

Legal sophistry to justify aggression

## Germany's "Red-Green" government to participate in war against Iraq

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*The following article was submitted by a reader of the World Socialist Web Site in Germany.*

The facts of the matter are plain. The election promise by German Chancellor Gerhard Schröder (Social Democratic Party—SPD) to the effect that Germany would not participate in any fashion in a war against Iraq has been officially trashed. Schröder let the cat out of the bag over the issue of possible German participation in AWACS reconnaissance flights over Iraq. The chancellor is apparently ready to accede to the wishes of the US and, when called upon, provide German military assistance in an American-led war.

On the ARD German television programme *Farbe Bekennen* (“Come clean”) Schröder said that Germany would not take part in a military intervention, but would fulfil its responsibilities for the “protection” of the NATO alliance. “And that, of course, means that AWACS reconnaissance planes will be manned by German soldiers to protect the territory of the alliance,” he declared.

Schröder justified this position with the hair-splitting claim that AWACS planes were “not instruments with which one can carry out war operations”. The chancellor continued that, in the event of war, the machines would be utilised to protect NATO partner Turkey, i.e., they would operate within territory covered by the alliance. Schröder emphasised that he had discussed the decision to make German soldiers available for AWACS flights in the border regions of Iraq with his foreign minister, Joschka Fischer (Green Party).

Schröder’s stance is pure sophistry. It is commonly accepted that military reconnaissance is an indispensable necessity and inherent component of war. The participation of German AWACS crews would clearly constitute an active role in the impending war.

Schröder’s standpoint has been challenged by the defence speakers of the opposition CDU/CSU (Christian Democratic Union/Christian Social Union) parliamentary fraction as well as the Bündnis 90/Greens, Christian Schmidt and Winfried Nachtwei. According to the media source *SPIEGEL-online* (December 12, 2002), Schmidt declared the AWACS planes were able to detect enemy planes or ships from a great distance

and undertake counter measures. The crew of such flights includes a number of senior fighter pilots who, for example, are able to give directions for the intervention of fighter bombers. This would constitute active participation by German soldiers in an act of war. Schröder is well aware of this fact, especially in light of the AWACS judgement by the German Constitutional Court of 1994.

The shift by the SPD-Green government had been indicated several weeks previously, following increased pressure by the US government on Berlin. Prior to the decision on AWACS flights, the Israeli government—evidently in collaboration with the administration in Washington—had called on Germany to supply it with Patriot rocket defence systems and “Fuchs” transport tanks. The Israeli demand proved embarrassing for the German government when the German defence minister, Peter Struck, publicly confused the transport tank with another German tank designed for detecting chemical gases, the latter clearly being a defensive vehicle.

There is general agreement within the German government in favour of the delivery of Patriot rockets to Israel that, it is argued, are for the sole purpose of the defence of the country, under conditions where Germany has historically supported the Jewish state. There are differences within the government, however, over the issue of the “Fuchs” transport tanks, because the Israelis have made clear they would consider using such tanks in the occupied Palestinian territories.

The decisive change by Berlin came at the end of November, when leading SPD politicians made clear that Germany would guarantee freedom of German airspace for American planes, even if the US failed to win support from the UN for its war against Iraq. On November 27, under the headline “Movement and Transit Rights for the USA”, the ARD reported: “Chancellor Schröder has confirmed full movement and transit rights for the US in the event of an Iraq war. The US and NATO partners would be guaranteed freedom of airspace, the use of US bases in Germany and, in addition, Germany will ensure the defence of US bases in the country.”

While a section of the Greens has insisted that the US can make use of these rights only if the UN Security Council

expressly agrees to an intervention, Foreign Minister Fischer has, in familiar fashion, already gone further. In Brussels, Fischer posed the rhetorical question whether a military intervention required a second UN resolution. On this point, Security Council Resolution 1441 is, according to the leading Green politician, “indecisive”. Any discussion of the necessity for a mandate for an Iraq intervention is, according to Fischer, “yesterday’s debate”.

At a meeting of the Green Party central council in mid-December, Fischer secured the support of the new party leadership for his stance, following remarks by the newly elected party chairman, Angelika Beer, that pointed in a different direction. According to those taking part in the meeting, Fischer made clear that Resolution 1441 could be put forward as a sufficient mandate for military intervention ( *Süddeutsche Zeitung*, December 17, 2002).

SPD foreign policy expert Gernot Erler put forward a similar position. He said use of airspace “will definitely be guaranteed”. He added, “This has already been agreed.” A refusal to allow use of German airspace in the event of an American intervention in Iraq without a UN mandate, as was resolved by a recent conference of the Greens, differs from the standpoint “which has been supported by leading members of the Greens,” Erler declared.

The SPD speaker on home affairs, Dieter Wiefelspütz, opposed the demand made at the Green Party conference to deny the US the use of German airspace and its bases in Germany in the event of an Iraq war without a specific UN mandate. Wiefelspütz maintained there is a clear legal position that is internationally binding. As a result, the US would be able to use airspace as well as its military bases and airports in Germany. “Based on the clear legal position, there is nothing that has to be allowed,” he said.

Apparently the SPD home affairs expert has studied neither the relevant international treaties nor the German constitution. In fact, the legal position is perfectly clear—but in an entirely opposed manner to the interpretation of Wiefelspütz. The planned US action meets all of the criteria for an aggressive war of intervention, and thereby violates international law and all relevant international treaties, including the United Nations Charter (Article 2), the 1949 Geneva Convention IV for the protection of civilians (Article 51) and the final communiqué of the 1975 Helsinki NATO treaty (Article 51).

The German constitution also strictly forbids any participation in a war of aggression (Article 26, paragraph 1 of the Grundgesetz). In addition, paragraph 80 of the German criminal code states: “Whoever prepares a war of aggression involving the danger of war for the German Federal Republic, and requires the German Federal Republic to take part in such a war, will be punished with life imprisonment or imprisonment for not less than ten years.”

When asked, in an interview with the *taz* newspaper, to stipulate the legal basis for his estimation of the “clear legal

position”—the “most legally qualified politician in the governing coalition”, Wiefelspütz began to prevaricate. Asked whether the US “only has rights to airspace when it abides by international law” Wiefelspütz answered, “Yes, but, as I say, I presume this will be the case.” To the question: “When the US undertakes an inadmissible preventive war without a UN mandate, is it the case that it does not have airspace rights?” Wiefelspütz replied, “I do not want to get involved in any sort of academic intellectual speculation” ( *taz*, December 13, 2002).

Here it is necessary to emphasise that even a mandate for American imperialism from the UN Security Council would not alter in the slightest the illegality, in terms of international law, of a US war of aggression against Iraq.

In any assessment of the legal position regarding German participation in war, the German constitution and international law are the highest courts of authority. From a legal standpoint all other agreements are subordinate, including the NATO treaty of April 4, 1949.

This also applies to the so-called “mutual assistance” clause in Article 5 of the NATO treaty, which takes effect after an armed attack on one or more members of the alliance in Europe or North America. As stated by Supreme Administrative Court Judge Dieter Deiseroth to the *Frankfurter Rundschau* (September 14, 2002): “The observation whether or not this is the case cannot be decided freely by the treaty states. Article 5, in line with the entire NATO treaty, is expressly conditional on the reservation that it is compatible with the UN charter and other valid international law.”

Even the Bush government has refrained from claiming that Iraq has undertaken military action against the US. If the Bush administration undertakes a war against Iraq and decides, against all expectations, to officially involve the alliance, from a legal point of view this by no means implies the coming into force of the NATO “mutual assistance” clause—contrary to reports circulating in the German media suggesting the opposite.



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