term "aggression" as used in this article may be wider than "armed attack"[160], giving the Security Council the chance to defuse a situation before the critical mass armed attack/self-defense has built up, the Definition gives a useful guideline, as in the absence of aggression, there can certainly not be any armed attack either[160a].

The only acts by Iran which do at all require some closer inspection as to their aggressive character are actual attacks on German merchant vessels in the Gulf area and the threat of a potential closing of the Strait of Hormuz to stop all oil shipments.

B. Attack on German Merchant Vessels

Aside from stops and searches of German ships by the Iranian Navy[161], at least one outright attack was reported. On June 12, 1988, two Iranian gunboats opened fire on the German freighter "Dhaulagiri" in international waters near the Strait of Hormuz when it was on its way to the Saudi Arabian port of Dhamman[162]. One Filipino crew member was killed and two of his countrymen were injured. It is not clear whether the freighter flew the German flag and thus had German nationality or, as its name might indicate, was only German-owned. It is furthermore uncertain whether the Iranian act was illegal, as a belligerent warship may use force to break the resistance of a neutral merchant vessel against a lawful order to stop[163]. Assuming that the ship was German and that the Iranian move

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[159] Resolution 3314 (XXIX) of 14 December 1974, AJIL 69 (1975), p.480.

[160] See Bryde (note 139), p.213; but see also B. Broms, The Definition of Aggression, RdC 154 (1977 I), pp.299, 370; Ipsen (note 68), in: Schwarz (ed.), p.620, considers the term "act of aggression" as the narrower one; according to K. Kersting, Bündnisfall und Verteidigungsfall (1979), pp.59–81, all acts listed in Art.3 of the Definition qualify as "armed attacks".

[160a] See the fifth preambular paragraph of the Definition.

[161] See Lagoni (note 1), p.1850 note 75 and p.1861 note 126; visits and searches of neutral ships and their diverting and ordering into port by the naval forces of a belligerent power are legal under international law (*idem*, p.1860–1861; O. Rojahn, Ships, Visit and Search, in: EPIL Instalment 4 [1982], pp.224–226; J. Wolf, Ships, Diverting and Ordering into Port, in: EPIL Instalment 4 [1982], pp.223–224).

[162] FAZ, 13 June 1988, p.2.

[163] Lagoni (note 1), pp.1862–1863.

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violated international law, one incident – or even a limited number of incidents of this category – cannot be qualified as an "armed attack" triggering the right of self-defense under Art.51 U.N. Charter[164]. Art.3 (d) of the Definition of Aggression requires an "attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State"[165]. The term "fleets" was deliberately used to avoid the impression that forcible measures against one or a few non-military ships already constituted an act of aggression[166].

A merchant ship is not *territoire flottant* of the flag state[167] so that an attack on it is not necessarily tantamount to an attack on that state. It represents its flag state neither actively nor passively. One can, however, hardly deny the right of a neutral merchant vessel to defend itself against an attack by a belligerent warship in violation of international law. It is also inconceivable that a neutral warship, flying the same flag as the merchant vessel and being present on the scene, could not legally intervene by armed forces, if necessary, in such a case[168]. Whether one considers this as an act of self-defense or a permissible limited use of force short of self-defense does not really matter.

The question in our context rather is if, as a defensive measure, the West German Navy could have been sent to the scene to prevent future attacks on West German merchant ships. A show of force like this, involving the danger of an escalation, would only have been justified in a situation comparable to the one described in Art.3 (d) of the U.N. Definition of Aggression. It has another quality than the immediate repulse of an attack on a merchant vessel taking place in the presence of a warship.

C. Closing of the Strait of Hormuz

The closing of the Strait of Hormuz by armed forces, entirely cutting off West Germany's oil supply from the region, may throw a different light on the situation.

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164 But see Woopen (note 34), p.208 note 30: The West German Navy could use armed forces to free a single German tanker seized in the Indian Ocean.

165 Emphasis added; mistakenly not reprinted in the AJIL (note 159); see B.B. Ferencz, Aggression, in: EPIL Instalment 3 (1982), p.3.

166 Broms (note 160), pp.351, 365; Lagoni (note 1), pp.1841–1842.

167 D.P. O'Connell, The International Law of the Sea, vol.II (1984), pp.735–736.

168 K. Skubiszewski, Use of Force by States. Collective Security. Law of War and Neutrality, in: M.Sørensen (ed.), Manual of Public International Law (1968), pp.739, 773; but see Lagoni (note 1), pp.1863–1864.

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1. Interruption of Supply Lines v. Embargo

It should be noted that such an action cannot be compared to an oil embargo which normally will not even appear to be a violation of international law, let alone an armed attack[169]. The question was not if Iran would have had the right to stop shipping its own crude oil to the Federal Republic for promoting its interests in the ongoing armed conflict with Iraq. Iran would rather have used its armed forces to interrupt trade between neutral states[170], effectively blocking the flow of oil essential to the West German economy.

2. Analogy to a Blockade

Pursuant to Art.3 (c) of the U.N. General Assembly's Definition of Aggression, the blockade of the ports or coasts of a state by the armed forces of another state qualifies as an act of aggression. Iran's closing of the Strait of Hormuz would not have imposed a blockade in that sense on the Federal Republic of Germany because it would not have interrupted all seaborne transportation links to and from West German ports[171]. But as Art.4 of the Definition of Aggression makes clear that the enumeration of aggressive acts in Art.3 is not exhaustive, there seems – at first sight – to be good reason to consider such an Iranian move as a use of armed forces against the political independence of the Federal Republic of Germany in the sense of the general clause in Art.1 of the Definition, being a forcible attempt to accomplish the same ends as by means of a blockade[172]. Considering the effect, it can hardly make a difference whether Iranian forces intercept oil tankers bound for Germany close to their ports of destination or of departure.

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[169] J.J. Paust/A.P. Blaustein, The Arab Oil Weapon – A Threat to International Peace, AJIL 68 (1974), p.410; I.F.I. Shihata, Destination Embargo of Arab Oil: Its Legality Under International Law, AJIL 68 (1974), p.591, and more generally H.G. Kausch, Embargo, in: EPIL Instalment 8 (1985), pp.169, 172, and *idem*, Boycott, in: EPIL Instalment 3, (1982), pp.75–77.

[170] The neutrality of the oil-exporting states Kuwait and Saudi Arabia, which gave at least substantial financial assistance to Iraq, is highly doubtful. It was denied by Iran (speech by Iranian Parliament Speaker Rafsanjani on 3 May 1988, EA 43 [1988], Z 98), but will here be presumed *arguendo*; on the duties of neutral states see R.L. Bindschedler, Neutrality, Concept and General Rules, in: EPIL Instalment 4 (1982), p.9, 13.

[171] See L. Weber, Blockade, in: EPIL Instalment 3 (1982), p.47.

[172] Gillessen (note 86); Klein (note 140).

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3. Threat of Force and Anticipatory Self-Defense

Iran did, however, not actually block the tanker traffic through the Strait of Hormuz, nor did it attempt to do so. Iran only deployed Silkworm missile batteries nearby and threatened to use them to close the Strait in the future[173]. Thus any West German use of force in self-defense to keep the Strait open would have been anticipatory. But even those who consider anticipatory self-defense as legal under international law[174] would only allow it under the narrow circumstances outlined in the U.S.-British exchange of letters following the 1837 *Caroline* incident[175]. There the criterion was agreed upon as being "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation"[176]. At no time was there any such necessity for the Federal Republic in the Persian Gulf.

However, the West German act of anticipatory self-defense contemplated here would not necessarily have amounted to a use of force against Iran. The question was not whether, e.g., to take out the Iranian missile batteries by a first-strike naval bombardment, but whether to dispatch navy units for a naval demonstration with the purpose of deterring Iran from using those missiles. Such a measure of power-projection would have qualified as a threat of force against a similar threat of force by Iran.

While Art.2 (4) U.N. Charter also outlaws the mere threat of force besides its actual use, Art.51 U.N. Charter, as an exception to the latter prohibition, does not refer to the former. It must, however, *a fortiori* serve to justify the threat of force as a proportional response to a prior such threat. Such a threat would in this case be consistent with the purposes of the United Nations (Art.1 [1] U.N. Charter) as an appropriate means of preventing the actual outbreak of hostilities and maintaining international peace and security. One might, however, argue that Art.2 (3) U.N. Charter favors a more peaceful response even in the face of a (mere) threat of force, as a counter-threat always involves the danger of escalation[177]. The Basic Law, obliging the Federal Republic to work for international peace

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[173] See *supra* notes 15–16 and accompanying text.

[174] They refer to the "inherent" classical right of self-defense only mentioned in, though not limited by, Art.51 U.N. Charter (see Brierly [note 139], pp.417–421).

[175] See L. Henkin, How Nations Behave (2nd ed. 1979), p.141, and Schachter (note 148), pp.496–497.

[176] See D.J. Harris, Cases and Materials on International Law (2nd ed. 1979), p.677.

[177] The International Court of Justice rejected a "policy of force" in the *Corfu Channel* Case (Merits), ICJ Reports 1949, pp.4, 35.

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and understanding, may also call for restraint. But deterrence, too, has its merits for the maintenance of international peace and stability. The preliminary conclusion would therefore be as follows: The use of the West German Navy in the Persian Gulf to threaten Iran with forcible countermeasures in the event of an attempt to cut off the Federal Republic's oil supply would have been a legitimate act of individual self-defense under international law. It would thus also have been permissible according to Art.87a (2) of the Basic Law[178].

4. Factual Background: Situation Not Sufficiently Grave to Warrant Threat of Force

Giving second thoughts to this result, the conclusion must be revised, though only for reasons of fact, not law. By closing the Strait of Hormuz, Iran would not have completely interrupted West Germany's oil supply, as it gets only about 10 per cent of its crude from the area. This potential loss could relatively easily have been neutralized on the world market, especially in view of the current oil glut. So there was no chance of destroying West Germany's economy. It would certainly have had to endure the economic disturbances flowing from the ensuing price increases on the world oil market. Even assuming that those economic disruptions would have been serious, the necessary level to trigger the right of self-defense would not have been reached. Only acts which themselves or whose consequences are exceptionally grave can be qualified as acts of aggression[179]. In the universal interest of maintaining world peace, the cases in which the threat and use of force are legal must be kept to a minimum.

D. Pretense of Naval Exercises?

Art.87a (2) of the Basic Law does not bar the West German Navy from conducting naval exercises at any place in the world for training future defensive action and maintaining its state of readiness. It has been proposed to send warships to escort merchant vessels through crisis areas for "training purposes"[180]. It seems that Art.87a (2) of the Basic Law may not be evaded by using training missions as a cloak for what are actually combat missions.

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[178] But see Coridaß (note 34), pp.118–121.

[179] See Art.2 *in fine* of the Definition of Aggression (*de minimis*-clause); see also Broms (note 160), p.346.

[180] Coridaß (note 34), pp.120–121.

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E. Dispatch of German Minesweepers

According to the foregoing, the dispatch of minesweepers could not have been justified by West Germany as an act of individual self-defense, for the minelaying on the High Seas was not an armed attack on it by Iran[180a]. It would therefore have been permissible only, if it had remained outside the scope of Art.87a (2) of the Basic Law because it had not been a "use" in the sense of this provision. The premise thus stated refers us to the interpretation of the term "use of force" in international law, as the contents of Art.87a (2) of the Basic Law is determined by international law as far as the external use of the armed forces is concerned.

The sending of a minesweeping flotilla to a war zone to remove a large number of mines layed by a belligerent amounts to a use of force within the meaning of Art.2 (4) U.N. Charter against this belligerent. The minesweeping interferes with the latter's war effort, no matter if the minelaying itself violated international law. It cannot be qualified as a mere international police action, which may be possible in the case of mines of unknown origin suddenly appearing somewhere in peace time. There is reason to consider such a minesweeping operation as justified under international law[180b], even though not covered by Art.51 U.N. Charter.

F. Result

Given the circumstances prevailing in the Persian Gulf, the Federal Republic of Germany could at no time have claimed a right of self-defense against an Iranian armed attack under international law. Accordingly, for constitutional reasons, the Federal Government was at all times barred from using the navy in the Gulf (Art.87a [2] of the Basic Law)[181]. The dispatch of minesweepers was excluded as well, no matter whether it would have been legal under international law. The Basic Law defines the Federal Republic of Germany's war power more narrowly than international law does.

[180a] The ICJ held the laying of mines in the internal or territorial waters of another state to be a use of force (Military and Paramilitary Activities in and against Nicaragua [Merits], ICJ Reports 1986, pp.14, 147 *sub* [6]).

[180b] The ICJ held that minesweeping in another state's territorial waters in peace time constituted an illegal intervention (*Corfu Channel* Case [Merits], ICJ Reports 1949, pp.4, 33–35).

[181] Coridaß (note 34), p.122, even raises constitutional doubts about the "Mediterranean option"-like indirect support of allied military action. I do not share those doubts because the mere "being present" is not a "use" (see *supra* notes 135–136 and accompanying text).

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IX. Addendum: West German Participation in a United Nations Peace-Keeping Force in the Persian Gulf Area?

From the beginning of the Western escort operation, the U.S.S.R. not only condemned the foreign military presence in the Gulf region, but also proposed to replace it by an international naval force operating under the auspices of the United Nations[182]. This proposal was supported by some states[183] but rejected by the United States[184], which was unwilling to concede the Soviet Union any role in the area.

While the Soviet proposal was thus never realized, the U.N. Security Council on August 9, 1988, decided unanimously to set up a U.N. observer force for securing compliance with the cease-fire between Iraq and Iran that entered into force on August 20, 1988[185]. This "United Nations Iran–Iraq Military Observer Group" (UNIIMOG) is the newest one in a long line of so-called U.N. peace-keeping forces, an institution developed outside the U.N. Charter but today generally recognized as legal under international institutional law[186].

This development has prompted renewed discussion in the Federal Republic of Germany whether the Basic Law would permit the participation of a West German military contingent in such a U.N. peace-keeping force[187]. So far, West Germany has only indirectly supported U.N. peace-keeping operations by providing transport, equipment and instruction[188].

A working group of the opposition Social Democratic Parliamentary Group in the Federal Diet proposed an amendment to Art.24 of the Basic Law. This amendment would have expressly permitted a use of West German troops within the framework of the United Nations while at the same time introducing the NATO-area restriction to all other uses into the

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182 Speech by Soviet Foreign Minister Shevardnaze to the U.N. General Assembly, 23 September 1987, AdG 57 (1987), p.31485. Statement by First Deputy Foreign Minister Voronzov during a visit to Iraq, 28–29 October 1987, EA 42 (1987), Z 211–212.

183 Statement by Jordanian Foreign Minister al-Masri, 31 August 1987, AdG 57 (1987), p.31480.

184 Statement by State Department Spokeswoman Oakley, AdG 57 (1987), p.31485.

185 FAZ, 10 August 1988, p.1; P. Bardehle, Soldaten für den Frieden, EA 43 (1988), pp.591, 595–596.

186 E. Suy, United Nations Peacekeeping System, in: EPIL Instalment 4 (1982), p.258–265.

187 FAZ, 6 August 1988, p.4 (statement by Defense Minister Scholz). See also Kalisch (note 90).

188 See *supra* text following note 132. See also response by the Federal Government to the U.N. Secretary-General, 17 September 1979, U.N. Doc.A/AC./121/30/Add.1, reprinted in ZaöRV 41 (1981), pp.633–634.

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constitution[189]. The Social Democratic Party Convention on September 1, 1988, however, resolved: "All military use of the Bundeswehr outside the area of the [NATO] alliance is impermissible for constitutional reasons ... Even a participation in [U.N.] peace-keeping forces would require an amendment to the Basic Law; we reject such participation"[190]. Any constitutional amendment, requiring a two-thirds majority in the Federal Diet (Art.79 [2] of the Basic Law), would need the support of the Social Democrats.

Since the Federal Republic of Germany acceded to the United Nations on 18 September 1973[191], the debate on its contribution to U.N. peace-keeping has been going on[192]. The prevailing, though strongly challenged, opinion in the legal literature, until recently also shared by the Federal Government[193], is that the Basic Law would have to be amended to enable the assignment of a military contingent to U.N. forces. This would not constitute a use for defense purposes under Art.87a (2) of the Basic Law[194], as the term "defense" does not include all forms of non-aggressive uses of military force. Nor would it be covered by Art.24 (2) of the Basic Law because U.N. actions outside Chapter VII of the Charter are not taking place within the U.N. system of collective security. Participation by member states is voluntary, their sovereign discretion remaining unlimited[195].

The proponents of a West German role are primarily using the *argumentum a maiore ad minus*. They either proceed from Art.87a (2) of the Basic

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189 FAZ, 25 August 1988, pp.1–2, and G. Gillessen, Bundeswehrsoldaten für die Vereinten Nationen?, FAZ, 25 August 1988, p.10.

190 FAZ, 2 September 1988, pp.1–2 (translation by the author).

191 BGBl.II 1973, pp.430, 505 and 1974, p.1397.

192 Klein (note 129); *idem*, in: Die Welt, 10 September 1988, p.6; D. Fleck, UN-Friedenstruppen im Brennpunkt – Überlegungen zu einer Beteiligung der Bundesrepublik Deutschland, VN 22 (1974), p.161; *idem*, UN-Friedenstruppen: Erfolgszwang und Bewährung, VN 27 (1979), p.99; Ipsen (note 68), in: Schwarz (ed.), pp.624–625; Mössner (note 134); H.-P. Kaul, UN-Friedenstruppen: Versuch einer Bilanz, VN 31 (1983), pp.1, 6–7; Stein (note 103), pp.92–93; von Bülow (note 100), pp.198–205; Coridaß (note 34), pp.76–88; N. K. Riedel, NJW 1989, pp.639–641.

193 For the traditional government position see the references given by von Bülow, ibid., p.199; Speth (note 132), p.163, and Coridaß, ibid., p.87: only unarmed soldiers assisting in the areas of supply and transport could be provided; a recent statement by Defense Minister Scholz indicates that this position is under review (note 92); the Parliamentary Under Secretary of Defense recently evaded this question (BT-Drs.11/2882 [7 September 1988], p.3).

194 But see Speth (note 132), pp.166–167.

195 Klein, in: Die Welt (note 192).

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Law[196] arguing that if this norm permits the use of armed force for self-defense in exception to Art.2 (4), it cannot stand in the way of peace-keeping in conformity with and in furtherance of this central provision of the U.N. Charter. The problem with this reasoning is that it tacitly changes the point of departure: self-defense presupposes an armed attack on West Germany (or an ally) while its participation in peace-keeping is not so conditioned.

The argument is sometimes instead based on Art.24 (2) of the Basic Law[197] which, allowing the use of West German armed forces for enforcement action under Art.42 U.N.Charter, must also permit the lesser assignment to U.N. peace-keeping forces. But Art.42 U.N. Charter applies only after a formal determination by the Security Council pursuant to Art.39 U.N. Charter while peace-keeping forces may be established without. It is also pointed out that West Germany's accession to the United Nations in conjunction with the Basic Law's objective of promoting international peace by an effective system of collective security (Art.24 [2]) calls for an exception to the strict norm of Art.87a (2) of the Basic Law[198].

The better way seems to be modifying the term "use" in the sense already explained[199]. If external "use" means any mission in conflict with Art.2 (4) U.N. Charter unless supported by Art.51 U.N. Charter, U.N. peace-keeping would *a priori* not be addressed, nor would military enforcement action pursuant to Art.42 U.N. Charter. It would not come within the range of application of Art.87a (2) of the Basic Law, and a West German participation would thus be permissible as just one other foreign policy option covered by Art.32 (1) of the Basic Law. This approach would have the advantage of creating no problems with the Federal Republic's obligations under the U.N. Charter[200]. On the other hand, it would allow missions outside the reach of Art.87a (2) of the Basic Law, widening a hole in a fence which has hitherto only been permeable to non-military assignments. In view of the international control this would seem tolerable, all the more so as U.N. peace-keeping forces are normally not involved in combat.

With doubts remaining, and with regard to the unprecedented reserva-

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[196] Ipsen (note 68), in: Schwarz (ed.), p.625; E. Busch, Letter to the Editors, FAZ, 7 November 1988, p.10; but see Stein (note 103), p.93 note 59.

[197] Mössner (note 134), p.111; see also Tomuschat (note 136), Art.24 notes 188, 190, and Scholz (note 92).

[198] Ipsen (note 68), in: Schwarz (ed.), p.625; Coridaß (note 34), pp.87–88.

[199] See *supra* V.

[200] See Klein (note 129), pp.444–450

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tion in Art.87a (2) of the Basic Law in favor of the *pouvoir constituant institué* or constitutional amendment power[201] which generally urges a cautious interpretation, and, finally, the sensitiveness of the question, the best solution would be a constitutional amendment. It would lend the necessary political and legal support to any future government decision by clarifying that the West German military could be sent on U.N. peace-keeping missions. This would also be preferable to a use of the Bundes-grenzschutz which is not within the reach of Art.87a of the Basic Law[202].

Austria and Finland, facing similar constitutional problems, have chosen a somewhat different solution. They have enacted laws authorizing the build-up of specific units outside their usual military organization just for international assignments on the request of international organizations[203]. The Federal Republic of Germany should rather take the direct way.

[201] See K. Stern, Das Staatsrecht der Bundesrepublik Deutschland, vol.I (2nd ed. 1984), p.152.

[202] See H.-J. Ordemann, Letter to the Editors, FAZ, 16 September 1988, p.11.

[203] W. Strasser, Die Beteiligung nationaler Kontingente an Hilfseinsätzen internationaler Organisationen, ZaöRV 34 (1974), pp.689, 705–706; for the Austrian situation cf. L.K. Adamovich/B.-C. Funk, Österreichisches Verfassungsrecht (3rd ed. 1985), p.308.

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