The NATO-Treaty on Wheels?: Static and Evolutive Treaty Interpretation before the German Federal Constitutional Court

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Alberico Gentile and Hugo Grotius knew that the meaning of treaties can change through interpretation. Yet, the rise of treaty making since 1945, the increasing importance of treaties, as well as ground-breaking political, economic, and scientific changes affecting world politics put issues of static and evolutive interpretation on the agenda on a regular basis. Disputes about whether the meaning of treaties has changed arise more often. There is increasing academic attention, and the International Law Commission is dealing i.a. with these questions in its project Subsequent agreements and subsequent practice in relation to interpretation of treaties.

Questions of stasis and evolution entail particular problems for domestic legal systems, especially when they come before national courts. Two landmark cases before the German Federal Constitutional Court (FCC) evidence the interesting problems as well as possible ways to deal with them: The *New Strategic Concept case* (ILDC 134 (DE 2001)) and the *Tornado case* (ILDC 819 (DE 2007)). They both concerned the development of the NATO-Treaty and the question whether there ought to be parliamentary assent when developing the NATO-Treaty through strategic concepts. The cases were brought before the FCC by a parliamentary group, which claimed that the rights of Parliament had been violated since there was no parliamentary consent according to Art. 59 (2) German Basic Law to an amendment of the treaty and any other development of the treaty would be *ultra vires*.

The first interesting aspect is the setting of the case which is a prime example of how questions of static and evolutive interpretation evolve: the NATO-Treaty was gradually developed by so called strategic concepts. Strategic concepts are informal but official documents that define the object and purpose of the NATO-Treaty and in particular the term security in greater detail and set forth the basic approaches how to render the treaty operational. In terms of Art. 31 of the Vienna Convention on the Law of Treaties they could be categorised as subsequent agreements. NATO is a product of the cold war and bloc confrontation, the first four strategic concepts, which were developed until 1967, aimed at prohibiting an interstate war with the member states of the Warsaw Pact. The global environment changed radically after the fall of the iron curtain. In order to provide for international security for its member states, NATO adapted its strategy in several strategic concepts. The strategic concept of 1999 allowed for crisis-management operations of armed forces beyond the obligation to collective self-defence as enshrined in Art. 5 of the NATO-Treaty. This strategic concept gave rise to the *New Strategic Concept case* in 2001. In 2007, the same parliamentary group brought the *Tornado case* as Germany was part of NATO's ISAF mission in Afghanistan, which was a crisis management operation as outlined in the strategic concept of 1999.

In the *New Strategic Concept case*, the Court i.a. first looked into whether the new strategic concept was to be considered as an international treaty and in a next step whether the strategic concept entailed an interpretation that could not be reconciled with the treaty. Both questions were denied by the Court. Therefore, the FCC came to the conclusion that there was no violation of the right of Parliament to decide whether an international treaty could be concluded. This decision was upheld in the *Tornado case*. Two issues the FCC had to deal with stood out: First, whether the new strategic concept went beyond the confines of what the treaty allowed. Second, how the separation of powers worked regarding international law.

As to the first question, the FCC clearly acknowledged that there was room for evolutive interpretation in international law and that this evolutive interpretation could happen without the formal consent of Parliament. Yet, it also tried to establish limits of evolutive interpretations by stressing that the "identity" of the NATO treaty and its "programme of integration" are not to be transgressed. The Court tried to determine a kind of essence of the treaty which was not to be violated.

As to the question of the separation of powers in the context of foreign relations, there have been theories about a fourth power regarding external relations which was separate from the three internal powers and was generally performed by the executive branch. John Locke has called it "federal power". The FCC did not engage in theoretical debates but rather tried to balance the needs of all powers. It showed judicial deference in granting a margin of appreciation with respect to its judicial review. Especially in the *New Strategic Concept case*, it attributed the general responsibility to conduct foreign relations to the executive branch. Thereby, it enhanced effective government and international cooperation. Yet, it also stressed the continued responsibility of legislative branch to review the developments and to control government. This kind of control was beyond mere parliamentary consent but relied on public discussion and debate and the rights of parliament to hold the executive branch accountable.

The problem how democratic states are to be represented internationally is pertinent in particular when treaties are developed through interpretation. The approach taken by the FCC was later developed further in the context of European integration. In its famous *Lisbon case* (ILDC 1364 (DE 2009)), the Court found that the executive branch was obliged by the constitution to inform parliament of developments in order to allow it to influence the process. In

contrast, the Court has not found such specific requirements for information and parliamentary participation in the case of international law. Yet, if the number of evolutive treaty interpretations continues to grow, the problems outlined in this post will become more pertinent and it will be exciting to watch how the FCC and other domestic courts all around the world will react to it.