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## The Reemergence of German Arms: How Far Will Germany's March Toward Full Use of Military Force Go?

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# The Reemergence of German Arms: How Far Will Germany's March Toward Full Use of Military Force Go?

## ABSTRACT

*In 1994, the German Federal Constitutional Court handed down a landmark decision redefining the constitutionality of German use of military force. For more than forty years, the German government claimed that the German Constitution forbade the use of military forces for other than the defense of NATO territory. The Federal Constitutional Court, however, held that a majority vote of Parliament was all that was required to commit forces to military actions sanctioned by collective security agreements. In 1995, for the first time since World War II, Germany sent offensive military forces into a combat zone. These events raise the question of how far Germany will go toward unrestricted use of military force as a tool of foreign policy. This Note begins with a summary of the history of restrictions on German use of military force from their genesis in the World War II Treaty of Surrender to their recent redefinition in the 1994 Federal Constitutional Court decision. The author examines Germany's current collective security agreements and their potential effect on future use of force. The Note continues by reviewing relevant social and political factors bearing on German decision making, both within Germany and in the international community as a whole. In conclusion, the author analyzes the range of use of force options now available to Germany and predicts which option the German Parliament is most likely to adopt.*

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## I. INTRODUCTION

Asked what he considered the most dangerous weapon in Europe, Winston Churchill once responded, "A German military band."<sup>1</sup> After the destruction of two world wars precipitated by German military aggression, no one can blame Churchill or his contemporaries for fearing the potential return of German militarism. Many considered the German people to be inherently militaristic.<sup>2</sup> After World War II, fear of renewed German expansionism led the victorious Allied powers to severely restrict the fielding and use of German military forces. The Allies enforced the restrictions first by treaty and later through an Allied sponsored constitution, known as the Basic Law, for the newly created Federal Republic of Germany (FRG).<sup>3</sup> For over forty years, the FRG government interpreted the Basic Law to mean that German military forces could only be used for defensive purposes on North Atlantic Treaty Organization (NATO) territory.<sup>4</sup> After suffering two humiliating defeats in less than thirty years, the German people were tired of war. Following World War II, a wave of pacifism took hold in Germany that persists, in many ways, to the present day.<sup>5</sup> The attitude of the German people underscored the German government's interpretation of the Basic Law's restrictions on the use of force.

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1. John F. Farmer, *Germany's Return to Leadership Strs Unease*, NEWARK STAR-LEDGER, July 17, 1994, available in 1994 WL 12472426.

2. John Dornberg, *Germany Should Redefine Military Role*, PORTLAND OREGONIAN, May 13, 1993, at D11, available in 1993 WL 6912291. According to David Large:

Another problem was that the victors, especially the Americans, tended to oversimplify the issues they were dealing with. They tended to see the German war machine as the culmination of three hundred years of Prusso-German military history. In this view, the Nazis were the heirs of a unilinear tradition beginning with the Great Elector in the mid-seventeenth century; Hitler's attempt to conquer all of Europe was the "latest stage of Prussian militarism." American policy makers believed that the only way to end this pattern of "militaristic aggression" was to insist upon a thorough "demilitarization of the German mind."

David Clay Large, *Germans to the Front: West German Rearmament in the Adenauer Era* 13 (1996) (footnote omitted).

3. Grundgesetz [Constitution] [G.G.] (F.R.G.), translated in David P. Currie, *The Constitution of the Federal Republic of Germany* (1994) [hereinafter GG].

4. Mary Williams Walsh, *German Military Inches its Way Back Toward Global Battlefields; Focus: A Tortured Debate in Bonn*, Montreal Gazette, June 27, 1995, at B1, available in 1995 WL 6968856.

5. Marc Fisher, *Germany Gropes Toward New Military Role; Nazi Past Colors Debate Over Nation's Responsibilities in Conflicts Beyond Its Borders*, Wash. Post, February 23, 1992, at A27.

Over the years, German reluctance to engage in offensive military action has resulted in increasing pressure from some of Germany's allies to supply what they consider to be the Germans' fair share of military force. Some commentators have gone so far as to "[charge] the Germans with hiding behind their constitution."<sup>6</sup> Not only has Germany's refusal to militarily assist its allies resulted in antagonism, it has also reduced the effectiveness of United Nations (U.N.) and NATO missions.<sup>7</sup> Recently, growing international pressure and a German desire to have greater influence in international affairs, convinced the German government to begin reducing restrictions on the use of military forces.<sup>8</sup> These gradual changes to long-standing policy resulted in legal actions brought by the opposition party in the Federal Constitutional Court (FCC).<sup>9</sup>

On July 12, 1994, in a landmark decision, the German FCC ruled that the use of German forces to support internationally sponsored military operations outside of NATO territory does not violate the Basic Law.<sup>10</sup> The court held that forces could be dispatched to support United Nations, NATO, and Western European Union (WEU) missions as long as a simple majority of Parliament approved.<sup>11</sup> The decision marked a major departure from the government's previously held interpretation of the Basic Law. It freed Germany to use military forces in collective security arrangements and "remove[d] the last major barrier to a German foreign policy based on national interest—the kind of foreign

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6. *Germany's Expanding Role*, Salt Lake Trib., July 15, 1994, at A14, available in 1994 WL 738240.

7. *Yes, Let Germany Rejoin the World*, Milwaukee J., July 16, 1994, at A8, available in 1994 WL 8283372.

8. Rick Atkinson, *Luftwaffe's Wings Clipped in First Action Since 1945*, Wash. Post, August 19, 1995, at A15. The tentative German forays into out-of-area use of military force included sending military medical teams to Cambodia, a force of engineers to Somalia, and providing part of the crew of NATO-run airborne warning and control system (AWACS) aircraft flying surveillance missions in support of U.N. operations in the Balkans. *Id.*

9. *Federal Constitutional Court Approves Expanded International Role for German Military*, Wk. in Germany High Tech, July 15, 1994, available in 1994 WL 2219817 [hereinafter High Tech]. The opposition brought three lawsuits against the coalition government to test the constitutionality of out-of-area German military deployments. The suits were based on the government's commitment of naval forces to assist in the U.N. sponsored embargo of Yugoslavia, the deployment of combat engineers to assist in U.N. operations in Somalia, and the use of German air force officers as part of the crews of NATO AWACS aircraft performing surveillance operations over the Adriatic. *Id.*

10. *Neve Juristische Wochenschrift* [N.J.W.] 24 (1994), 2207 (2207).

11. High Tech, *supra* note 9.

policy that the world's other major powers pursue as a matter of course."<sup>12</sup>

The German government did not have to wait long to test this new foreign policy option. On June 30, 1995, the German Parliament voted to send combat forces to support U.N. operations in Bosnia. The vote marked the first use of German forces outside of NATO territory in a potential combat role since the end of World War II.<sup>13</sup> Now that Germany has taken the first tentative step toward sovereign use of force, the question on many minds is: How far will Germany go toward full use of its armed forces as a tool of foreign policy?

This Note will address that question. It begins with a discussion of the evolution of legal constraints on German use of military force, beginning with the Allied terms of surrender after World War II and concluding with the FCC's decision in 1994. The Note then analyzes the current social and political factors bearing on an expanded use of military force, including those internal to Germany and those driven by the international community. Finally, the Note discusses various foreign policy options for German military use and identifies those that are most likely to be pursued in light of current legal restrictions and the social and political climate.

## II. THE EVOLUTION OF LEGAL CONSTRAINTS BEARING ON THE GERMAN USE OF MILITARY FORCE

The current legal restraints on the German military have their roots in the restrictions levied by the victorious Allies at the end of World War II.<sup>14</sup> Originally enforced through the treaty of surrender and subsequent occupation legislation, the same concept of military restraint continued in the Allied-approved Basic Law of the newly-formed FRG.<sup>15</sup> As a result of the unique nature of German constitutionalism,<sup>16</sup> the government's

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12. Gary L. Geipel, *A German Foreign Policy Based on National Interest*, Indianapolis Star, July 26, 1994, at A5. The decision is critical to German foreign policy even if the option to deploy forces is never used. The key is that it removes the "convenient" constitutional bar that spared German politicians the difficulty of considering the use of force along with every other foreign policy option. German leaders will now need to review the "military option" in foreign policy decisions. *Id.*

13. *Germany Takes Bosnia Role*, S. F. EXAMINER, June 30, 1995, at A34. "The vote was needed to ratify a cabinet decision to send 1,500 soldiers, Tornado jet fighters, transport aircraft and a field hospital to support the United Nations' new rapid reaction force in former Yugoslavia." *Id.*

14. See *infra* notes 17-19 and accompanying text.

15. See *infra* notes 22-32 and accompanying text.

16. As explained by Professor Kommers:

interpretation of those restrictions has represented the primary impediment to German sovereign use of military force for the last forty years. This section describes restrictions on German military use under international law and provides an analysis of the development of internal restraints concentrated in the German Basic Law.

#### A. *The Birth of the Federal Republic of Germany and the Basic Law*

In 1945, the end of World War II brought the total defeat of Germany and its subsequent unconditional surrender. Given that war's unprecedented destruction, Allied governments were wary of renewed German militarism. Article 2 of the Declaration Regarding the Defeat of Germany demanded the immediate demilitarization of all German forces.<sup>17</sup> Article 13 gave Allied governments the authority to forbid the rearming of Germany as long as "they deem[ed] requisite for future peace and security."<sup>18</sup> The demilitarization of Germany was complete and was intended to be long term.<sup>19</sup>

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. . . any law, administrative regulation, legal relationship, or political practice that cannot be justified in terms of the Basic Law is by definition unconstitutional and, in the German variant of the constitutional state, it must be so declared if the order of legality and legal certainty—among the highest values of the German *Rechtsstaat*—is to be maintained.

Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L. J. 837, 848 (1991).

17. Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, June 5, 1945, art. 2, para. (a), 60 Stat. 1649, 1651, 68 U.N.T.S. 189, 192. Article 2 provides:

All armed forces of Germany or under German control, wherever they may be situated, including land, air, anti-aircraft and naval forces, the S.S., S.A., and Gestapo, and all other forces or auxiliary organisations equipped with weapons, shall be completely disarmed, handing over their weapons and equipment to local Allied Commanders or to officers designated by the Allied Representatives.

18. *Id.* art. 13, para. (a).

19. David Large describes the "draconian" demilitarization measures:

. . . the [Allies] prohibited Germans from wearing their old military uniforms . . . displaying military rank, medals, and insignia; belonging to any veterans organizations, regimental associations, or sport groups with a military character; possessing weapons, munitions, or explosives; planning, constructing, or maintaining military facilities of any kind; conducting scientific or historical research of a military nature; maintaining commemorative plaques, monuments, statues, buildings, or street designations that might keep alive the German military tradition; and operating exhibitions or museums focusing on German military history since 1914. Libraries and educational institutions were ordered to

For four years, Germany remained divided and under Allied military control with no meaningful self-government. In 1949, following a failure to come to terms with the Soviet Union,<sup>20</sup> the western Allies decided to unite their three occupation zones to create the Federal Republic of Germany (FRG). As part of that decision, the Allies authorized German representatives to convene an organization to create a constitution for the FRG.<sup>21</sup> The Allies required that the resulting constitution conform to certain specified requirements and be approved by the Military Governors before being presented to the German states for ratification.<sup>22</sup> In addition, the Allies retained authority to continue to enforce disarmament.<sup>23</sup> Although the German constitutional convention was theoretically free to define the constitution, these restrictions ensured that they would define it in a manner acceptable to the Allies.<sup>24</sup> As a result, the final Basic Law contained explicit restraints on the sovereign use of military force.

The general view is that constitutional restraints on military use were required by the Allies to prevent future German militarism.<sup>25</sup> Three articles of the original Basic Law restrict Germany's ability to use military force. Article 26 forbids acts with the "intent to disturb the peaceful relations between nations" and provides criminal sanctions for its violation.<sup>26</sup> This article

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purge their collections of any materials that might be used for the preservation of Germany's war-making potential.

LARGE, *supra* note 2, at 25.

20. Following the surrender of Germany, the country was divided into four zones of occupation each of which was governed by one of the four victorious Allied powers (the United States, the United Kingdom, the Soviet Union, and France). The original intent was to reunite the four occupation zones, but disagreements between the western powers and the Soviet Union made this impossible.

21. Final Communiqué on London Talks Regarding Germany (June 1, 1948), reprinted in CIVIL ADMINISTRATION DIVISION, OFFICE OF MILITARY GOVERNMENT FOR GERMANY, DOCUMENTS ON THE CREATION OF THE FEDERAL CONSTITUTION at 42-43 (Sept. 1, 1949) [hereinafter London Talks].

22. *Id.*

23. *Id.*

24. As Dr. Carlo Schmid, a delegate from the Social Democratic Party, eloquently stated, "A constitution which has to be approved by somebody else represents the policy of the one entitled to approve it, but does not represent a true result of the sovereignty of the people of the one who has to obtain approval." Excerpts from the Speech of Dr. Carlo Schmid (SPD) at the Plenary Meeting of the Parliamentary Council Held in Bonn on 8 September 1948, reprinted in CIVIL ADMINISTRATION DIVISION, OFFICE OF MILITARY GOVERNMENT FOR GERMANY, DOCUMENTS ON THE CREATION OF THE GERMAN FEDERAL CONSTITUTION at 78 (Sept. 1, 1949) [hereinafter Schmid Speech].

25. Lori Fisler Damrosch, Constitutional Control of Military Actions: A Comparative Dimension, 85 AM. J. INT'L L. 92, 99 (1991).

26. GG, *supra* note 3, art. 26(1).



effectively rules out any use of force for "aggressive" purposes.<sup>27</sup> Article 25 provides that the general rules of public international law are part of the federal law of Germany and take precedence over laws enacted by its government.<sup>28</sup> Therefore, to the extent that any use of military force would violate international law, it would be unconstitutional. Finally, Article 24 allows Germany to join collective security agreements for "the maintenance of peace."<sup>29</sup> Since, at the time, Germany was not yet permitted to have any military forces, there were no provisions explicitly controlling the use of military force in the original Basic Law.

In addition to the constitutional restrictions, the Allies reserved other rights to prevent the reemergence of German militarism. The Allies approved the Basic Law subject to rights maintained by them in a separate Occupation Statute.<sup>30</sup> In the Occupation Statute, the Allies retained the express right to continue to regulate German disarmament.<sup>31</sup> The Allies also reserved the right to approve any proposed changes to the Basic Law itself.<sup>32</sup> These actions effectively prevented Germany from establishing any type of military forces for the next five years.

### B. NATO and the Rearming of Germany

By 1947, Allied military officers began to consider the rearming of Germany as a viable method of defending against the

27. Section 1 of Article 26 provides in full:

Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, are unconstitutional. They shall be made a criminal offense.

*Id.*

28. *Id.* art. 25.

29. *Id.* art. 24(2). Section 2 provides authority for joining organizations for purposes of collective security:

For the maintenance of peace, the Federation may enter a system of mutual collective security; in doing so it shall consent to such limitations upon its rights of sovereignty as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world.

*Id.* Section 1 is also important in this context as it states that, "[t]he Federation may by legislation transfer sovereign powers to intergovernmental institutions." *Id.* This section allows Germany to join an organization for purposes of mutual collective security and transfer command of its military forces to the organization.

30. Letter of Approval of the Basic Law (May 12, 1949), reprinted in CIVIL ADMINISTRATION DIVISION, OFFICE OF THE MILITARY GOVERNMENT GERMANY, DOCUMENTS ON THE CREATION OF THE GERMAN FEDERAL CONSTITUTION at 138 (Sept. 1, 1949).

31. Occupation Statute Defining the Powers to be Retained by the Occupation Authorities, April 8, 1949, para. 2, reprinted in UNITED STATES DEPARTMENT OF STATE, DOCUMENTS ON GERMANY 1944-1985, at 212 (1985).

32. *Id.* para. 5.

growing Soviet threat.<sup>33</sup> At the higher levels of Allied government, however, there were no public plans to rearm Germany.<sup>34</sup> Disarmament was intended to be permanent.<sup>35</sup> By 1950, military necessity, brought on by the Western Allies' inability to match Soviet troop strength in Europe, caused the United States to begin rethinking this policy.<sup>36</sup> The invasion of South Korea by the communist-backed forces of North Korea in June of 1950 marked a turning point.<sup>37</sup> At the time, U.S. planners could easily draw an analogy between the situation in Korea and a potential Soviet invasion of West Germany.<sup>38</sup> In September of 1950, U.S. Secretary of State Acheson publicly announced that the United States would seek rearmament of West Germany.<sup>39</sup>

The initial U.S. plan proposed severe restrictions on the German forces to placate European fears of renewed German militarism.<sup>40</sup> The French were not satisfied with these controls, however, and proposed to make German forces part of a combined European army. The French proposal eventually came to be known as the European Defense Community (EDC).<sup>41</sup> Although negotiations concerning the EDC succeeded in holding up German rearmament for several years, in the end it received little support from European countries or even the French army.<sup>42</sup> Ironically, it was the French government that sealed the fate of the EDC by refusing to ratify the Treaty in August of 1954.<sup>43</sup>

The defeat of the EDC Treaty left the Allies with no method of integrating German forces into a collective security scheme. To resolve the situation, Allied leaders met in London at the Nine-Power Conference in September of 1954.<sup>44</sup> At that conference, they approved a proposal to integrate German forces into NATO and the WEU.<sup>45</sup> The rules for German accession to the two collective security pacts were strict. The German military

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33. LARGE, *supra* note 2, at 35.

34. ROBERT MCGEEHAN, *THE GERMAN REARMAMENT QUESTION: AMERICAN DIPLOMACY AND EUROPEAN DEFENSE AFTER WORLD WAR II* 13 (1971).

35. *Id.*

36. *See id.* at 27-28 (describing the justification for the potential rearming of Germany).

37. *Id.* at 20-21.

38. *Id.*

39. *Id.* at 34.

40. The German forces were not to operate independently. A German High Command or General Staff was banned and all the forces would be directly integrated into NATO. *Id.* at 43-44.

41. LARGE, *supra* note 2, at 92. This plan was also known as the "Pleven Plan."

42. *Id.* at 122.

43. *Id.* at 205.

44. *Id.* at 217.

45. *Id.*

command structure was fully integrated into NATO and the *Bundeswehr* (West German military) had to coordinate all military tasks, deployments, and equipment with NATO Headquarters.<sup>46</sup>

In May of 1955, the Occupation Statute was formally revoked and Germany was admitted as a member of NATO.<sup>47</sup> Internal German issues, however, still prevented immediate rearmament. From the establishment of the FRG, the opposition party in the German Parliament, the Social Democratic Party (SPD), had been against rearmament.<sup>48</sup> The SPD took the matter to the FCC arguing that rearmament violated the Basic Law.<sup>49</sup> In 1956, the ruling party acquiesced to a "military constitution" by amending the Basic Law. These amendments codified Parliamentary control over the military and integrated it into the democratic institutions of the state.<sup>50</sup>

The amendments contained in the "military constitution" set up detailed rules to govern the use of the new armed forces.<sup>51</sup> The most important of these rules are found in Article 87(a), Sections 1 and 2. Section 1 provides in part that "[t]he Federation shall establish Armed Forces for defense purposes."<sup>52</sup> Section 2 provides that "[a]part from defense, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law."<sup>53</sup> The interpretation of these restrictions has an important

46. Wolfram F. Hanrieder, *The FRG and NATO: Between Security Dependence and Security Partnership*, in *THE FEDERAL REPUBLIC OF GERMANY AND NATO: 40 YEARS AFTER 194*, 206 (Emil Kirchner & James Sperling eds., 1992). For other restrictions on Germany enforced through NATO and WEU membership, see *id.* at 201.

47. LARGE, *supra* note 2, at 233.

48. The SPD wanted to adopt a policy of neutrality in hopes that it would convince the Soviet Union to allow the reunification of West Germany with East Germany. The SPD cited four major grounds for opposing rearmament: "it would damage the prospects for reunification by aligning West German with one of the cold war camps; it would antagonize the Soviet Union and increase world tensions; it would support militarist elements in domestic German society; and it would bring Germany into a conservative West European union that could split non-Communist Europe." Beverly Crawford & Jost Halfmann, *Domestic Politics and International Change: Germany's Role in Europe's Security Future*, in *THE FUTURE OF EUROPEAN SECURITY* 216, 225-226 (Beverly Crawford ed., 1992).

49. LARGE, *supra* note 2, at 155.

50. *Id.* at 251.

51. Claus Kress, Note, *The External Use of German Armed Forces—The 1994 Judgment of the Bundesverfassungsgericht*, 44 INT'L & COMP. L. Q. 414 (1995).

52. GG, *supra* note 3, art. 87a(1) (emphasis added).

53. *Id.* (emphasis added). In its 1994 decision, the FCC sidestepped the issue of defining the term "defense" by holding that Article 24 authority to join collective security agreements predated, and thus superseded, the Article 87(a)(2) restriction. It is uncertain what restrictions are encompassed by this term. See *infra* notes 84-89 and accompanying text.

impact on German freedom to use military force as a tool of foreign policy.

### C. German Reunification and the Treaty on Final German Settlement

After more than forty years of cold war, changes in the international political climate made the long-awaited reunification of Germany possible.<sup>54</sup> Under Article 7 of the Treaty on the Final Settlement with Respect to Germany (also called the "Two Plus Four Treaty"), the four World War II Allies extinguished their remaining rights and privileges, including any authority over the German military, under the post-war declarations.<sup>55</sup> The treaty paved the way for a united and truly sovereign Germany.

In addition to the general grant of sovereignty over external affairs in Article 6, the treaty specifically provided that German rights and responsibilities arising from its alliances would not be affected.<sup>56</sup> Since Germany had already decided to join NATO after reunification, this provision allows the united Germany to continue to act within the NATO charter without violating the treaty.<sup>57</sup> Given that Germany was also a member of both the United Nations and the WEU at the time of the treaty, presumably this freedom would apply to actions under the charters of those organizations as well. Although the maximum extent of actions permissible under the provision is not clear, it is certain that "the Germans will continue to be able to exercise the right of self-defense both individually and collectively in pursuit of their

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54. See generally STEPHEN F. SZABO, *THE DIPLOMACY OF GERMAN UNIFICATION* (1992) (describing the international event leading up to the reunification of Germany).

55. Article 7 of the treaty provides:

(1) The French Republic, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America hereby terminate their rights and responsibilities relating to Berlin and to Germany as a whole. As a result, the corresponding, related quadripartite agreements, decisions and practices are terminated and all related Four Power institutions are dissolved.

(2) The united Germany shall have accordingly full sovereignty over its internal and external affairs.

Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, art. 7, S. TREATY DOC. NO. 101-20, 29 I.L.M. 1186, 1191 (1990) [hereinafter *Two plus Four Treaty*].

56. Article 6 provided that "[t]he right of the united Germany to belong to alliances, with all the rights and responsibilities arising therefrom, shall not be affected by the present treaty." *Id.* art. 6.

57. Peter E. Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 475, 617 (1991).

obligations to NATO, the United Nations, and other institutions."<sup>58</sup>

The treaty also reaffirms Germany's commitment to peaceful relations and renunciation of aggressive warfare as a tool of national policy. In Article 2, Germany declares that it will "never employ any of its weapons except in accordance with its constitution and the Charter of the United Nations."<sup>59</sup> Since the text of Article 2 tracks the text of Article 26, Section 1 of the Basic Law,<sup>60</sup> the treaty could be read to prohibit Germany from ever significantly changing or deleting that article. Some legal scholars have suggested that the treaty may provide authority for international enforcement in a situation where Germany violates that constitutional provision.<sup>61</sup> The U.S. government's position, however, appears to be that the only restrictions on German use of military force emanate from the German Constitution and not from the treaty or any other external authority.<sup>62</sup> This interpretation, coupled with the Article 7 relinquishment of Allied authority, provides Germany with the opportunity to alter the Basic Law to reduce or eliminate its restrictions on the use of force.

Germany could make such a change by either amending the Basic Law<sup>63</sup> or adopting a new "permanent" constitution for the

58. *Implications of Treaty on Final German Settlement for NATO Strategy and U.S. Military Presence in Europe: Hearing Before the Committee on Armed Services of the United States Senate, 101-25 (1990)* [hereinafter *Settlement Treaty Hearings*] (statement of Hon. James F. Dobbins, Jr., Principal Deputy Assistant Secretary of State for European and Canadian Affairs) (emphasis added).

59. Two Plus Four Treaty, *supra* note 55, art. 2. The full text of Article 2 reads:

The Governments of the Federal Republic of Germany and the German Democratic Republic reaffirm their declarations that only peace will emanate from German soil. According to the constitution of the united Germany, acts tending to and undertaken with the intent to disturb the peaceful relations between nations, especially to prepare for aggressive war, are unconstitutional and a punishable offense. The Governments of the Federal Republic of Germany and the German Democratic Republic declare that the united Germany will never employ any of its weapons except in accordance with its constitution and the Charter of the United Nations.

*Id.*

60. See *supra* note 27 (text of Article 26(1) of the Basic Law).

61. Quint, *supra* note 57, at 614.

62. Settlement Treaty Hearings, *supra* note 58, at 24 (statement of Hon. James F. Dobbins, Jr., Principal Deputy Assistant Secretary of State for European and Canadian Affairs).

63. An amendment would require a two-thirds vote of both houses of the German Parliament. GG, *supra* note 3, art. 79(2). However, there is nothing in the treaty that prohibits Germany from approving an amendment to reduce the limitations on military use, and prior to the 1994 FCC decision, the current

united Germany.<sup>64</sup> Article 146 of the Basic Law was included to facilitate the replacement of the Basic Law with a permanent constitution approved by a united German people.<sup>65</sup> Reunification, however, was not achieved under Article 146.<sup>66</sup> Instead, the German Democratic Republic (GDR) joined the FRG under Article 23 of the Basic Law, which provided for the "accession" of other parts of Germany.<sup>67</sup> Nevertheless, to appease

government indicated a willingness to pursue such an option after reunification was complete. Settlement Treaty Hearings, *supra* note 58, at 25 (statement of Hon. James F. Dobbins, Jr., Principal Deputy Assistant Secretary of State for European and Canadian Affairs).

The need for an amendment has been partially alleviated by the FCC decision. See *infra* notes 70-103 and accompanying text. To the extent that the government may want to amend the Basic Law to allow use of force beyond the scope of that decision, it is unlikely that the needed two-thirds majority of Parliament could ever be achieved. The opposition of many members to increased use of external force and the total opposition by third parties to any use of military force would make the two-thirds majority difficult to obtain. Peter Schmidt, *German Strategic Options*, in *THE FUTURE OF EUROPEAN SECURITY* 25, 32-33 (Christoph Bluth et al. eds., 1995).

64. The FRG constitution was not intended to be a permanent document; rather, it was designed to be a temporary constitution for West Germany while the country remained divided and under Allied control. Paul M. Schwartz, *Constitutional Change and Constitutional Legitimization: The Example of German Unification*, 31 *HOUS. L. REV.* 1027, 1080 (1994). Schwartz contends that, "[t]he temporary nature of this document is indicated by its name, Basic Law (Grundgesetz) rather than Constitution (Verfassung) . . . ." *Id.* This idea is confirmed by some of the legislative history of the Basic Law. Dr. Carlo Schmid of the SPD stated during the debate:

Where only a partial exercise of the sovereignty of the people is possible, only the fragment of a state can be established. . . . The only thing we can do is to create a Basic Law for the fragment of a state. The real constitution we have is, even today, the written or unwritten Occupation Statute.

*Schmid Speech*, *supra* note 24, at 78. From the very beginning, factions of the German government believed it would be necessary to create a new constitution to complete the reunification process. Dr. Schmid emphasized this point, stating that, "[t]he future constitution for Germany as a whole should not be produced by amending the Basic Law of this fragment of a state; it must be made possible that this final constitution should originate independently." *Id.*

65. Prior to the amendments associated with the reunification of Germany, Article 146 provided: "[t]his Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force." GG art. 146 (F.R.G.), translated in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW* 306 (Ulrich Karpen ed., 1988). This provision provided for both a method of reunification and a smooth transition from the Basic Law to a constitution for a unified Germany. Quint, *supra* note 57, at 508.

66. Schwartz, *supra* note 64, at 1085.

67. Prior to the amendments associated with the reunification of Germany, Article 23 provided: "For the time being, this Basic Law shall apply in the territory of the Laender of [list of West German states]. In other parts of Germany

those factions in the FRG Parliament who supported the idea that a united Germany should have a new constitution, Article 146 was amended to ensure its continued validity after reunification.<sup>68</sup>

It is uncertain when, or if, Article 146 might be used to replace the Basic Law with a new German Constitution. If such an effort is undertaken, however, it presents important possibilities for change in the very fabric of the constitution. Because Article 146 does not provide a specific method for approval of the new constitution, some scholars argue that it could be approved by a simple majority of the German people. This method of change would bypass the supermajority needed in Parliament to amend the current Basic Law.<sup>69</sup> If a majority of the German people ever believe that the time has come to remove some of the limitations on the use of military forces, Article 146 provides another method to accomplish that goal. For the present, however, the restrictions in the Basic Law continue to govern the actions of the united Germany.

#### D. *The Federal Constitutional Court Decision of 1994*

From the inception of the *Bundeswehr* until the late 1980s, the various factions of the German government agreed that the FRG's forces could only be used for defensive purposes on NATO territory.<sup>70</sup> Following the Gulf War, the ruling coalition in Parliament began to approve limited operations in support of NATO and U.N. peacekeeping missions.<sup>71</sup> These actions were vigorously denounced by the opposition parties in the German Parliament as unconstitutional.<sup>72</sup> In response, the ruling coalition invoked Article 24 and defended the missions as actions under the auspices of collective security agreements.<sup>73</sup>

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it shall be put into force on their accession." GG art. 23 (F.R.G.), translated in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIS RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 237* (Ulrich Karpen ed., 1988). This method of unification allowed the GDR to accept the Basic Law as the constitution of a united Germany and eliminated the necessity of creating a new constitution. Schwartz, *supra* note 64, at 1085.

68. Quint, *supra* note 57, at 514-15. Article 146 currently provides: "This Basic Law, which is valid for the entire German people following achievement of the unity and freedom of Germany, shall cease to be in force on the day on which a constitution adopted by a free decision of the German people takes effect." GG, *supra* note 3, art. 146.

69. Quint, *supra* note 57, at 515.

70. Kress, *supra* note 51, at 414.

71. See *infra* notes 169-74 and accompanying text.

72. HIGH TECH, *supra* note 9.

73. *Id.*

Eventually the FCC accepted the issue for final resolution.<sup>74</sup> On July 12, 1994, the FCC issued a landmark decision which redefined German doctrine on the use of military force.<sup>75</sup>

The FCC, relying on Article 24, held that the use of German forces to support the contested actions was constitutional.<sup>76</sup> The court found unanimously that the constitutional authorization to enter collective security agreements implied the right to support the military activities required by such a system.<sup>77</sup> The court concluded that the use of armed forces was inherent in any security system and relied on the legislative history of the constitution to find that the drafters had intended such a consequence.<sup>78</sup> As a result, the court stated that Parliament's approval of accession to the agreement was sufficient, under Article 24, Section 1, to put German forces under the system's command and allow them to engage in military operations sanctioned by the charter of the organization.<sup>79</sup> The court held that such action was authorized even where the organization was acting on behalf of another security organization.<sup>80</sup>

The FCC went on to give the term "system of mutual collective security"<sup>81</sup> broad scope to include both those alliances intended to maintain order among members (such as the United Nations), and those primarily intended to protect members from outside attack (such as NATO).<sup>82</sup> In addition, the court found that the right to commit forces to collective security arrangements included the authority to use them in military actions whenever those organizations had authority to operate, thus discrediting the widely held belief that German forces could only be used on NATO territory.<sup>83</sup>

The FCC dispatched two major arguments made by those opposing the military actions. The first argument regarded the

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74. The Social Democratic Party and the Liberal Party brought the action on behalf of themselves and the Federal Parliament. The three specific actions in question were German naval actions in the Adriatic to enforce the embargo against Yugoslavia, German airmen on NATO AWACS planes enforcing the no-fly zone over Bosnia, and military engineers sent to support the U.N. operation in Somalia. Kress, *supra* note 51, at 415.

75. Manfred H. Wiegandt, *Germany's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops*, 10 AM. U. J. INT'L L. & POLY 889, 890 (1995).

76. *Id.* at 906-907.

77. *Id.* at 906.

78. Kress, *supra* note 51, at 416.

79. Wiegandt, *supra* note 75, at 906.

80. In this case, NATO was acting on behalf of the United Nations in Bosnia. *Id.* at 907.

81. GG, *supra* note 3, art. 24.

82. Kress, *supra* note 51, at 418.

83. Craig R. Whitney, *Court Lifts Restriction on Missions Abroad*, L. A. DAILY NEWS, July 13, 1994, at N1.



interplay between Article 24 and the command in Article 87a, Section 2 that, "[a]part from defense, the Armed Forces may be employed only to the extent expressly permitted by this basic law."<sup>84</sup> The opposition argued that since Article 24 did not expressly permit the use of force for non-defensive purposes, the actions were therefore unconstitutional. The court responded by invoking a "first in time" doctrine, saying that the defense purposes caveat was subordinate in time to the collective security provision.<sup>85</sup> Disregarding the majority of scholarly opinions, the court found that Article 87a was intended to regulate the domestic actions of the German military during emergency situations, and not to regulate its use in the international arena.<sup>86</sup> Ignoring the fact that Article 87a was adopted during a period when German government would not have considered use of forces for other than the defense of NATO territory,<sup>87</sup> the court held that Article 87a did not exclude deployments within collective security agreements.<sup>88</sup> The FCC avoided discussion of whether U.N. interventions (such as in Somalia) could be considered "defensive" and left the term in Article 87a open to interpretation.<sup>89</sup>

Second, the opposition advanced the argument that NATO and WEU forces in the former Yugoslavia were acting outside the bounds of their charter.<sup>90</sup> Since the German parliament had not agreed to these "changes" in the charter as required by Article 59,<sup>91</sup> the opposition reasoned that the actions were outside the authority of Article 24. The court's response to this argument was less decisive. By an equally divided vote,<sup>92</sup> the court held that Parliament understands the basic goals of treaties that it approves and implicitly approves any later differences in treaty interpretation as long as they remain within those basic goals.<sup>93</sup> This is true even if the differences in interpretation amount to an

84. GG, *supra* note 3, art. 87a(2).

85. Captain Kenneth S. Klimnik, *Germany's Army after Reunification: The Merging of the Nationale Volksarmee in the Bundeswehr, 1990-1994*, 145 MIL. L. REV. 113, 128 (1994).

86. Wiegandt, *supra* note 75, at 907-08.

87. *Id.* at 908.

88. *Id.* at 907.

89. *Id.* at 908-09.

90. *Id.* at 909.

91. Section 2 of Article 59 provides in part: "Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation require the consent or participation, in the form of federal statute, of the bodies competent in any specific case for such federal legislation." GG, *supra* note 3, art. 59(2).

92. Under FCC procedure, a tie vote results in the actions of the government being upheld as constitutional. Wiegandt, *supra* note 75, at 910.

93. *Id.*

effective amendment of the treaty.<sup>94</sup> The court held that the Parliament implicitly approved the actions by NATO and the WEU through Germany's accession to those organizations.<sup>95</sup>

The FCC placed one restriction on the deployment of German forces. Any military action must be approved by a majority of the votes cast in Parliament before or immediately after the action is taken.<sup>96</sup> The court cited no explicit provision of the constitution to support this rule.<sup>97</sup> Instead, it stated that parliamentary control of the military was implicit in various parts of the constitution and in the constitutional tradition of Germany.<sup>98</sup> Parliamentary approval is required even when forces are deployed to meet alliance obligations, or deployed under the authority of a U.N. Security Council resolution.<sup>99</sup> The significance of this requirement should not be overestimated, however. Given the requirement for only a simple majority and Germany's parliamentary form of government, any such request is very likely to be approved.<sup>100</sup>

The holdings in this case are particularly important to interpretation of the Basic Law restrictions on the use of force because of the unique position occupied by the FCC in German constitutional law. Germany is a civil law country, and German courts are not bound by the concept of precedent. The FCC's interpretations of the Basic Law and its decisions, however, are binding on all other courts.<sup>101</sup> In addition, FCC constitutional interpretation has the force of law and is binding on all other organs of government and public officials.<sup>102</sup> In essence, the FCC is charged with "the continuous elaboration of the Constitution's meaning."<sup>103</sup> As a result, the FCC decision conclusively defines the constitutional restrictions on German use of military force.

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94. *Id.*

95. *Id.* at 911.

96. Killimnik, *supra* note 85, at 128.

97. Wiegandt, *supra* note 75, at 911.

98. *Id.* The court referred to provisions in the 1919 Constitution of the German Reich and to former provisions of the Basic Law. *Id.* Its holding also drew upon parliament's role in approving the budget, size, and organization of the military as further evidence that control was intended by the constitution's drafters. Killimnik, *supra* note 85, at 128.

99. Wiegandt, *supra* note 75, at 911-12.

100. Kress, *supra* note 51, at 425. *See also* Wiegandt, *supra* note 75, at 912 (suggesting that disapproval of a proposed government deployment would be the equivalent of a no-confidence vote and thus very unlikely to occur).

101. Kommers, *supra* note 16, at 840.

102. *Id.* at 842.

103. *Id.* at 850.

### E. Analysis of Germany's Collective Security Agreements

The decision of the FCC was based in large part on its interpretation of Article 24 and Germany's responsibilities within its collective security agreements. Further analysis of potential use of military forces under these agreements requires an understanding of those responsibilities. Germany's three primary collective security agreements are with the United Nations, NATO, and the WEU.

#### 1. U.N. Responsibilities Based on the U.N. Charter

With the end of the cold war, it is more likely that the United Nations will take its intended place as the world's premier collective security organization.<sup>104</sup> In turn, Germany will be called on more often to support U.N. security actions. Security actions can take one of three forms: full-scale military action against an aggressor nation in defense of a U.N. member country, peacekeeping operations within a member country or along a border, or a combination of active military operations in connection with peacekeeping, sometimes called peacemaking.<sup>105</sup>

Military operations in response to aggression are explicitly grounded in Chapter VII of the U.N. Charter.<sup>106</sup> In order to invoke the authority of Chapter VII, the U.N. Security Council must first determine that actions by an aggressor nation constitute a "threat to the peace, breach of the peace, or [an] act of aggression."<sup>107</sup> Once such a determination is made, the Security Council has the authority to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."<sup>108</sup> Article 42 of the U.N.

104. During more than forty years of cold war, the United Nations was largely prevented from performing its collective security role because proposed enforcement actions were continually vetoed by one of the five permanent-members of the Security Council. From 1945 to 1990, two hundred and seventy-nine vetoes were cast in the Security Council. The lack of vetoes since 1990 bodes well for future collective security actions. James E. Rossman, *Article 43: Arming the United Nations Security Council*, 27 N.Y.U.J. INT'L L. & POL. 227, 231 (1994).

105. See *infra* notes 106-122 and accompanying text.

106. John Sanderson, *Peacekeeping and Peacemaking: A Critical Retrospective*, 20 MELB. U.L. REV. 35, 37 (1995).

107. U.N. CHARTER art. 39. Article 39 provides in full: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." *Id.*

108. U.N. CHARTER art. 42. Article 42 provides in full:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such

Charter is intended to provide a potent response to military expansionism, and there have only been two clear examples of its use: the Korean War and the Persian Gulf War.<sup>109</sup>

Peacekeeping operations have been more common, although their U.N. Charter authority is questionable.<sup>110</sup> There are commentators who claim that, within the auspices of Chapter VI, they represent an acceptable method for the "peaceful settlement of disputes" under Article 33.<sup>111</sup> Others suggest they are an unwritten innovation to a living U.N. Charter and thus represent a "Chapter VI 1/2."<sup>112</sup> Whatever their source of authority, peacekeeping operations are not enforcement actions and do not require the approval of the Security Council.<sup>113</sup> Because they do not carry Chapter VII authority, peacekeeping operations require the consent of the parties to the conflict, the involvement of impartial peacekeepers, and restrictions against the use of force except in self-defense.<sup>114</sup> These restrictions suggest that peacekeepers would seldom be involved in combat activity.<sup>115</sup> The concept of self-defense, however, is loosely defined and has been

action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

*Id.* Article 41 allows the Security Council to consider various options not involving the use of armed forces before resorting to armed action. See U.N. CHARTER art. 41 (stating that the Security Council "may decide what measures not involving the use of armed forces are to be employed").

109. Sanderson, *supra* note 106, at 37.

110. *Id.*

111. *Id.* Article 33 provides in part:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

U.N. CHARTER art. 33, para. 1 (emphasis added).

112. Ove Bring, *Peacekeeping and Peacemaking: Prospective Issues for the United Nations*, 20 MEL. U.L. REV. 55, 56-57 (1995).

113. The International Court of Justice has ruled that either the General Assembly or the Security Council can authorize peacekeeping actions. Jon E. Fink, *From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security*, 19 MD. J. INT'L L. & TRADE 1, 13-14 (1995).

114. Bring, *supra* note 112, at 56. Additional requirements that developed over the years include: the operation must be under U.N. command, have the backing of the international community, be multinational in composition, and exclude troops from the five permanent Security Council members. *Id.*

115. See Fink, *supra* note 113, at 14-15 (indicating that the use of force in peacekeeping operations as officially limited to "proportionate and necessary" self-defense thus distinguishing peacekeeping from troops in more aggressive enforcement actions).

modified to allow greater use of force in certain circumstances.<sup>116</sup> Until 1988, this type of action represented the primary type of peacekeeping carried out by the United Nations.<sup>117</sup>

A new type of peacekeeping operation, given teeth by a Chapter VII enforcement mandate, appeared in Bosnia in 1992 and again in Somalia in 1993.<sup>118</sup> These operations were different from the Chapter VII actions of earlier years (the Korean and Gulf Wars) as there were no aggressor nations.<sup>119</sup> The actions were entirely internal to those countries and were taken on humanitarian rather than defense grounds. While Article 2 of the U.N. Charter specifically forbids "interven[tion] in matters which are essentially within the domestic jurisdiction of any state," an exception is made for the application of enforcement actions under Chapter VII.<sup>120</sup> The Security Council has the authority to determine what constitutes a "threat to peace" under Article 39,<sup>121</sup> and it has recently adopted a "broader interpretation of Article 39 . . . [leading] to more liberal determinations of when a humanitarian violation constitutes a threat to international peace and security."<sup>122</sup>

Given this broader interpretation of "threats to peace," peacemaking actions are likely to increase in the future. Internal conflicts often have some type of transboundary impact,<sup>123</sup> and a "growing body of human rights law" is likely to provide future justification for armed intervention in internal conflicts with or without the consent of the host nation.<sup>124</sup>

116. *Id.* at 15.

117. Bring, *supra* note 112, at 59-60. Traditional functions included actions such as the monitoring of cease-fires and the controlling of buffer zones. Some actions were expanded to include peaceful involvement in the domestic affairs of the host state such as organizing and supervising elections, monitoring arms flow, monitoring human rights obligations, and assisting in the delivery of humanitarian aid. In all cases, however, the actions were not based on an enforcement mandate and required the consent of the host states. *Id.*

118. *Id.* at 60.

119. In Bosnia, U.N. forces were deployed to protect safe zones in a civil war between Bosnian Croats, Serbs, and Muslims. In Somalia, U.N. forces enforced peace between rival Somali warlords.

120. U.N. CHARTER art. 2.

121. Michelle Smith, *Expanding Permanent Membership in the UN Security Council: Opening a Pandora's Box or Needed Change?*, 12 DICK. J. INT'L L. 173, 176 (1993).

122. Fink, *supra* note 113, at 7.

123. Transboundary impacts of internal conflicts include: "mass migrations of refugees, expanding armed conflicts when a domestic struggle 'spills' across the border and problems with the availability and disruption of resources." *Id.* at 21.

124. *Id.* at 45.

Military forces to support all U.N. actions are requested from member nations.<sup>125</sup> Article 43 was intended to enforce these requests through a "special agreement or agreements" among the members.<sup>126</sup> However, these agreements never materialized, and Article 43 is considered a "dead letter."<sup>127</sup> Without such agreements, member nations are free to ignore Security Council requests for forces or withdraw their forces from any action at any time.<sup>128</sup> As one of the most economically and militarily powerful nations in the United Nations, Germany will continue to be expected to support all three forms of collective security. However, barring any future Article 43 agreement, the decision to participate in any U.N. operation will remain at the discretion of the German government.

## 2. Continuing Responsibilities under the North Atlantic Treaty

Germany's long history as a part of NATO<sup>129</sup> makes it likely that this agreement will remain an important one in any German decision concerning the use of force. NATO was originally organized as a defensive treaty<sup>130</sup> to counter the threat of attack by the Soviet Union and its Warsaw Pact allies.<sup>131</sup> With the dissolution of the Warsaw Pact, that threat has essentially ceased to exist.<sup>132</sup> Despite this fundamental change, NATO leaders still believe that the Alliance is a critical institution for the security of

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125. James W. Houck, *The Commander in Chief and the United Nations Charter Article 43: A Case of Irreconcilable Differences?*, 12 DICK. J. INT'L L. 1, 7-9 (1993).

126. U.N. CHARTER art. 43.

127. Houck, *supra* note 125, at 3-4.

128. *Id.* at 8-9.

129. See *supra* note 47 and accompanying text.

130. The primary operative part of the treaty, Article 5, provides in part:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

North Atlantic Treaty, April 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243, 246.

131. Colin McInnes, *The Future of NATO*, in *THE FUTURE OF EUROPEAN SECURITY* 85, 86 (Christoph Bluth et al. eds., 1995).

132. "The military function of the [Warsaw Pact] had been virtually defunct since the events at the Berlin Wall and the Kremlin officially terminated the Warsaw Pact military structure during April 1991." Jeffrey S. Palmer, *The New European Order: Restructuring the Security Regime under the Conference on Security and Cooperation in Europe*, 5 TEMP. INT'L & COMP. L. J. 51, 54 (1991).

Europe and that it must adapt to the changing international environment.<sup>133</sup> At a 1991 NATO conference in Rome, Alliance leaders announced a new strategic plan outlining these fundamental changes. The plan declared that NATO no longer had any known enemies, that future threats to peace were likely to be a result of instability rather than aggression, and that NATO forces were being reorganized to meet the new threat scenario.<sup>134</sup> In sum, "NATO is transitioning to become a broader alliance of collective security as opposed to purely a defensive alliance."<sup>135</sup>

For the present, at least, it appears that NATO will continue to be a viable collective security arrangement. In the short term, NATO will be necessary for "managing the residue of the East West conflict and the stabilization of Eastern Europe."<sup>136</sup> These are activities more consistent with its original defensive mandate. Over the long term, the survival of NATO depends on an innovative force structure called the Allied Command Europe Rapid Reaction Corps (ARRC).<sup>137</sup> The ARRC was created by NATO to "meet the sort of risks and challenges which are considered more likely to emerge in the future."<sup>138</sup> It is extremely flexible and designed to engage in operations ranging from peacekeeping and humanitarian efforts to high intensity conflict, giving NATO the capability to meet the full spectrum of collective security contingencies.<sup>139</sup>

Use of the ARRC to meet threats to NATO member security is clearly within the NATO mandate. The potential also exists for the use of the ARRC as NATO's method of responding to security threats on the NATO periphery, such as the Balkans and the Middle East.<sup>140</sup> The NATO treaty neither requires nor excludes operations outside of the NATO area, but Article 4 provides the basis for member nations to consult about such security

133. McInnes, *supra* note 131, at 85.

134. John Harwood & Mark M. Nelson, *Bush Is Assured Europe Wants U.S. in NATO*, WALL ST. J., Nov. 8, 1991, at A16.

135. *Settlement Treaty Hearings*, *supra* note 58, at 10 (statement of Major General John O. B. Sewall, Vice Director for Strategic Plans and Policies (J-5), Joint Staff).

136. Phil Williams, *CFE and the Future of NATO*, in *THE FUTURE OF EUROPEAN SECURITY* 133, 141 (J. Philip Rogers ed., 1993).

137. McInnes, *supra* note 131, at 93. The ARRC consists of a Corps headquarters under British command which will eventually have access to eight to ten divisions of varying forms (including: armored, airborne, airmobile, mechanized infantry, and mountain infantry) composed of nearly all NATO nationalities. The ARRC is intended to be extremely flexible in terms of size and force composition making it capable of meeting a wide spectrum of conflict situations. *Id.* at 96-97.

138. *Id.* at 87.

139. *Id.*

140. *Id.* at 98.

threats.<sup>141</sup> In the past, NATO has never acted collectively in response to out-of-area contingencies, mostly due to the objections of the French.<sup>142</sup> Recently, however, the Supreme Allied Commander Europe has argued that NATO should adopt a greater out-of-area role.<sup>143</sup> While the inter-alliance debate on the issue has not been resolved, NATO has agreed formally to out-of-area peacekeeping operations.<sup>144</sup>

NATO is transforming from a purely defensive relationship to a more standard collective security arrangement.<sup>145</sup> NATO forces will be used to meet the full spectrum of security contingencies within the NATO area and at least perform peacekeeping missions out-of-area. NATO will also eventually assume a more active out-of-area role either on its own or within the auspices of the United Nations.<sup>146</sup> While some commentators suggest that an all-European security arrangement should replace NATO,<sup>147</sup> NATO members appear to be committed to the alliance.<sup>148</sup> Even the former Soviet Union has accepted NATO as a stabilizing force on the continent.<sup>149</sup> As a key member of NATO,<sup>150</sup> Germany will increasingly be called on to support collective security actions both within and outside the NATO area.<sup>151</sup>

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141. Jane Stromseth, *Structuring a New Security Regime in Europe*, 85 AM. SOC'Y INT'L L. PROC. 277, 283 (1991).

142. Williams, *supra* note 136, at 139. The French prefer an all-European organization take such actions and the WEU has been used to fill the void. *Id.*

143. Stromseth, *supra* note 141, at 283.

144. McInnes, *supra* note 131, at 98-99.

145. See *supra* notes 130-135 and accompanying text.

146. Chapter VIII of the U.N. Charter permits the Security Council to use regional security organizations such as NATO to perform regional or international conflict management under Security Council control. Fink, *supra* note 113, at 8.

147. See Palmer, *supra* note 132, at 59 (arguing that a Euro-security organization may be better equipped to mediate regional conflicts than a U.S.-dominated NATO).

148. At the 1991 NATO conference in Rome, former President George Bush asked whether Europe was ready to forgo NATO in favor of an all-European security solution. In response, "[E]ach of the other 15 leaders personally endorsed a statement . . . calling NATO the leading force in Western security." Harward & Nelson, *supra* note 134, at A16. German Chancellor Kohl "called a united Europe without NATO 'unthinkable.'" *Id.*

149. Williams, *supra* note 136, at 140.

150. Germany is viewed as a "pivotal" member of NATO because of its resources and its geographic position in central Europe. Ingo Peters, *Neither a Pawn nor a Superpower: A New Security Arrangement for Germany in Europe*, in THE FUTURE OF EUROPEAN SECURITY 58, 65 (J. Philip Rogers ed., 1993)

151. German Air Force officers were key members of the AWACS crews enforcing the no-fly ban over the former Yugoslavia. *Security Council Decision on Bosnia Puts Pressure on Germany to Resolve Issue of the Role of the Military*, WEEK IN GERMANY HIGH TECH, April 2, 1993, available in 1993 WL 2497771. A German armored division is committed to the ARRC and can be called on in a contingency situation. McInnes, *supra* note 131, at 96.



## 3. Pan-European Security and the Western European Union

The WEU was formed in 1948 as an alliance among the West European victors of World War II "to afford assistance to each other . . . in maintaining international peace and security and in resisting any policy of aggression."<sup>152</sup> Even though a founding purpose was "[t]o take such steps as may be held to be necessary in the event of a renewal by Germany of a policy of aggression,"<sup>153</sup> the FRG was admitted to the WEU in 1954.<sup>154</sup> For the next thirty years, the WEU existed in relative obscurity in the shadow of NATO.<sup>155</sup> In 1984, however, the WEU was revived with the idea that it could be used to coordinate security policy for the European Community (EC).<sup>156</sup> Since then, it has been used to coordinate certain military activities such as the European forces involved in the Gulf War.<sup>157</sup> European forces, including German forces, have even been established outside the auspices of NATO and made available for use by the WEU.<sup>158</sup>

France openly opposes a European defense policy set by NATO, which it sees as dominated by the United States, and instead advocates the WEU as an EC defense force controlled by European will.<sup>159</sup> While most other European countries are unwilling to take the concept that far, there is support among British, German, and Italian officials for use of the WEU for out-of-area operations, rather than extending the NATO mandate.<sup>160</sup> The idea may be well intentioned, but it does not look promising given that EC countries remain free to define security issues in their own self-interest.<sup>161</sup> Divergent security policies in the Gulf

152. Treaty Between Belgium, France, Luxembourg, The Netherlands and the United Kingdom of Great Britain and Northern Ireland, March 17, 1948, 19 U.N.T.S. 51, 53.

153. *Id.*

154. Palmer, *supra* note 132, at 63 n.90.

155. *See id.* at 63-66.

156. Donna G. Starr, *An Analysis of European Political Cooperation During the Persian Gulf Crisis*, 10 DICK. J. INT'L L. J. 443, 452 (1992).

157. Palmer, *supra* note 132, at 63-64.

158. The "Eurocorps" is based in Strasbourg and consists of "an integrated force of 50,000 French, German, Belgian and Spanish troops presently under German command." In addition, two new forces consisting of Italian, Spanish, French, and Portuguese troops have been set up to protect Europe's Mediterranean flank. Tyler Marshall, *Europe Differs on Organizing Unified Forces*, PITTSBURGH POST-GAZETTE, May 29, 1995, at A1. Although the Eurocorps can be used to support NATO, its founding agreement makes it clear that its "foremost" role is to support the WEU. *Qu'est-ce qu'on fait? Ich weiss nicht*, ECONOMIST, May 23, 1992, at 51.

159. Palmer, *supra* note 132, at 65. Note that France is not a member of the military segment of NATO. *Id.*

160. Stromseth, *supra* note 141, at 283.

161. Starr, *supra* note 156, at 446.

War were a clear example of a lack of common resolve among the European states.<sup>162</sup> Even now, WEU members cannot agree on a common policy for military force structure.<sup>163</sup>

A lack of leadership is not the only factor preventing the WEU from becoming Europe's premier security arrangement. Declining military budgets make a totally separate force unrealistic.<sup>164</sup> As a result, any EC military force will be dependent on NATO equipment and expertise for the foreseeable future.<sup>165</sup> In contrast to NATO, the WEU will remain a minor actor in terms of collective security actions. Nevertheless, the WEU may take action where there is a commonality of interest among all the members, especially if the resulting operation is small. Therefore, Germany will have to consider the possibility of WEU action when planning for the use of military force.

### III. SOCIOPOLITICAL FACTORS BEARING ON THE GERMAN USE OF MILITARY FORCE

A country may be legally entitled to use military force, but the use of force is always tempered by social and political forces both from within and outside the country. This section analyzes

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162. Jeffrey Palmer asks the crucial question: "If the EC cannot unify its current members on policy questions, which they agree upon in principle, (here, the condemnation of the Iraqi invasion of Kuwait), how will it successfully coordinate a political body to encompass the entire European continent?" Palmer, *supra* note 132, at 63.

163. Some countries, like Germany, want a "centrally organized and highly integrated European military force," while Great Britain insists that its military forces will only operate under its national control. Marshall, *supra* note 158, at A1. Internal disagreements among WEU members may severely hamper the organization's effectiveness as a collective security arrangement for some time. Indeed, some commentators have suggested that only a NATO led by a strong U.S. presence can focus European security interests. See Hans-Peter Schwarz, *Germany's National and European Interests: A Country Without National Interests?*, DAEDALUS, Spring 1994, at 81, 88. Schwarz suggests two major arguments against the WEU taking NATO's place. The first is that U.S. presence in Europe has been a major factor in maintaining stability and democracy. The second is that the United States is effective at balancing interests which would otherwise have European countries divided and continuously maneuvering for position. *Id.* at 96. The WEU troubles in the Gulf War appear to have postponed its establishment as a full-scale Europe-only defense system. Starr, *supra* note 156, at 452. Many have accepted what Jonathan Eyal, director of studies at the Royal United Services Institute, has stated, "[t]he reality is that Europe cannot mount a large military operation on its own without American support." Marshall, *supra* note 158, at A1.

164. It has been estimated that the cost to create an independent European military force (outside of NATO) would be over \$100 billion annually for the next ten years. *Id.*

165. Harwood & Nelson, *supra* note 134, at A16.

the attitudes on the use of force within the German government and among the German people, as well as German international goals that might require a change in those attitudes. In addition, it reviews the international political climate from the perspective of those countries who would be most interested in a decision to expand the use of force: the United States, Russia, and the other major powers in Europe.

#### A. *Internal Factors Bearing on the Expanded Use of Force*

The FCC decision is only the first step toward expanded use of German military force. While the court ruled that the constitution does not forbid the out-of-area deployment of German forces, it also made it clear that the actual decision to commit troops in any particular situation belongs to the German Parliament and ultimately the German people.<sup>166</sup> The attitudes and the trends within the German government and among the populace in general influence the path German policy will follow.

##### 1. Conflicts Within the German Parliament

The FCC decision, as a matter of German law, did not resolve what continues to be a divisive political issue. From the time the Basic Law was adopted until relatively recently, the German government regularly proclaimed that it was forbidden to use armed forces for any reason other than the defense of NATO territory.<sup>167</sup> Ironically, it was this hard-line stance against the use of military forces in the Gulf War that resulted in the gradual policy changes that followed.<sup>168</sup> Shortly after the war ended, the

166. Mark M. Nelson, *Berlin Loses American Guard*, WALL ST. J. EUROPE, July 13, 1994, at 1.

167. This was the clear position taken as Allied forces began to gather for the war against Iraq. The German government was quick to take political measures against Iraq. It condemned the Iraqi invasion, froze the assets of both Iraq and Kuwait, and lent its support to international economic sanctions. Marc Fisher, *European Grope for Unified Response Toward Persian Gulf Threat; Bonn, Leery of Larger Role, Considers Joining Task Force*, WASH. POST, August 15, 1990, at A18. However, as Defense Minister Gerhard Stoltenberg made clear, "no German forces could take part in the international effort because of the constitutional restrictions against military involvement outside of the NATO area." *Id.*

168. Fisher, *supra* note 5, at A27. The resulting Allied backlash led to "a growing awareness that any repeat of the 1991 Persian Gulf War, where Germany sat at home alone while the rest of Western Europe went to fight, would be disastrous for the country." Marshall, *supra* note 158, at A1. In a later interview, Karl Lamers, a German foreign policy specialist and legislator, said, "We've got to accept our responsibility, . . . [o]ur ability to keep our freedom, our prosperity depends far more on the Germans than we realize.'" *Id.*

German government began to send limited numbers of military forces outside of the NATO area.<sup>169</sup>

The actions touched off a political debate that highlighted strong divisions in the government. The opposition party, the SPD, took the position that "German troops must never be permitted to join international combat missions."<sup>170</sup> Opposition by the SPD and the Green party continued when the German government sent military engineers to support the U.N. mission in Somalia and allowed German air crew members to fly on Airborne Warning and Control System (AWACS) aircraft performing surveillance of the former Yugoslavia.<sup>171</sup>

The attitude against out-of-area use of force showed some signs of changing, however, in the debate over German support for the U.N. mission in Bosnia.<sup>172</sup> Government support for a

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169. Germany sent troops to take part in the humanitarian effort to help the Kurds in Iraq, even though the mission took place outside of NATO territory. Fisher, *supra* note 5, at A27. In 1992, naval forces were committed to operations off the Yugoslav coast "as a way to broaden the reach of German military forces beyond strict limits observed for decades by West German governments." Marc Fisher, *Deployment of Destroyer Sets Off Storm in Bonn*, WASH. POST, July 16, 1992, at A18. The German foreign minister, Klaus Kinkel, inferred that the action was taken partially to reduce pressure from the western allies stemming from Germany's refusal to participate militarily in the Gulf War. He suggested that it was time for Germany to "drop its 'shirker' role and quit behaving like 'an impotent dwarf' in international organizations." *Id.*

170. Rick Atkinson, *New 'Grand Coalition' Less Likely in Germany; Social Democrats Still Targeting Kohl*, WASH. POST, August 25, 1993, at A16. "The policy declaration represented a victory for the party's pacifist faction and seemed to scuttle chances for a compromise with Kohl's government regarding the role of Germany's military." *Id.* The SPD leader clearly announced the basic point of contention: "The conflict we have in Germany . . . is about whether our armed forces can be deployed for wars that have nothing to do with the defense of our country." *Id.* The party adopted the position that German military forces could only be used for the defense of NATO. Many of the party members subscribed to the theory that the constitution forbade German involvement in combat abroad. The ruling party, the Christian Democrats (CDU), took the opposite position saying that, "our position is clear and precise: the German army can be deployed in U.N. missions." *Id.*

171. Nelson, *supra* note 166, at 1.

172. In late 1994, the CDU argued that Germany had a responsibility to support U.N. and NATO operations in Bosnia. In a speech to the German Parliament, Defense Minister Volker Ruehe said, "[w]hen it is a question of providing protection for Frenchman, Britons and Americans who have done so much for our freedom, without whom we would never have achieved German unity in freedom, anyone who refuses this is taking an axe to the alliance." Ramesh Jaura, *Germany-Bosnia: Opposition Mounts to Military Involvement*, Inter Press Service, Dec. 23, 1994, available in 1994 WL 8688061.

Opponents saw the action as simply bowing to the will of NATO. A member of the Green party even suggested that the chief of the German armed forces had conspired with NATO leaders to persuade them to ask for the German forces. *Id.*

Many members of the SPD, however, switched sides and agreed to some type of military support. Guenter Verheugen, general secretary of the SPD, said that it

combat role in Bosnia increased in early 1995, culminating in a Parliament vote to commit up to 1,700 troops to support the U.N. mission.<sup>173</sup> Despite the fact that the coalition government holds only a ten seat margin in the Parliament, the vote in favor of the deployment was 386 to 258.<sup>174</sup> Included in the solid majority were several dozen members of both the SPD and the Green party who ignored their party's pacifist traditions.<sup>175</sup> In December of 1995, when another vote was taken to commit additional troops, the margin was even wider with 543 voting in favor of the deployment and only 107 against deployment.<sup>176</sup>

Despite this obvious change in attitude, the German Parliament is still a long way from endorsing the unrestricted use of military force. Restrictions on the activities of the forces deployed in Bosnia show that these first steps are tentative.<sup>177</sup> In addition, the government continues to reduce the size of the German military, calling into question its commitment to any significant use of forces in the future.<sup>178</sup> Reductions in both the

had become "self-evident that Germany has to be ready to assist the U.N. in [the] former Yugoslavia." *Id.* While the complete reason for the change in position is not clear, some have suggested that SPD members were convinced to support the measure by "more than four years of intense media coverage of the ongoing slaughter in [the] former Yugoslavia." Erik Kirschbaum, *Reluctant Germany Votes to Send 4,000 Troops to Balkans*, WASH. TIMES, Dec. 8, 1995, at A14.

173. Mary Williams Walsh, *Edging Toward Combat, Germans Boost Bosnia Role*, L.A. TIMES, July 1, 1995, at 1.

174. *Id.* The German military commitment was substantial, including medics and logistics troops, transport planes, and Tornado bombers for reconnaissance and surface to air missile defense. Most of the German forces are restricted to supporting a rapid reaction force of British, French, and Dutch troops. *Id.* at 8.

175. *Germany Takes Bosnia Role*, *supra* note 13, at A34. One commentator called the action of several Green party leaders in voting for the deployment "startling evidence of a . . . change in German attitudes." Atkinson, *supra* note 8, at A15. Helmut Lippelt, a Green party member who voted for the deployment said, "[t]he United Nations [mission] can only function if it's protected militarily." Jaura, *supra* note 172. Another commentator pointed out that "[t]he success of Chancellor Kohl . . . in organizing a 128-seat margin for [the] vote shows how far German public opinion has come in the five years since German unification." *Id.*

176. Marsha Van De Berg, *Germany is Astride Europe Again - With a Difference*, SEATTLE TIMES, Dec. 29, 1995, at B5. The ruling party was joined in the vote by many leaders of the SPD and even the pacifist Green party. *Id.*

177. The combat aircraft are restricted to flying in support of the British-French-Dutch Rapid Reaction Force. They cannot enforce the U.N. no-fly zone or protect the U.N. safe areas. A German general in the NATO command center is responsible for ensuring that all the German Air Force assignments comply with the restrictions placed on them by Parliament. Atkinson, *supra* note 8, at A15. Despite these rigid restrictions, some of the members of the SPD are already accusing the German Air Force of exceeding parliamentary authority by flying unauthorized missions. *Id.*

178. As late as 1990, West German forces alone numbered over 500,000. Marc Fisher, *Kohl Plans Cut in German Forces; Military May Shrink 40 Percent to Buttress Faltering Economy*, WASH. POST, Feb. 7, 1993, at A26. In the Two Plus

size of forces and military budgets have also resulted in lower morale within the German military.<sup>179</sup>

Despite all these factors, however, the ruling coalition has been able to slowly steer German policy away from a forty-year pacifist tradition, and has taken the first steps toward the use of military force as a tool of foreign policy. Along the way, it has gained support from members of the opposition and has established a trend for continued acceptance of a German role in NATO and U.N. military missions.

## 2. The Will of the German People

After the carnage of World War II, it is not surprising that the German people would shun the use of force. When early discussions of rearmament were held in late 1949, a large majority of the German people opposed it.<sup>180</sup> Fifty years later, this attitude still exists and recently appeared to be growing

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Four Treaty, Germany committed to reducing its forces to 370,000 within three to four years after reunification. Two Plus Four Treaty, *supra* note 55, art. 3. Despite the fact that this commitment is not binding under international law, it is politically binding on the government of the newly united Germany and is fully intended to be met. *Settlement Treaty Hearings*, *supra* note 58, at 18 (statement of Hon. James F. Dobbins, Jr., Principal Deputy Assistant Secretary of State for European and Canadian Affairs). In fact, the total manning of the German armed forces is expected to be down to 300,000 troops by the end of 1996 and there have been some reports that the government intends to reduce the final number to around 200,000. Fisher, at A26. However, even with the reductions, Germany still has the largest military in the European Union. Walsh, *supra* note 4, at B1. A military of reduced size may not be as much of a handicap given the general reduction of forces in Europe. Schmidt, *supra* note 63, at 29. One French defense official has suggested that Germany will be Europe's strongest military power in five years. Joseph Fitchett, *Germany Moves to Shoulder Europe's Post-2000 Military Burden*, INT'L HERALD TRIB., Dec. 7, 1995, at 1.

179. In 1993, the budget was cut by nearly \$600 million and plans for new armament programs were frozen. Fisher, *supra* note 178, at A26. In a report, Parliament found that the German military was not ready to support deployment for active operations. The report found that the lack of readiness was a result of budget cuts, integration of East German units, and large changes in force structure and planning. The report also found that German forces suffer from a severe crisis of morale brought on by the drastic cuts in defense spending and the lack of a clear political policy. Quentin Peel & Reuter, *Warning on German Forces: Bundeswehr not ready for active operations, says report*, FIN. TIMES, March 24, 1993, at 3. However, it is also expected that the reduced force structure may result in the elimination of the draft and a move to an all professional military. Fisher, *supra* note 178, at A26. This would likely result in a higher quality, although smaller, force and would probably eliminate some of the current morale problems.

180. MCGEEHAN, *supra* note 34, at 68. The New York Times reported, "The French aversion to arming the Germans appears to be matched only by the German aversion to being rearmed." *Id.* For a good description of many of the reasons why most Germans were against rearmament see Large, *supra* note 2, at 45-47.

stronger.<sup>181</sup> During the Gulf War when the attack on Iraq began, thousands of Germans denounced it in the streets.<sup>182</sup> Although support for Allied action increased as the war went on,<sup>183</sup> the vast majority of Germans opposed any direct involvement by the German military.<sup>184</sup> Although there was some support for the U.N. peacekeeping efforts in Somalia,<sup>185</sup> overall there is little popular support for any use of military force.<sup>186</sup>

If public opinion continues in this general vein, it is unlikely that the German government will be able to expand the use of military force even with the blessings of the Parliament and the FCC. The current action in Bosnia is likely to be a watershed in this regard. From early on, public opinion was against any German military involvement in the former Yugoslavia, and this attitude did not change significantly over time.<sup>187</sup> Nevertheless,

181. Fisher, *supra* note 178, at A26. Opinion polls are showing reduced support for use of military forces. In the early 1980s, three quarters of West Germans supported the need for armed forces, while polls today show that less than half continue to support that need. *Id.* With the demise of the Soviet Union, many Germans no longer see a justification for the *Bundeswehr* and believe the money could be better spent on the cost of reunification. *Qu'est-ce qu'on fait? Ich weiss nicht*, *supra* note 158, at 53. The feeling is strong not only among those who remember World War II but among the younger generation as well. This is born out by "the fact that each year almost as many German 18-year-olds declare themselves to be conscientious objectors and opt for alternative, and longer, civilian service as actually report for duty as draftee soldiers in the *Bundeswehr*." Dornberg, *supra* note 2, at D11.

182. Timothy Aepfel, *Outgoing U.S. Ambassador to Bonn Says Unfited Germany Doesn't Pose a Threat*, WALL ST. J. (Europe), Aug. 16, 1991, at 2.

183. Initially, only about half the German public thought the war was justified. Following a visit by the German Foreign Minister to war-damaged Jerusalem, support for the allied action firmed up and reached 66% in the opinion polls. Christopher Knowlton & Carla Rapoport, *Germany & Japan: Missing in Action*, FORTUNE, March 11, 1991, at 57, 58.

184. Although one poll eventually showed 80% of Germans supporting the coalition attack, three-fourths of the same people opposed any direct involvement by the German military. John Templeman, *It's Time for Germany to Stop Sitting on its Hands*, BUS. WEEK, February 4, 1991, at 67.

185. A poll by the German military showed an 80% public acceptance of the military's efforts in Somalia. Nelson, *supra* note 166, at 1.

186. Marshall, *supra* note 158, at A1. In addition, a commentator suggests that "[t]he gradual disintegration of the centrist Free Democrats and the prospect that the environmentalist Greens might emerge as the new holders of the balance of national power will only enhance this reluctance." *Id.*

187. In 1992, a poll reported in a Munich newspaper showed 65% of those surveyed were against any German participation in a joint European effort to enforce a cease fire and 54% were opposed to any military actions outside of NATO territory. Fisher, *supra* note 167, at A18. In 1993, another survey showed 64% against any German military action to end the civil war in Yugoslavia and 53% expressed German forces should only be used in defense of Germany or NATO territory. Dornberg, *supra* note 2, at D11. Finally, as late as December of 1994, a survey showed 63% of those interviewed to be categorically against the deployment of German forces in Bosnia. Jaura, *supra* note 172.

since Germany has committed to U.N. peacekeeping operations, the potential exists for a change in attitude.<sup>188</sup> If the German public comes to accept the idea of forces in Bosnia, it could result in greater public support for future government attempts to use military forces in support of security actions.

### 3. Germany's Future Goals in the International Community

The united Germany has the largest population in the European community, dominates central Europe geographically, and has one of the largest and strongest economies in the world.<sup>189</sup> One would expect such a country to play a major role in international politics, but that has not been the case. The late West German Chancellor, Willy Brandt, once described his country as "an economic giant but a political dwarf."<sup>190</sup> German inaction in the Gulf War was a perfect example of this attitude. During that war, "Germany came under sharp criticism [from other countries] for not living up to the military responsibilities of a country of its stature, stability and economic clout."<sup>191</sup> Even German commentators argued that military inaction was incompatible with the united Germany's desired stature in the world.<sup>192</sup>

It now appears that the Gulf War embarrassment may have been the turning point for Germany's understanding of what responsibilities a nation must accept to be a major world power.<sup>193</sup> In September of 1993, Germany offered itself for a permanent position on an expanded U.N. Security Council.<sup>194</sup> At that time, Germany's reluctance to provide military forces to

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188. Johann G. Dora, the commander of the *Luftwaffe* forces serving in Bosnia, suggests that "[t]he feeling in German society toward the military has changed, and it has also changed in the Parliament. There's a much broader support for this kind of mission." Atkinson, *supra* note 8, at A15.

189. The united Germany has a population of 80.3 million compared to 57.6 million in Italy, 57.5 million in Great Britain, and 56.6 million in France. In 1992, Germany exported goods worth \$429 billion compared to \$235 billion for France, \$190 billion for Great Britain, and \$180 billion for Italy. Schwarz, *supra* note 163, at 84.

190. Van De Berg, *supra* note 176, at B5.

191. Walsh, *supra* note 4, at 1.

192. Josef Joffe, foreign editor of a Munich daily paper wrote, "Bonn cannot always let others do the dirty work. . . . In the long run, it cannot be good for the Germans, either, when dictators start playing with oil—the lifeline of the world economy—and the A-bomb." Fisher, *supra* note 167, at A18. The National newspaper *Die Welt* commented, "[S]overeignty is not compatible with half-neutralism in a conflict started by an aggressor in a crucial part of the world . . . [w]e must be in a position to act." *Id.*

193. Knowlton & Rapoport, *supra* note 183, at 58.

194. Ian Davidson, *Germany Seeks to Join Enlarged Security Council*, FIN. TIMES, September 30, 1993, at 4.



support U.N. peacekeeping operations was seen by many commentators as a major impediment to securing a position.<sup>195</sup> As a result, German Chancellor Kohl began to promote a greater international role for Germany's military, especially after the FCC removed the perceived constitutional barrier.<sup>196</sup>

The Parliamentary vote authorizing the use of combat forces to support the U.N. operations in Bosnia was a major victory for Kohl, and a big step toward a major international role for Germany.<sup>197</sup> Nevertheless, Germany will be pressured to support other U.N. efforts, and will have to expand its military role if it hopes to garner a Security Council position and the international leadership that comes with it.

### B. *International Factors Bearing on the Use of Force*

Given the history of German military aggression and the resulting wariness of most countries, it is unlikely that Germany will expand its military activities without considering international opinion. Economically, Germany is considered a world leader, and it will not take any action that might jeopardize that position. The United States, Russia, and Germany's neighbors in Europe are likely to have the greatest effect on any decision to use force.

The United States has the most positive view of a militarily active Germany. Upon hearing the decision of the FCC, President Clinton stated that he was "completely comfortable" with the reduced restraints on German military use.<sup>198</sup> The United States is also eager to have Germany shoulder a larger part of the cost for worldwide security.<sup>199</sup> Nevertheless, trust in Germany is not yet absolute. The primary reason for insisting that the newly reunited Germany remain in NATO was to ensure that the United States could still exert some control over its security policy.<sup>200</sup> With this one caveat, the United States is fully prepared to have Germany participate in military operations abroad.<sup>201</sup>

195. *Id.*

196. Paul Richter & Marjorie Miller, *Germany Urged to Take Broader Role, Clinton Asks Country to Share Costs and Burdens of Leading Europe*, DES. MOINES REG., July 12, 1994, at 7.

197. *Germany Takes Bosnia Role*, *supra* note 13, at A34.

198. Nelson, *supra* note 166, at 1. The United States has a close bilateral relationship with Germany and appreciates Germany's "preference for balanced, transatlantic solutions to European security problems." Geipel, *supra* note 12, at A5.

199. Richter & Miller, *supra* note 196, at 7.

200. Gustav Schmidt, *Happy Moments: Solving the Special German-Soviet Russian Conflict*, 24 CORNELL INT'L L.J. 437, 444 (1991).

201. Michael Anders, *German Ruling Lets Troops Go Abroad*, CHI. SUN-TIMES, July 13, 1994, at 34.

At the other extreme is Russia which has only recently, and very slowly, begun warming to the idea of the reemergence of German arms. Russia and Germany were enemies for most of this century and many Russians still have strong memories of German actions in World War II.<sup>202</sup> As late as 1988, the Soviet Union insisted that a divided Germany, with East Germany serving as a buffer country, was integral to Soviet security interests.<sup>203</sup> When the Soviet Union did accept the idea of reunification, it would only do so under the condition that Germany be "demilitarized" and adopt a policy of neutrality.<sup>204</sup>

The West German government went to great lengths to ease Soviet fears to win their approval for reunification and the right to remain in the NATO alliance. The Germans agreed to reevaluate the NATO view of the Soviet threat,<sup>205</sup> an effort which eventually led to the changes in NATO strategy outlined by the Rome Declaration.<sup>206</sup> The Germans also assured Moscow that the Soviets would be invited to be part of a pan-European security arrangement giving the Soviet Union a voice in the future of European security.<sup>207</sup> Finally, Germany agreed to a significant list of military and economic concessions.<sup>208</sup> Under these conditions, the Soviet Union finally agreed to reunification, membership in NATO for the united Germany, and relinquishment of its remaining World War II rights to control the German military.<sup>209</sup> Even with all of these concessions, it is likely that the former Soviet Union will monitor any significant use of German force, especially in areas where the Russians have security interests.

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202. Rick Atkinson & Fred Hiatt, *Twin Giants Sway Europe's Fate: Russia-Germany Equilibrium Crucial to Continent*, WASH. POST, November 26, 1995, at A1, A30.

203. Schmidt, *supra* note 200, at 441.

204. Valentin Falin, *Let Germany Abjure Force, Then Map its Own Future Germany*, L.A. TIMES, June 6, 1990, at B7. The extent of the desired neutrality is not clear, although included in the Soviet Union's demand was a requirement that "Germany would be obliged not to use force or the threat of force to resolve conflicts of interest or pursue any objective." *Id.* (emphasis added). See also Schmidt, *supra* note 200, at 442. To the Soviet Union, the U.S. demand that the united Germany remain a part of NATO was a continuation of Cold War confrontationalism. Falin, *supra* at B7.

205. Schmidt, *supra* note 200, at 444.

206. See *supra* note 134 and accompanying text.

207. Schmidt, *supra* note 200, at 442.

208. Germany agreed to the following concessions: (1) NATO forces will not be deployed on the territory of the former East Germany; (2) the United States will reduce the size of its military presence in Germany; (3) limits will be placed on the overall size of the German military; (4) there will be no nuclear weapons ever stationed on former East German soil; and (5) Germany made major economic contributions to the modernization of the Soviet economy. *Id.* at 451-52.

209. See *supra* notes 55-58 and accompanying text.

The attitudes of the other countries in Europe tend to fall somewhere between these two extremes. Initially, history made it very difficult for other Western European powers to accept a Germany with military forces under sovereign control.<sup>210</sup> Eastern European countries also had reason to be concerned.<sup>211</sup> Even the Poles, while welcoming the prospect of German participation in multilateral military operations, suggested that German participation "will have to be prepared with more care than usual."<sup>212</sup>

Events since reunification have done much to ease the fears of other European countries. First, the reunified Germany has remained a part of NATO and therefore quelled some of the fears of what course a "neutral," but armed, Germany might take without NATO restraint.<sup>213</sup> Germany has worked hard to continue to associate itself with NATO interests and thus "anchor [itself] ever deeper in the West."<sup>214</sup> In addition, Germany amended Article 23 of the Basic Law to commit itself to the development of the European Union and its common interests.<sup>215</sup> On the military side, Germany is using joint operations to convince other European countries of its sincerity.<sup>216</sup> Finally, Germany has received significant help from the United States which remains a stout advocate of a greater German role.<sup>217</sup>

210. "The French, Belgians and British have long memories of German juggernauts over two centuries." Hobart Rowen, *Japan and Germany Must Take Bigger Military, Policy Making Roles in World Affairs*, WASH. POST, March 3, 1991, at H1, H14. As French analyst Phillippe Moreau Defarges put it, "there is this fear that the old devils can always come back" Nelson, *supra* note 166, at 1.

211. As Dieter Dettke, executive director of the German Friedrich Ebert Foundation, explains it, "From the perspective of a small eastern European country, even a Bundeswehr which has been reduced to 370,000 soldiers is large, . . . modern and well-equipped and sits on their doorstep." Van De Berg, *supra* note 176, at B5.

212. Nelson, *supra* note 166, at 1 (quoting Andrzej Karkoszka, director of the Department of Strategic Studies and the Polish Defense Ministry).

213. Quint, *supra* note 57, at 606.

214. Van De Berg, *supra* note 176, at B5.

215. Schwarz, *supra* note 163, at 84. Schwarz suggests that "[b]y this step the virtual equation of German and European interests . . . was anchored in the constitution." *Id.* at 85.

216. The Franco-German Corps was intended to cement a "special relationship" between Germany and France. *Qu'est-ce qu'on fait? Ich weiss nicht*, *supra* note 158, at 51; See also Fitchett, *supra* note 178, at 1 (German Chancellor made a personal inspection of a Dutch-German military force to allay Dutch fears.).

217. Nelson, *supra* note 166, at 1.

#### IV. SPECTRUM OF POTENTIAL MILITARY INVOLVEMENT AND GERMANY'S SOVEREIGN USE OF FORCE

Now that Germany has full sovereign rights over its military, its options for the use of force represent a spectrum ranging from a policy of virtual neutrality, where German forces are only used in self-defense or perhaps in direct defense of NATO territory, to a policy of aggression based on national objectives reminiscent of the first half of the century. Neither of these extremes is the likely final outcome. External pressure and a desire to take a position of economic and political leadership in the post Cold War world will prevent Germany from completely shirking military responsibility. National and international legal restrictions and the watchful eye of a wary international community, however, will prevent the type of aggressive militarism that sparked two world wars. In between these two extremes lies a wide range of options including use of force for peacekeeping, peacemaking in a multilateral context, and unilateral military action for the same purposes. This section analyzes this spectrum of potential use of force and relies on the factors identified in the first part of this Note to suggest the most likely path German military policy will take.

##### A. *Self-Defense and a Policy of Limited Use of Force*

One potential direction for German policy would be a retreat to use of force only in self-defense. Some Germans oppose any type of military involvement based on "historical, moral, constitutional, and budgetary grounds."<sup>218</sup> In theory, Article 24 of the Basic Law, which allows Germany to transfer sovereign powers to collective security organizations, requires that the mandates of those organizations be met.<sup>219</sup> The U.N. Charter, however, does not require support for U.N. military operations, and both NATO and the WEU only require action when one of the members is attacked.<sup>220</sup> Germany is not obliged to provide military forces for any other reason than the direct defense of NATO or WEU territory.

Some of the smaller parties in the German Parliament do not support the use of force except in self-defense.<sup>221</sup> Some

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218. Schwarz, *supra* note 163, at 102.

219. GG, *supra* note 3, art. 24.

220. See *supra* notes 128, 130 and 152 and accompanying text.

221. Both the Green party and the reform Communist Party of Democratic Socialism opposed the government's recent efforts to send forces to Bosnia. Kirschbaum, *supra* note 172, at A14. The fundamentalist wing of the Green party calls for neutrality and the dissolution of all military alliances. Crawford and Halfmann, *supra* note 48, at 223.

commentators have suggested that an alliance formed between the SPD and these smaller parties might drive Germany toward a policy of neutrality.<sup>222</sup> Such a possibility seems to have taken on new life now that the SPD has elected a new leader.<sup>223</sup> The new head of the SPD is a pacifist, and many of his other political views accord with the German left wing.<sup>224</sup> These factors increase the possibility of an alliance between the SPD and these smaller parties.

Despite these changes, the chance of Germany returning to an isolationist military policy is remote. The current coalition government supports membership in NATO and a multilateralist policy.<sup>225</sup> Other members of NATO expect Germany to support military collective security actions in the Middle East and Eastern Europe.<sup>226</sup> In the end, Germany will not realize its international political goals without using military force where appropriate.<sup>227</sup> These very pragmatic reasons account for the fact that "German neutrality . . . is not a political option contemplated by any of the major political forces in Germany"<sup>228</sup> and the fact that less than one-third of the German population supports a policy of neutrality.<sup>229</sup> At least for now, "Germany [is] moving with . . . slightly surprising speed to shed inhibitions about the use of force."<sup>230</sup>

### B. *Military Action within a Collective Security Agreement*

Germany's actions in Somalia and Bosnia represent the first steps toward the external projection of force within a multilateral collective security agreement. After the 1994 FCC decision, there is no legal impediment to continuing these types of operations. According to the FCC and constitutional authority in Article 24, Germany may participate in collective security actions under the auspices of the United Nations, NATO, and the WEU as long as they are "permissible under public international law and can be said to create or secure peace."<sup>231</sup> Because the Two Plus Four

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222. Emil J. Kirchner & James Sperling, *From Instability to Stability*, in *THE FEDERAL REPUBLIC OF GERMANY AND NATO* 1, 14 (Emil Kirchner and James Sperling eds., 1992).

223. Michael Anders, *New Leader Rouses Social Democrats for Comeback After Crisis*, Agence France-Presse, Nov. 17, 1995, available in 1995 WL 11472042.

224. *Id.*

225. Crawford & Halfmann, *supra* note 48, at 235.

226. *Id.* at 217.

227. Schmidt, *supra* note 63, at 27.

228. Peters, *supra* note 150, at 65.

229. Crawford & Halfmann, *supra* note 48, at 222-23.

230. Fitchett, *supra* note 178, at 1.

231. Kress, *supra* note 51, at 419.

Treaty specifically confirms Germany's right to use force in accordance with the Basic Law, the only remaining requirement for use of force is that it be approved by a majority vote of Parliament.

Germany will have many opportunities to use this new-found sovereignty. Although there appears to be little chance of a major war in Europe in the foreseeable future,<sup>232</sup> the end of the strong restraint formerly exercised by the former Soviet Union over Eastern Europe respective camps has rekindled ethnic, religious, and economic differences.<sup>233</sup> As a result, the United States, Britain, and France have pushed for more active German military participation in collective security agreements.<sup>234</sup> The German leadership understands that the United States wants Europe to be more responsible for its own security and that Germany must shoulder a large part of that load.<sup>235</sup>

It is likely that the German Parliament will respond favorably to this responsibility and approve collective security actions in support of the United Nations, NATO, and the WEU. In the past, Germany has shown a preference for acting in a multinational role.<sup>236</sup> The German government's recent decision to assist in Bosnia demonstrates a growing acceptance of a military responsibility to its allies.<sup>237</sup> The voting margin of the decision in Parliament adds credence to the view that Germany has willfully accepted that role. Still, Parliament should not be expected to blindly approve every request for military assistance. Chancellor Kohl made it clear that although Germany recognizes its international responsibilities, it will continue to make the decision

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232. Dieter Dettke, *Civil Foreign Policy: German Domestic Constraints and New Security Arrangements in Europe*, in *THE FUTURE OF EUROPEAN SECURITY* 250, 252 (Beverly Crawford, ed., 1992). Although Russia still has a powerful military, the loss of forward basing in the former Warsaw Pact countries and a reduced military posture would give the West much more notice of impending attack. This makes such an attack unlikely. *Id.*

233. Sanderson, *supra* note 106, at 35. When invasion of Europe by the Soviet Union was the primary threat to NATO security interests, Germany's will and ability to defend its own territory was sufficient to meet Western needs. Now that the primary security interests have changed, there is a need for Germany to contribute to actions outside of its own territory. Schmidt, *supra* note 63, at 31-32.

234. *Germany's Expanding Role*, *supra* note 6, at A14.

235. Following the announcement of the 1994 FCC decision, Chancellor Kohl stated, ". . . America needs a Europe that assumes greater responsibility for itself and for international security. We Germans know that our security and our foreign-policy capability depend on our being reliable partners and our allies having confidence in us." Nelson, *supra* note 166, at 1.

236. Van De Berg, *supra* note 176, at B5.

237. *Id.*

to use force "on a case-by-case basis."<sup>238</sup> Each decision will no doubt take into account whether the request involves a peacekeeping or peacemaking operation.

### 1. Support of Multilateral Peacekeeping Operations

Germany will be expected to support more peacekeeping operations in the future. The number of such actions is on the rise,<sup>239</sup> and the United Nations has asked Germany to participate fully in future military operations.<sup>240</sup> In light of a recent U.N. study suggesting that all permanent members of the Security Council should contribute to peacekeeping operations, Germany's bid for a permanent Security Council seat gives it added incentive to participate in peacekeeping.<sup>241</sup> Since NATO has also taken on a peacekeeping role, Germany's involvement in future NATO actions will be critical to attempts to bring stability to Europe.<sup>242</sup>

The 1994 FCC decision gives a clear "green light" to use of German military forces for multilateral peacekeeping under Article 24 of the Basic Law.<sup>243</sup> The lopsided vote supporting operations in Bosnia, which have been couched in terms of a "NATO-led peacekeeping, not peacemaking, mission,"<sup>244</sup> shows that Parliament fully supports such actions. Even the new head of the opposition SPD confirms that his party supports "participation in 'peace operations' under the United Nations."<sup>245</sup> The German people also support peacekeeping operations, and the German military, even in its reduced state, is adequate to support such contingencies.<sup>246</sup> Barring some unforeseen change, German participation in future peacekeeping operations appears to be a forgone conclusion.

### 2. Multilateral Peacemaking and Beyond

German participation in multilateral peacemaking operations is somewhat less certain. There is no constitutional problem with such action. The FCC ruled that Article 24 includes authority for

238. *Remarks by President Clinton, Chancellor Kohl, and President Delors at the Reichstag in Berlin on July 12*, U.S. Newswire, July 16, 1994, available in 1994 WL 8283372.

239. From 1990 to 1994, the United Nations began 14 peacekeeping operations, more than the total number of actions in its history to that point. Rossman, *supra* note 104, at 240-41.

240. Schmidt, *supra* note 63, at 29.

241. Bring, *supra* note 112, at 63-64.

242. See Nelson, *supra* note 166, at 1.

243. Wiegandt, *supra* note 75, at 890.

244. Van De Berg, *supra* note 176, at B5.

245. Anders, *supra* note 223.

246. See *supra* notes 185 and 188 and accompanying text.

participation in coercive actions such as those brought under Chapter VII of the U.N. Charter.<sup>247</sup> In the case of peacemaking operations, however, it will be more difficult to obtain Parliamentary support. The new leader of the SPD has come out against "combat missions" for the German military.<sup>248</sup> The German people may not be supportive of such actions. Former Defense Minister Volker Ruhe has suggested that it could be a decade before the German people are psychologically receptive to the external use of military force.<sup>249</sup>

Nevertheless, the ruling government is preparing for these types of contingencies. It has created a 50,000 man, all volunteer, rapid reaction force designed for combat missions outside of Europe.<sup>250</sup> This force is clearly too large for standard peacekeeping missions. In addition, Germany lobbied hard to provide the commander for NATO's new ARRC.<sup>251</sup> While Germany lost out to the British in the end, the very fact that it was interested suggests increasing support for external combat operations. Finally, military planners have been preparing for operations in potential trouble spots like North Africa and the Middle East if they are necessary to protect German interests in strategic materials.<sup>252</sup> These actions suggest a government willing to engage in future peacemaking operations.

Other factors also point toward Germany becoming more involved in future peacemaking. Pressure for this type of action will come from Germany's allies in the same way as it will for peacekeeping. In addition, although the United States and French governments have supported Germany's bid for a permanent seat on the Security Council,<sup>253</sup> final selection, by Charter, must be based in part on the member's "contribution to the maintenance of international peace and security."<sup>254</sup> If selected, Germany will be expected to deploy troops in support of U.N. actions around the world.<sup>255</sup> For these reasons, Germany is likely to move toward support of peacemaking operations in the future.

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247. Kress, *supra* note 51, at 417.

248. Ian Traynor, *SPD Fudges but Returns Home Cheered*, *GUARDIAN*, November 18, 1995, at O16.

249. *Qu'est-ce qu'on fait? Ich weiss nicht*, *supra* note 158, at 53.

250. Fitchett, *supra* note 178, at 1.

251. McInnes, *supra* note 131, at 100.

252. An internal *Bundeswehr* report, quoted in several German publications, implied that actions might be taken to preserve "political, economic, military and ecological stability." Fisher, *supra* note 5, at A27.

253. Smith, *supra* note 121, at 185.

254. *Id.* at 178.

255. *Id.* at 188-189.



### C. Unilateral Intervention in Support of Foreign Policy

After more than forty years of having its security policy defined by NATO and the United States, Germany has become comfortable working within the confines of multilateral security arrangements.<sup>256</sup> During this period, German national interests played a secondary role in defining security policy.<sup>257</sup> The return of full military sovereignty now presents Germany with the possibility of taking unilateral action in support of its own national interests.

Three sources of crisis are potentially important enough to German interests that they might lead to unilateral action. First, Germany's national interests are heavily tied up in its world class economy and the foreign trade that helps fuel it.<sup>258</sup> A security crisis that threatens the German economy or foreign trade could present the potential for unilateral use of force.<sup>259</sup> Second, because Germany has strong economic and political interests in the stability of Eastern Europe,<sup>260</sup> any destabilization in this area would be a major threat to Germany's national interest.<sup>261</sup> A

256. As Emil Kirchner et al. explain:

Since the 1950s, Germany's position in the international political system and its security policy were fairly well defined, because fundamental decisions were largely made for it. Since that time, Germany's political elite has enjoyed a consensus on two major points. First, Germany must remain firmly anchored in the Western security system; and second, it was necessary for Germany to participate in multilateral frameworks on a co-operative basis. Multilateralism was slowly transformed into an end in itself.

Emil Kirchner et al., *Introduction*, 'in THE FUTURE OF EUROPEAN SECURITY 6 (Christoph Bluth et al. eds., 1995).

257. Schmidt, *supra* note 63, at 25.

258. Schwarz, *supra* note 163, at 89. Schwarz suggests that the high costs of reunification and a corresponding dependence on world capital markets to pay for it have put Germany in a position of acting in an even more "narrowly defined national interest" where its economy is involved. *Id.* at 91-92.

259. As Crawford & Halfmann point out: "Countries with great-power economies have increasingly acquired far-flung interests. If those interests conflict with the interests of other powerful states, the temptation to augment economic power with appropriate military capabilities arises." Crawford & Halfmann, *supra* note 48, at 216.

260. Schwarz, *supra* note 163, at 98-99. Schwarz notes that Germany is equally important to Eastern and Southeastern European countries and that these countries have high expectations of a continuing German role in this area. *Id.* at 86. This suggests that German national interests in this area will become even more important as these countries continue to democratize and draw away from the former Soviet Union.

261. *Id.* at 101. The possible destabilization of Eastern Europe is a very real concern unless their economies begin to improve. Dettke suggests that "if living conditions [in Eastern Europe] decline further, the potential for social and ethnic

serious security threat in Eastern Europe presents a strong justification for unilateral action.<sup>262</sup> Finally, a breakup of NATO and the failure of European collective security could force Germany to act unilaterally to protect its national interests and its position as a major power.<sup>263</sup>

In order to take unilateral military action, however, Germany needs to overcome several legal obstacles. The appropriate analysis would vary depending on whether Germany was defending another country from external attack or intervening in another country's internal affairs (for example, attempting to resolve a civil war or protect human rights). First, in order to meet the mandates of Article 26 of the Basic Law and Article 2 of the Two Plus Four Treaty, Germany would have to show that the action was not "aggressive." The FCC would probably not deem defense of another country from external attack "aggressive," but intervention in another country's internal struggle might meet the definition. The determination would be based on the circumstances of the case.

A second stumbling block to unilateral action would be Article 25 of the Basic Law. This article would be violated if the action was contrary to international law.<sup>264</sup> While Article 51 of the U.N. Charter would permit Germany to assist another country in its right of self-defense,<sup>265</sup> a unilateral intervention in a country's internal affairs could be considered a violation of Article 2 of the U.N. Charter.<sup>266</sup> Nevertheless, some states have found justifications to maneuver around the plain meaning of Article

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conflict will increase and possibly even endanger the emerging and still fragile democratic institutions." Dettke, *supra* note 232, at 254.

262. Schwarz suggests that German military action would be critical to the defense of Eastern Europe because of Germany's geographic position and the low probability that other Western European powers would be willing to take risks in the area. Schwarz, *supra* note 163, at 88. Indeed, some German officials have already spoken of protecting Eastern European interests in almost a "Monroe Doctrine" kind of way. Crawford & Halfmann, *supra* note 48, at 217.

263. Schwarz suggests a scenario where the WEU wins out over NATO and the United States withdraws from Europe. In such a situation, he finds it unlikely that Germany would continue allowing its security policy to be set by France and Britain and would turn instead to acting in its own national interest. Schwarz, *supra* note 163, at 97. Deprived of workable collective security arrangements, Germany would act unilaterally to protect its interests. Crawford & Halfmann, *supra* note 48, at 245.

264. See *supra* note 28 and accompanying text.

265. Article 51 provides in part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." U.N. CHARTER art. 51. See also Houck, *supra* note 125, at 13.

266. See *supra* note 120 and accompanying text.

2.<sup>267</sup> Although a supportable argument against unilateral action could be made based on Article 25, the FCC would be unlikely to use this as a basis for a ruling.

Probably the strongest argument against unilateral use of force can be made based on Article 87a, Section 2, of the Basic Law. This would be essentially the same argument made by the opposition in the 1994 FCC case.<sup>268</sup> In that case, the FCC dismissed the argument because it found that Article 24 implicitly permitted the use of force within the confines of collective security agreements.<sup>269</sup> Unilateral actions, however, could not claim protection under Article 24. Any such action, therefore, would have to meet Article 87a's mandate that it be for defensive purposes.<sup>270</sup> While the FCC has not ruled on the exact definition of the "defense caveat," commentators have argued that it requires a "finding by the [Parliament] that [Germany] is under attack or that an attack is imminent."<sup>271</sup> Clearly, the majority of unilateral actions would not meet this requirement. As a result, the FCC would probably declare unilateral use of force unconstitutional.

Based on the authority of the Basic Law, a ruling of unconstitutionality by the FCC would effectively end any attempt at the unilateral use of force.<sup>272</sup> One possible method to allow such use of force would be to amend the Basic Law. The Basic Law, however, is structured to preserve the status quo and limit the power of the state. Such a change would be difficult, especially given the current attitudes in Parliament.<sup>273</sup> The only

267. See Fink, *supra* note 113, at 7 (pointing to interventions "to support self-determination, socialism (Brezhnev Doctrine), democracy (Reagan Doctrine) and humanitarian interventions.").

268. See *supra* notes 84-89 and accompanying text.

269. See *supra* note 28 and accompanying text.

270. According to Kress:

Given the Court's insistence on not deciding the issue [of whether Article 87a(2) governs the external use of armed forces outside of systems of mutual collective security], caution is called for here. It seems at least as likely that, if faced with this specific issue, the Court would attribute decisive weight to the wording rather than to the drafting history of Article 87a(2) and affirm its applicability to the external use of the armed forces outside collective security systems.

Kress, *supra* note 51, at 420.

271. Kilimnik, *supra* note 85, at 128 n.56 (referring to Article 115a of the Basic Law).

272. The constitution grants the FCC authority to ensure the "Basic Law will prevail over all legal rules or state actions that would subvert or offend it." Kommers, *supra* note 16, at 847.

273. *Id.* at 853. Amending the Basic Law requires a two-thirds vote in Parliament which is unlikely given the opposition party's strict opposition to the use of force for the "projecting of power in the national interest." Fisher, *supra*

other alternative would be to replace the Basic Law with a new constitution for the unified Germany under Article 146. Since reunification, however, the Basic Law has taken on the character of a permanent constitution, and thus, it is unlikely that it will be replaced.<sup>274</sup> Even if a new constitution were to be subjected to a referendum of the German people, it is unlikely that their current attitudes would support any reduction of the current restraints on the use of force.<sup>275</sup>

Finally, there are other factors that suggest that a unilateral use of force is unlikely. The German military, due to its reduced size and morale problems, could probably not sustain a major external intervention. In addition, any such action would undoubtedly be disfavored by part or all of the international community. Germany's neighbors are accustomed to having German military policy anchored firmly within the policies of NATO or the United Nations. Unilateral operations have the potential for renewing old fears and hindering Germany's international relations. For these reasons, Germany is unlikely to undertake any unilateral use of force in the foreseeable future. Instead, any German action is likely to remain within the guidelines of multilateral security agreements.<sup>276</sup>

#### D. Nationalism and a Return to Aggression

Of all the potential paths Germany could take, a return to nationalistic aggression is the least likely. Such action is incompatible with the national culture of today's Germany.<sup>277</sup> Unlike earlier this century, Germany no longer has outstanding claims to territories occupied by other countries.<sup>278</sup> Article 1 of

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note 5, at A27 (quoting Karsten Voigt, an SPD legislator on the Parliamentary Defense Committee).

274. See Kommers, *supra* note 16, at 837 (noting the authority given the Basic Law by the passage of time and the decision by East Germany to accept it during reunification rather than demand a new constitution).

275. See *supra* notes 180-88 and accompanying text.

276. Peters, *supra* note 150, at 72. After the 1994 FCC decision was announced, German Foreign Minister Klaus Kinkel provided assurances that there was no threat of Germany acting unilaterally. In his words, "Germany . . . does not want to become the world police." Nelson, *supra* note 166, at 1.

277. The opinions of the commentators appear united on this point. See Van De Berg, *supra* note 176, at B5 ("we have got the most benevolent united Germany that history has seen. Germany has undergone a democratic evolution."); Farmer, *supra* note 1 ("The new Germany is physically and psychologically far different from the country created a century ago out of Prussian ambition, which produced two World Wars. Its relations with its neighbors, East and West, are vastly different."); Peters, *supra* note 150, at 58-59 (" . . . in its forty-year history the Federal Republic has repeatedly demonstrated its liberal, democratic values and commitment to a stable, secure Europe.").

278. Two Plus Four Treaty, *supra* note 55, art. 1.

the Two Plus Four Treaty states, "The united Germany has no territorial claims whatsoever against other states and shall not assert any in the future."<sup>279</sup> Germany's integration with NATO and the WEU also makes it improbable that its national interest would ever diverge sufficiently from the interests of those organizations to incite unilateral aggressive action.

In addition, such aggressive action would be unquestionably illegal under both international and German constitutional law. It would violate the U.N. Charter and the Two Plus Four Treaty. As a result, such action would violate Article 25 of the Basic Law. It would also violate the ban on the use of aggressive force in Article 26 of the Basic Law and would theoretically subject all of the government officials involved in the action to criminal sanctions. Finally, aggressive action would violate the Article 87a requirement that German forces be used for only defensive purposes.

Although the Basic Law could theoretically be amended to allow for the aggressive use of force, it is unlikely that the German government could muster the required two-thirds majority. The fervent nationalism necessary to support such a policy no longer exists in Germany.<sup>280</sup> Furthermore, none of the major parties would support such a concept. Although right-wing extremist parties do exist, none have ever received enough votes to garner a single seat in Parliament.<sup>281</sup> This situation is unlikely to change in the future, given that German voters' behavior has increasingly become tied to economic interests and Germans would see little benefit in such nationalist policies.<sup>282</sup> Hard core right-wing voters, like right-wing parties, do exist, but they comprise a small minority of the total population.<sup>283</sup>

Even an unexpected change in the German electorate, resulting in the election of parties willing to eliminate the constitutional restrictions, would still face a formidable foe in the FCC. The FCC could use its authority under Article 21 to declare the parties unconstitutional and strip them of their Parliamentary seats.<sup>284</sup> This is not an idle threat as the FCC has declared

279. *Id.*

280. As Crawford and Halfmann explain, "[N]ationalism or patriotism, which feeds on a population's pride in the 'achievements' of a nation and which has provided ideological guidelines for Germany's past foreign policies, no longer functions as a basis for pursuing national security interests in today's Germany." Crawford & Halfmann, *supra* note 48, at 240.

281. *Id.* at 221.

282. *Id.* at 222.

283. Schwarz, *supra* note 163, at 92.

284. Article 21(b) provides in part:

Parties that, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free *democratic order* or to *endanger the*

political parties unconstitutional on two occasions in the past.<sup>285</sup> Finally, if a government bent on aggressive action were to take power and attempt to amend the Basic Law, the FCC would still have one last line of defense. German constitutional law gives the FCC the authority to void "any constitutional amendment conflicting with the core values or spirit of the Basic Law as a whole."<sup>286</sup> Presumably, any attempt to remove military restrictions so basic to German constitutional history would be considered unconstitutional.

## V. CONCLUSION

The German potential to use military force must be understood in the context of forty years of legal restraints and security policies dictated by multilateral security organizations. While the 1994 FCC decision opens the door for sovereign use of force, numerous social and political factors influence the selection of a security option. These factors include: the will of the German people and their Parliament, the demands and fears of Germany's allies and European neighbors, the state of the German military, and Germany's goals in the international arena. The scope of possible action will also be constrained by remaining restrictions enforced through international agreements and the Basic Law itself.

The spectrum of potential military use ranges from a policy of semi-neutrality and self-defense to aggressive action based on nationalist interests. Within this range of options, Germany is most likely to accept external responsibilities, but only within the multilateral framework of the United Nations, NATO, and the WEU. The constitutionality of such action is clearly supported by the FCC and the German Parliament and the German people are supportive at least to the extent of peacekeeping operations. In the long term, as the German public accepts its international role, Germany is likely to support peacemaking operations as well.

There is little chance that Germany will begin acting unilaterally. There are several restrictions in the Basic Law that

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*existence* of the Federal Republic of Germany are unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality.

GG, *supra* note 3, art. 21 (emphasis added). The FCC could base the action on the argument that attempts to take aggressive military action were contrary to the democratic order or that such action in violation of international law might invite retaliation which would endanger the continued existence of Germany.

285. The FCC outlawed a neo-Nazi party in 1952 and the German Communist Party in 1956. Kammers, *supra* note 16, at 854.

286. *Id.* at 852 (emphasis added).

would prevent such actions, and the German Parliament is not supportive of amendments to allow the unilateral use of force. Aggressive actions based on nationalist interests are even less likely and would have to find their way through multiple layers of legal checks before they could emerge. These legal restraints, the watchful eye of the international community, and the modern German culture make Germany far less likely to engage in unilateral action than the United States or Russia.

In the end, Germany's resources, industry, and ability to equip and maintain a large military force demand that it accept its share of responsibility in the post-cold war world.<sup>287</sup> Germany realizes that by staying out of the Gulf War, it missed a chance to assume a position of leadership in world affairs.<sup>288</sup> It is unlikely to make that mistake again. By supporting U.N. operations since the Gulf War, Germany has proven that it can shoulder its share of the international security burden "without awakening historical ghosts."<sup>289</sup> In the words of Vernon Walters, former U.S. Ambassador to West Germany, "Fears of a resurgent Germany rising up to dominate Europe are unfounded, . . . [t]he Germans have learned that hard work is more profitable than war."<sup>290</sup> It is time for the world to stop fearing the reemergence of German arms and encourage Germany to accept its rightful role in the international community.

Walter J. Lemanski

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287. Fitchett, *supra* note 178, at 1.

288. Knowlton & Rapoport, *supra* note 183, at 58.

289. Geipel, *supra* note 12, at A5.

290. Aepfel, *supra* note 182, at 2.