

## Merely a Landmark or a Change of Course: The Federal Constitutional Court Hears Arguments in the NATO Strategic Concept Case.

---

**Suggested Citation:** *Merely a Landmark or a Change of Course: The Federal Constitutional Court Hears Arguments in the NATO Strategic Concept Case.*, 2 German Law Journal (2001), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=37>

[1] The Second Senate of the *Bundesverfassungsgericht* (Federal Constitutional Court) heard oral arguments on June 19, 2001, in the "NATO Strategic Concept" case. The parliamentary fraction of the Party of Democratic Socialism (PDS)(1) in the *Bundestag* (Federal Parliament) brought the case to the Federal Constitutional Court as an *Organstreitverfahren* (dispute between federal organs), which permits one federal organ (in this case, the Federal Parliament as represented by one of its party fractions) to challenge the constitutionality of an action taken by another federal organ (in this case, the *Bundesregierung* [Federal Government - executive branch]).(2) The Federal Government consists of a parliamentary coalition between the Social Democratic Party (SPD) headed by Chancellor Gerhard Schröder, and the Alliance 90/the Greens (Greens), whose most prominent figure in the Federal Government is Foreign Minister Joschka Fischer.

[2] The PDS charges that the Federal Government violated Article 59(2) of the Basic Law when it assented to the NATO Strategic Concept announced at the defense organization's summit in Washington, D.C., in the spring of 1999, without the consent of the *Bundestag*. The pronouncement of the new Strategic Concept coincided with NATO's 50th anniversary celebration. Article 59(2) of the Basic Law, the constitution's treaty ratification provision, states:

*Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis.*

The PDS argues that the new Strategic Concept represented such a fundamental change to NATO policy that it exceeded the scope and intent of the *Bundestag's* previous ratification of the NATO treaty. The PDS claims that the 1999 Strategic Concept should have been presented to the *Bundestag* for ratification as a new NATO treaty.

[3] The case also implicates Article 24(2) of the Basic Law:

*With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.*

The Court will be required to determine, with respect to Article 24(2), whether a transfer of sovereignty to NATO is absolute or whether it is in some way qualified, especially by the ratification requirements of the constitution.

[4] The disputed NATO Strategic Concept is a schizophrenic document, equal parts victory lap and prophet of doom. It employs a tone typical of the Western military establishment as it struggles to reinvent itself (and to find justification for maintaining the budgets it enjoyed throughout the Cold War) for the post-Cold War era. The Strategic Concept proudly (and justifiably) credits NATO with an "indispensable role in bringing [the] East-West confrontation to a peaceful end."(3) At the same time, the document engages in a hand-wringing itemization of on-going and new threats to Euro-Atlantic peace and security. Among the threats to which NATO must now be prepared to respond, the Strategic Concept identifies: (a) uncertainty and instability in and around the Euro-Atlantic area; (b) the existence of powerful nuclear forces outside the alliance; (c) the proliferation of NBC (nuclear, chemical and biological) weapons; and (d) the spread of weapons technology.(4)

[5] The Strategic Concept outlines the principles that are to guide NATO as it confronts the new, post-Cold War security environment. The most dramatic changes to the principles that guided NATO throughout the Cold War (articulated, above all, in the NATO Treaty of 1949, but also outlined in previous Strategic Concepts), and the changes that are at the heart of the proceeding before the Federal Constitutional Court, are: (a) an expansion of the territorial scope for NATO actions; and (b) an expansion of the circumstances in which NATO may become militarily engaged. With respect to the first of these changes, the Strategic Concept describes a shift from the Alliance's territorial concern for threats aimed at the Euro-Atlantic area (emanating primarily from the Warsaw Pact) to a wider territorial context including the periphery of the Euro-Atlantic area and perhaps extending to the whole world.(5) With respect to the second of these changes, the Strategic Concept anticipates NATO engagement in "conflict prevention and crisis management", (6) a proactive stance well removed from the defensive posture to which NATO is limited by Article 5 of the 1949 NATO treaty:

*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.*

*Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.*(7)

[6] The new Strategic Concept must, of course, be seen in the context of NATO's bombing campaign against Yugoslavia, which was already a month old when the heads-of-state announced the new Strategic Concept in Washington, D.C. In this context, the controversial elements of the 1999 Strategic Concept (territorial expansion and intervention) served as the Alliance's justification for the war it undertook on behalf of the persecuted Kosovars. In spite of the Strategic Concept's concession that "The United Nations Security Council has the primary responsibility for the maintenance of international peace and security . . .",<sup>(8)</sup> and in spite of its emphasis on "partnership," "consultation" and "cooperation" with other international organizations,<sup>(9)</sup> the disputed elements of the new Strategic Concept outline the possibilities for a new, NATO-led unilateralism. The Kosovo campaign was and remains the example, in practice, of this unilateralism, as NATO acted against Yugoslavia without U.N. Security Council authorization. The NATO bombing campaign animates, as the first war in which German soldiers participated since the end of World War II, the proceedings before the Federal Constitutional Court.<sup>(10)</sup>

[7] The questions with which the Federal Constitutional Court must grapple in deciding the matter include the delicate balance of the separation of powers in a parliamentary democracy (in which the executive is a remote extension of the legislative branch) and the nature of treaties (requiring legislative-branch ratification, as opposed to unchecked executive action in foreign affairs). But much, much more than these legal questions is at stake in the case. The case will determine the scope of Germany's new military identity and increasingly important military role in the New World Order, after its long exile to the margin of post-World War II military policy in Europe. The case will also impact the ideological landscape of German politics, formalizing the shift of the pacifist mantle from the Greens to the PDS. The case raises questions identical to those that plague the developmental process of the European Union, which moves from one treaty negotiated by the heads-of-state to another while bucking severe criticism that the process lacks democratic/popular legitimacy. At an even deeper level, and especially with the legitimacy of the European Union in mind, the case will serve as another step in the evolution of post-modern liberal democracy (both in Germany and throughout the Western democracies) as the governing elites adapt democracy to, create and/or seek to take advantage of increasing electoral apathy and the increasingly complex areas of governmental concern.

[8] Recognizing the dual nature of the case (involving concrete legal questions and broader political/philosophical themes) the Federal Constitutional Court invited political and policy comments at the morning session and heard legal arguments in the afternoon session. The case attracted an all-star cast to the oral argument. As the Court's international law specialist, Justice Di Fabio served as the Court's Reporting Judge (case manager), bringing his highly intellectual and characteristically philosophical perspective (especially with regards to questions of statehood and the role of states in the international associations<sup>(11)</sup>) to bear on the matter. Foreign Minister Joschka Fischer, the former peace-activist turned pragmatist/hawk, appeared on behalf of the Federal Government as did Defense Minister Rudolf Scharping. For Foreign Minister Fischer, the case would seem to have high personal stakes as Court's decision could serve as the legal and constitutional blessing (coming from such a highly respected institution as the Federal Constitutional Court) for his shift from hard-core peace activist and radical member of the political opposition to a more mainstream posture, admitting the utility of military engagement. Fischer acknowledged as much in his comments as he repeatedly invoked his past to chide the PDS and to bolster his credibility and objectivity before the Court. In its legal arguments the Federal Government dispatched Professor Jochen Frowein, the Director of the Max Planck Institute for Comparative and International Law in Heidelberg and one of the world's most respected international law experts. Rupert Scholz, a member of the *Bundestag's* powerful Justice Committee (responsible for, among other things, handling the election of half the Federal Constitutional Court's Justices) also appeared on behalf of the Federal Government, emphasizing that, while the PDS parliamentary fraction was proceeding on behalf of the Bundestag, all other parliamentary fractions in the Bundestag (SPD, CDU, CSU and FDP) were in favor of the Federal Government's assent to without parliamentary ratification of the new Strategic Concept. The PDS countered with Gregor Gysi, the party's former Chairman and its most visible member. Gysi is one of the very few political survivors of the former East German SED and presently he features prominently as a candidate for Berlin's recently vacated Mayor's office.

[9] Led primarily by Foreign Minister Fischer, the Federal Government staked out a clear position for the Court. The disputed Strategic Concept, Fischer repeatedly explained, is merely another of a series of *Wegmarken* (landmarks)

set down by NATO throughout its 50 years of service in response to the world's fluid security situation. Building on this image, the Federal Government argued that the Strategic Concept was nothing more than a political position paper according to which NATO would fix its bearings in the coming years. As such, the Strategic Concept did not alter (or write anew) the fundamentals of the NATO project: the closely-knit and binding defense identity. Foreign Minister Fischer insisted that none of the participants at the conference that produced the Strategic Concept conceived of the project as the re-casting of the NATO treaty. Fischer argued that the new Strategic Concept did not create new, binding responsibilities for the NATO member states.(12)

[10] When pressed to distill the distinction between the NATO treaty and the Strategic Concept, Foreign Minister Fischer leaned heavily on the concept of a treaty's binding impact on the parties. The Strategic Concept lacked that authority, Fischer explained. When pressed further on the issue, an evidently exasperated Fischer concluded that the what really makes the NATO treaty what it is (in contra-distinction to the Strategic Concept) is that it binds the United States to defensive action in Europe on behalf of the other NATO members. This fundamental thrust of the NATO treaty, Fischer explained, was unaltered by the Strategic Concept. Fischer pressed even further with the point, arguing that the PDS charges before the Federal Constitutional Court risked damaging this guarantee by sending an already (and increasingly internationally skeptical U.S.) the signal that its NATO partners are unable or unwilling to adapt to the new threats facing the Alliance. In this respect, Fischer complained that a decision in favor of the PDS would negatively affect Germany's credibility and relationships in international affairs.

[11] In response to questions from the Court, Foreign Minister Fischer asserted that the Strategic Concept should be viewed independently of NATO's Kosovo campaign. The Strategic Concept, he argued, did not mandate the Kosovo War and neither was the War the exclusive, defining precedent for the Strategic Concept. Fischer also insisted that the terms of the Strategic Concept do not work in combination with the precedent of the Kosovo bombing campaign to establish new international law with respect to the authority and supremacy of the United Nations Security Council.

[12] The representatives of the Federal Government also pressed the point that initiatives like the new Strategic Concept are shaped in close cooperation and consultation with the Bundestag.

[13] The Federal Government also asserted that its acceptance of the new Strategic Concept, though involving a much less significant exercise of executive power than the War Powers authority at the disposal of the President of the United States, represented a similar case of the executive branch's need for rapid decision making and flexibility in international security matters. The implication of this argument being that a legislature or parliament, though speaking with the voice of the people, is too unwieldy an institution for some modern contexts. In any event, it was explained, even if the U.S. President can involve American forces in a military action without first consulting with the representatives of the people, those representatives retain the budgetary control over the military which serves as the ultimate authority to approve or disapprove of the decisions of the President. The Federal Government reminded the Court that the *Bundestag* retains this final, budgetary authority as well.

[14] For its part, the PDS looked to stake out the moral/ideological high ground in the argument. It began by embracing its less-than-democratic heritage and turned this past into the force driving the present action. One representative of the PDS explained that, having only recently exchanged its authoritarian methods for popular democracy, the party has a special appreciation for the risks involved in over-extending the authority of any single party or institution. This, the argument went, is exactly what the NATO Strategic Concept case is about: not an attempt to limit the Federal Government's power in foreign affairs, but to support the important balance in the field and maintaining a link to the popular will, especially in light of Europeanization and internationalization.

[15] The most intriguing questions from the Court built on the argument of the PDS. Justices Sommer and Hassemer pressed the Federal Government to account for the "informal" process by which the Strategic Concept was created and then adopted as an influential (if not binding) force over and perhaps against Germany's sovereignty, especially in a matter as fundamental and sensitive to the identity of the Federal Republic of Germany as the role of its military in the world. The term "informal" seemed a diplomatic volley in the battle over democratic legitimacy and the importance of the popular will in such fundamental matters. It is this subtext to the case that begs for the Court's attention, even as NATO debates whether it will follow the principles of the Strategic Concept back into the Balkans (this time in Macedonia), bringing German soldiers with it.

[16] German Law Journal will review the decision of the Federal Constitutional Court when it is announced.

---

**For More Information:**

The NATO Strategic Concept of April 24, 1999, from the U.S. Department of State web-page:  
[http://www.state.gov/www/regions/eur/nato/nato\\_990424\\_stratcncpt.html](http://www.state.gov/www/regions/eur/nato/nato_990424_stratcncpt.html)

The 1949 NATO Treaty on line: <http://www.ola.bc.ca/online/cf/documents/1949NATOTreaty.html>

Resolutions 1199 and 1244 of the United Nations Security Council Concerning Kosovo:  
<http://www.un.org/peace/kosovo/98sc1199.htm> and <http://www.un.org/Docs/scres/1999/99sc1244.htm>

NATO on-line: <http://www.nato.int/>

Party of Democratic Socialism on-line: <http://www.pds-online.de/>

German Foreign Ministry on-line: [http://www.auswaertiges-amt.de/www/de/index\\_html](http://www.auswaertiges-amt.de/www/de/index_html)

(1) The Party of Democratic Socialism is the successor to the former East German *Sozialistischen Einheitspartei Deutschland* (German Socialist Unity Party), which held a political monopoly in the German Democratic Republic. The influence of the PDS today is largely limited to the new Länder (Federal States) in the former East Germany, holding 37 seats in the 668 seat Bundestag. See, Bundestag Infothek: Sitzverteilung 14. WP - Überhangmandat (visited June 20, 2001) [http://www.bundestag.de/info/wahlen/154/1541\\_14.html](http://www.bundestag.de/info/wahlen/154/1541_14.html).

(2) Article 93(1)(1) of the Basic Law provides for the Federal Constitutional Court's Organstreitverfahren jurisdiction: "The Federal Constitutional Court shall rule: on the interpretation of this 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 this Basic Law or by the rules of procedure of a supreme federal body; . . ." See, *Bundesverfassungsgerichtgesetz* (Federal Constitutional Court Act) Article 13(5). Donald Kommers describes this unique jurisdiction in the following way:

*Conflicts known as Organstreit proceedings involve constitutional disputes between the highest "organs," or branches, of the German Federal Republic. The court's function here is to supervise the operation and internal procedure of these executive and legislative organs and to maintain the proper institutional balance between them. The governmental organs qualified to bring cases under this jurisdiction are the federal president, Bundesrat, federal government, Bundestag, and units of these organ vested with independent rights by their rules or the Basic Law.*

DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 12 (2d ed. 1997).

(3) NATO Strategic Concept, April 24, 1999, Archive Site for State Department Information Prior to January 20, 2001, 2 (visited June 20, 2001) [http://www.state.gov/www/regions/eur/nato/nato\\_990424\\_stratcncpt.html](http://www.state.gov/www/regions/eur/nato/nato_990424_stratcncpt.html)

(4) *Id.* at 's 20-22.

(5) The Concept makes repeated reference to NATO's traditional territorial interest in the Euro-Atlantic area, but also invokes concern for threats emanating from and/or posing security risks to the Alliance's "periphery", "other states" ( 20), "other regions" ( 22) and "non-state actors" ( 22). See, *id.*, at 24.

(6) *Id.* at 31.

(7) North Atlantic Treaty, April 4, 1949, Art. 5, (visited June 20, 2001) <http://www.ola.bc.ca/online/cf/documents/1949NATOTreaty.html>

(8) *Id.* at 15.

(9) *Id.* at 's 10, 15-19.

(10) Some argue that the NATO bombing campaign, more than a mere contradiction of the cooperative and internationalist spirit of the new Strategic Concept, probably violated international law: ". . . those who argue that the NATO operation was lawful under international law have a hard case prove." Michael Bothe, Kosovo - Many Questions, Few Answers (editorial), INTERNATIONAL PEACEKEEPING 1, 2 (January - April, 1999).

(11) See, e.g., Udo Di Fabio (Interview), The Present and Future Meaning of the State and the Role of the Federal Constitutional Court, 2 GERM. L. J. 9 (June 1, 2001) <http://www.germanlawjournal.com>

(12) The Strategic Concept itself uses conflicting language with respect to its binding nature. In its Introduction, the

Strategic Concept refers to itself as a guide for the implementation of NATO's binding mission. But in its Conclusion, the Strategic Concept, claims that it will "govern the Alliance's security and defence policy, . . ." NATO Strategic Concept, April 24, 1999, Archive Site for State Department Information Prior to January 20, 2001, 's 5 and 65 (visited June 20, 2001) [http://www.state.gov/www/regions/eur/nato/nato\\_990424\\_stratcnpt.html](http://www.state.gov/www/regions/eur/nato/nato_990424_stratcnpt.html).