Permanent Mission
of the Federal Republic of Germany
to the United Nations
New York

Note No. 88/2016

The Permanent Mission of the Federal Republic of Germany to the United Nations presents its compliments to Secretary-General of the United Nations and, with reference to Chapter III: A (§ 26 "Subsequent agreements and subsequent practice in relation to the interpretation of treaties") of the Report of the International Law Commission on its Sixty-seventh Session (4 May 5 June and 6 July 7 August 2015) [United Nations document A/70/10], and in addition to the information submitted on 27 February 2015 (Note 91/2015) concerning the identical topic under Chapter III: A § 26 of the Report of the International Law Commission on its Sixty-sixth Session (2014) [United Nations document A/69/10], has the honour to submit the following information requested by the International Law Commission:

Subsequent agreements and subsequent practice in decisions of national courts that contributed to the interpretation of a treaty

Selected decisions of German courts

I. Federal Constitutional Court, Judgment of 7 July 1975, 1 BvR 274/72, 209/72, 195/73, 194/73, 184/73 and 247/72[1]

Several constitutional complaints ("*Verfassungsbeschwerden*")[2] were directed against the parliamentary acts of 23 May 1972 by which the Federal Parliament

[1] Entscheidungen des Bundesverfassungsgerichts ("BVerfGE) Vol. 40, pp. 141-179; English translation in "Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany" / publ. by the members of the Court / Vol. 1 International Law and Law of the European Communities 1952 – 1989; pp. 284 et seq.

[2] Article 93 (1) No. 4a of the Basic Law establishes the possibility of the "*Verfassungsbeschwerde*" as an extraordinary judicial remedy. According to this article the Federal Constitutional Court enjoys the exclusive competence to rule on constitutional complaints, which may be filed by any person alleging

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("*Bundestag*") ratified the Treaty between the Federal Republic of Germany and the Union of Soviet Socialist Republics of 12 August 1970 ("Moscow Treaty") and the Treaty between the Federal Republic of Germany and the People's Republic of Poland on the basis for normalising their mutual relations of 7 December 1970 ("Warsaw Treaty").

The Court held that:

> "The declaration by the Federal Minister for Foreign Affairs is, to be sure, a unilateral declaration by the German side. The Polish side did however during the negotiations seek assurances as to the background to and legal significance of the declaration. It secured corresponding explanations from the German side and accepted these without contradiction. The content and scope of the declaration were therefore known to the Polish government and did not arouse resistance from it. In these circumstances, the German side could take it that the declaration had been accepted by the Polish side."[3]
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> An important indication that the declaration is a Treaty instrument relevant to the interpretation of the Warsaw Treaty (c.f. Article 31 (2) of the Vienna Convention on the Law of Treaties (VCLT)) is supplied also by the informative note handed over by the Polish government to the German side in connection with conclusion of the Warsaw Treaty."[4]

II. Federal Constitutional Court, Judgment of 12 July 1994, 2 BvE 3/92, 5/93, 7/93 and 8/93[5]

In 1993 the parliamentary groups of the Social Democrats and the Free Democrats instigated several "*Organstreitverfahren*"[6] against the Federal Government claiming that according to the Basic Law any deployment of the German armed forces outside the territory of the NATO member states required prior parliamentary approval by a majority of two-thirds of its members.

The Court stated:

> "[…] [T]he substance of an international treaty may also be modified by other sources of law. Thus, the development of new customary law, particular to the parties of a certain treaty, may modify the substance of that treaty."[7]

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that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 of the Basic Law has been infringed by public authority.

[3] Translation from "Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany" / publ. by the members of the Court / Vol. 1 International Law and Law of the European Communities 1952 – 1989; pp. 284 et seq. [306].

[4] Ibid.

[5] Entscheidungen des Bundesverfassungsgerichts („BVerfGE") Vol. 90, pp. 286-394, English translation not available.

[6] Article 93 (1) No. 1 of the Basic Law provides the Federal Constitutional Court with the exclusive competence to give rulings on the interpretation of the Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by the Basic Law or by the rules of procedure of a supreme federal body ("*Organstreitverfahren*").

[7] Ibid note 5, p. 361.

"Moreover, modern international law knows multiple cases in which treaties acquire a dynamic interpretation in response to changing circumstances. In particular, treaties establishing [international] organisations whose bodies are supposed to act independently within the framework of the treaty are regularly invested with such dynamism. [...] The object and purpose of the treaty, as expressed in its text, provide an essential tool for its interpretation pursuant to Article 31 (1) and (2) of the VCLT."[8]

"[It] cannot be ruled out that novel international rights and obligations for the Federal Republic of Germany may arise from legally relevant action by the Federal Government on behalf of the Federal Republic of Germany within the framework of existing treaties, either by contributing to a consensual "authentic interpretation" of an existing treaty by all of its parties or by participating in applying the treaty in a manner that evinces a consensual interpretation of the treaty by all its parties and establishes a practice which is of relevance to the treaty's substance. (cf. Article 31 (3) (b) of the VCLT)"[9] [10]

III. Federal Constitutional Court, Judgment of 22 November 2001, 2 BvE 6/99[11]

The *Organstreit* proceedings initiated by the Socialist (PDS) parliamentary group against the Federal Government claimed that the Federal Government's approval of the 1999 NATO Strategic Concept at the NATO Summit on 23-24 April 1999 infringed the rights of the *Bundestag* since the necessary parliamentary approval had not been obtained.

The Court stated:

"The decision on the new Strategic Concept was not intended as an amendment of the existing NATO Treaty. International treaties are agreements between two or more subjects of international law which are to alter the legal situation that exists between them. This includes

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[8] Ibid note 5, p. 361.

[9] Ibid. note 5, p. 361.

[10] German text reads: *„Der Inhalt eines völkerrechtlichen Vertrages kann indessen auch aus anderen Rechtsquellen eine Änderung erfahren. So kann etwa die Entstehung von neuem partikulärem, zwischen den Vertragspartnern geltenden Gewohnheitsrecht auf einen Vertragsinhalt modifizierend einwirken. Darüber hinaus erfahren Verträge im modernen Völkerrecht vielfach eine den wechselnden Lagen entsprechende dynamische Auslegung. Zumal Verträge, durch die eine eigene Organisation ins Leben gerufen wird, deren Glieder im Rahmen des Vertrages selbständig handeln, sind regelmäßig auf eine solche Dynamik angelegt. [...] Die im Vertragstext zum Ausdruck kommenden Ziele und Zwecke des Vertrages bieten nach Art. 31 Abs. 1 und 2 WVRK die wesentlichen Auslegungshilfen bei der Handhabung der Verträge. [Es] ist nicht auszuschließen, daß durch rechtserhebliches Handeln der Bundesregierung "im Rahmen" bestehender Verträge für die Bundesrepublik Deutschland neue völkerrechtliche Rechte und Pflichten entstehen, sei es daß die Bundesregierung im Einvernehmen mit den Regierungen der anderen Vertragsparteien geltendes Vertragsrecht "authentisch auslegt", sei es daß unter ihrer Mitwirkung durch eine Anwendung des Vertrages, aus der die Übereinstimmung der Vertragsparteien über seine Auslegung hervorgeht, eine Übung begründet wird, die für seinen Inhalt Bedeutung gewinnt (vgl. Art. 31 Abs. 3 Buchst. b) WVRK)."*

[11] BVerfG, Judgment of 22 November 2001 – 2 BvE 6/99; http://www.bverfg.de/e/es20011122_2bve000699en.html (last visited on 9 February 2016).

agreements that amend existing treaties. International as well as national case law has acknowledged that acts of the organs of international organisations can, at the same time, constitute a treaty between two or more members of the organisation [...]. Whether an instrument in international relations constitutes a treaty under international law is to be deduced from the circumstances in the individual case [...]. The name of the instrument and the form of its acceptance are irrelevant [...]. A treaty that amends another treaty can also be inferred from acts of parties."[12]

"The lack of a ratification clause is an indication that the document in question is not a treaty. The consent to be bound by the treaty can manifest itself in the text of the treaty if it has a ratification clause or if it provides its deposit with the Secretary General of the United Nations. This is not the case here. With a view to the highly political content of the new 1999 Strategic Concept, a reservation of the ratification on the part of the Federal Republic of Germany and probably also on the part of all other member states would have been constitutionally required if the document in question constituted a treaty. Based on nothing more than the fact that the document makes no reference to reservation of ratification, however, it cannot be cogently inferred that no treaty under international law has been concluded [...]. Because under international law, a state can, pursuant to Article 7 of the Vienna Convention on the Law of Treaties, also enter into obligations that arise from treaties through the Minister for Foreign Affairs and other members of the executive who are typically competent for the external representation of a state. The states are, pursuant to Article 11 of the Vienna Convention on the Law of Treaties, free to choose the means of expressing their consent to be bound by a treaty. Ratification by the Parliament is, pursuant to Article 14 of the Vienna Convention on the Law of Treaties, only one of the forms of consent that are at the parties' disposal."[13]

"In this respect, however, stricter requirements, in particular requirements that refer to the content of the treaty, can result from national constitutional law, as is the case, e.g., for the Federal Republic of Germany pursuant to Article 59.2 (1) of the Basic Law."[14]

"The Alliance has already, on several occasions, reacted to profound changes of the political situation without formally amending the Treaty. In this respect, the NATO Treaty is open to further development. Such flexibility with a view to the further development of the Treaty, which is the basis of the system of collective security, is required to keep the Alliance efficient and adaptable in accordance with its aims."[15]

"The new 1999 Strategic Concept, however, does not provide any indications of such a transformation of NATO. According to the wording of the Concept, which concretises prerequisites for operations of NATO's armed forces, the operations are to be carried out only if they

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[12] BVerfG, Judgment of 22 November 2001 – 2 BvE 6/99 – para. 4; English translation at: http://www.bverfg.de/e/es20011122_2bve000699en.html (last visited on 9 February 2016).
[13] Ibid. para. 5.
[14] Ibid. para. 6.
[15] Ibid. para. 18.

are consistent with international law. This means that the following is not called into question: the obligatory prohibition on the threat or use of force (Article 2, No. 4 of the Charter of the United Nations); the accepted prerequisites for the use of military force, which include the grant of a UN mandate to states (Article 42 in conjunction with Article 48 of the Charter of the United Nations) or to regional organisations (Article 53 of the Charter of the United Nations) by the United Nations; collective defence, also of third states; and intervention by request, and the proportionality of such action."[16]

"The concretisation of the operations pursuant to Article 5 for the defence of the Alliance's territory, and the concretisation of the non-Article 5 operations (crisis response operations) does not indicate any intention to disturb peace that is motivated by power politics or even by aggression."[17]

IV. Federal Administrative Court, Judgment of 29 April 2009, 6 C 16.08[18]

The complaint addressed the question of whether the imposition of tuition fees was compatible with the International Covenant on Civil and Political Rights (ICCPR).

The Court held:

"The written comments from the Committee on Economic, Social and Cultural Rights [...], which reflect practice in the application of the Covenant, have proven to be an important tool for its interpretation."[19] [20]

The Permanent Mission of the Federal Republic of Germany to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.

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[16] Ibid. para. 33.
[17] BVerfG, Judgment of 22 November 2001 – 2 BvE 6/99 – para. 34.
[18] German text only at http://www.bverwg.de/entscheidungen/entscheidung.php?lang=de&ent=290409U6C16.08.0 (last visited on 9 February 2016).
[19] *„Als wichtiges Mittel für die Auslegung des Paktes haben sich die die Vertragsanwendungspraxis widerspiegelnden schriftlichen Äußerungen des durch den Wirtschafts- und Sozialrat der Vereinten Nationen im Jahr 1985 als Unterorgan eingesetzten Ausschusses für wirtschaftliche, soziale und kulturelle Rechte (im Folgenden: Sozialausschuss) erwiesen."*
[20] BVerwG, Judgment of 29 April 2009 – 6 C 16.08 – para. 48.