

## MARITIME BOUNDARY DELIMITATION

## Territorial questions between Eritrea and Yemen

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It is rare that an international tribunal awards total victory to one party in a maritime boundary dispute. This appears to be almost inevitably so even in situations where strict application of legal principles to the geography of the situation would seem to require that result. Two maritime boundary arbitrations - the 1999 Eritrea v Yemen and Qatar v Bahrain case under the 1982 Law of the Sea Convention (UNCLOS) merit discussion. The international law of maritime delimitation has been the subject of considerable examination during the past half century. The history of the development of the law through the cases, starting from the 1969 North Sea Continental Shelf cases, has been well documented and it would be better to focus on both the maritime boundary cases decided under the UNCLOS. First of all, we would like to discuss the Eritrea and Yemen case, which was the delimitation of a single maritime boundary.

We find that the arbitration about the Eritrea and Yemen case was conducted before an ad hoc Tribunal under the auspices of the Permanent Court of Arbitration. The case involved a dispute between Eritrea and Yemen States about sovereignty over the Red Sea area between them and in the second phase - the maritime delimitation that took place after the tribunal had already allocated between them sovereignty over the four sets of contested mid-sea islands. The tribunal stated at the outset that it would approach the delimitation using the proposition that a median line fits the requirements of UNCLOS articles 15, 74 and 83. Both Parties in turn claimed that their proposed delimitation line was based on the median line.

The Parties differed with respect to the effect that should be given to the mid-sea islands, whose sovereignty had been decided in the first phase. The Tribunal recognised that the provisions of UNCLOS required an equitable result achieved. Its role was to examine whether giving the mid-sea islands full or partial effect would achieve the desired result. The Tribunal examined in general terms whether giving the islands a certain effect

(full or partial) would produce a disproportionate effect on the maritime boundary, depending on their size, importance and like considerations in the general geographical context.

The Tribunal divided the maritime area between the Parties into three different sectors - North, Middle and South for the purpose of the delimitation. In the North, it maintained that the delimitation was essentially a mainland-to-mainland delimitation between the Parties' opposite coasts. In the Middle, it held that the delimitation became complicated by the presence and proximity of the mid-sea islands. The Tribunal concluded that the boundary would have to be moved to the west in order to take into account overlapping Territorial Sea and three sets of mid-sea islands. The Tribunal gave the mid-sea islands certain partial effects, but did not explain its methodology. Interestingly, the Tribunal rejected various arguments made by Yemen in relation to the Middle sector that would have given it control over all the shipping lanes in the southern Red Sea. In the South, the Tribunal again used a coastal median line.

Perhaps the most notable aspect of the Eritrea/Yemen Award was its treatment of the traditional fishing regime of the Parties in the Red Sea. In both phases of the arbitration, the Parties put forward claims to the effect that their nationals relied significantly on the Red Sea fishing industry and fish consumption. The first Award decreed that the sovereignty found to lie within Yemen entails the perpetuation of the traditional fishing regime in the region, including free access and enjoyment for the fishermen of both Eritrea and Yemen.

The Tribunal based its decision to recognise and give effect to the traditional fishing regime on what it referred to as local custom and Islamic law. The texts of the Awards, however, do not reflect a profound examination of either source of law. In any event, the Tribunal's treatment of Islamic law does assist in bringing a new dimension to the exact nature of the rights and obligations imposed by the Awards under the aegis of the protection of the traditional Red Sea artisanal fishing regime. The Tribunal clarified that the obligation imposed on Yemen

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in relation to its sovereignty over the mid-sea islands extended to requiring Yemen to enable Eritrean fishermen to exercise their entitlement to fish around the islands and even use the islands freely for such traditional activities as drying fish, repairing boats and nets, establishing and using way stations, and taking shelter.

The Tribunal took the view that the obligation also required Yemen to permit artisanal Eritrean fishermen to fish up to its mainland coasts and to permit them to land their catches in Yemeni ports. Shortly after the Award was issued, the Parties met to discuss various aspects of their fishing activities in the Red Sea. It transpired that they had differing views of the Award on the issue of the traditional fishing regime and Eritrea requested a clarification from the Tribunal. A decree issued by the Tribunal in response to this clarification that Yemeni fishermen did not enjoy a right to fish off Eritrea's continental coast inside the internal waters of the Dhalak Islands in the northern sector. This ruling was particularly significant because the best fisheries in the Red Sea are around the mid-sea islands (awarded to Yemen in the first phase), off Yemen's mainland coast, and around Eritrea's Dhalak Islands. The effect of this clarification meant that, while the Eritrean's could fish around Yemen's fishing grounds in the Red Sea, Yemenis could not fish off Eritrea's fishing grounds. Thus the benefit of the protections afforded to the traditional artisanal Red Sea fishermen in effect fall substantially to Eritrea.

Ultimately, despite the

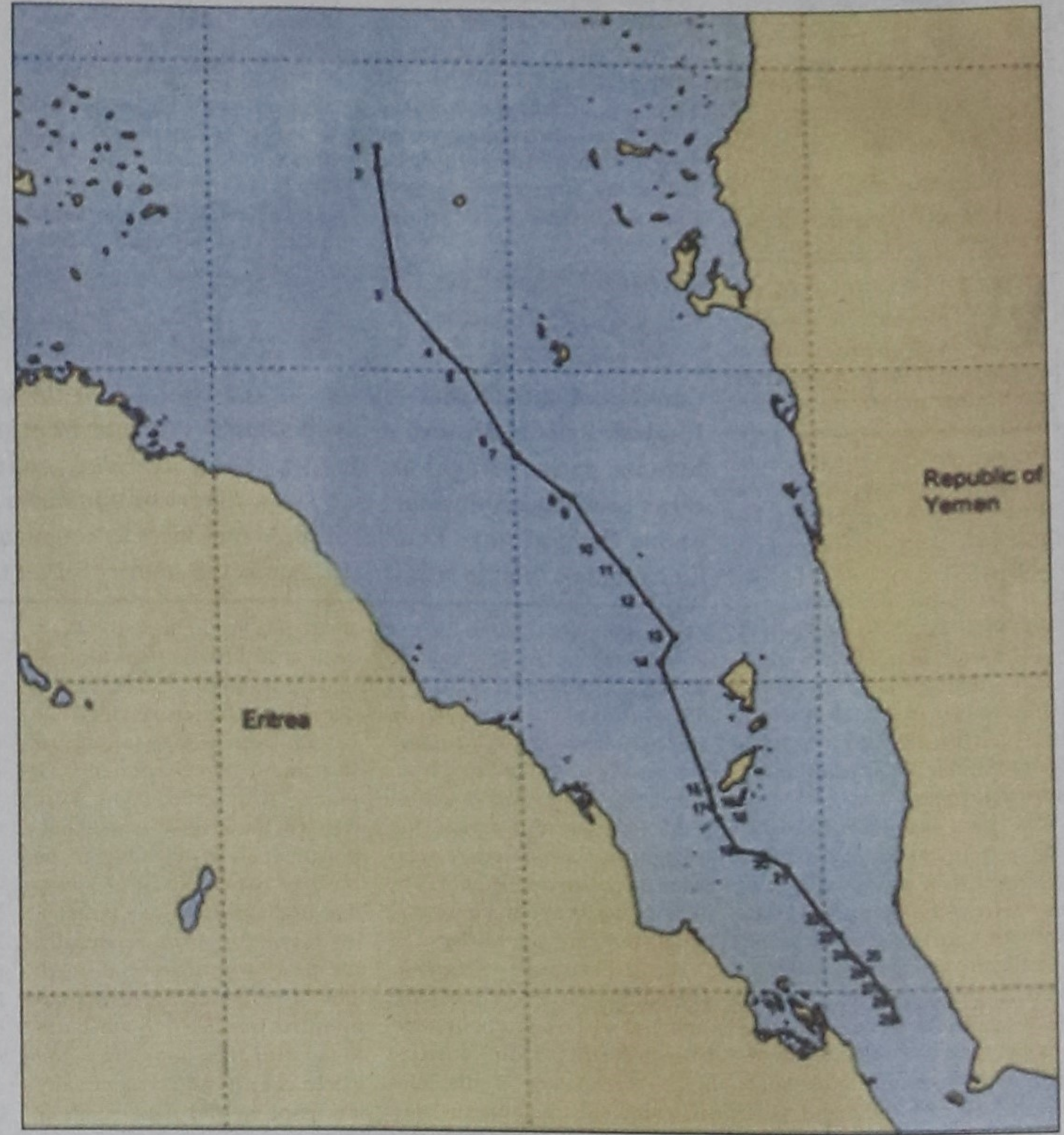
Tribunal's post-award attempt to clarify the scope of the traditional fishing regime, it appears that the issue might still be considered by some to be far from clear. From the court rulings and the articles referred above, it can be derived that the land dominates the sea, right to maritime territory, whether Exclusive Economic Zone (EEZ) or Continental Shelf (CS), derives from sovereignty over its adjacent land territory and also in areas of overlapping Territorial Sea (TS) are to be divided by the median or equidistance line method, unless variation is required by historic title or special circumstances. The tribunal also dealt the issue of Islamic law for the first time in so far as the maritime boundary is concerned. The Eritrea-Yemen Arbitration unanimously resolved the disputed territorial sovereignty over the Red Sea islands and the delimitation of international maritime boundary, to the satisfaction of both Parties and to the benefit of the consolidation of peace and security in one of the strategically most sensitive regions of the world, the solution of which had been awaited since the end of the First World War.

With its recognition of a traditional fishing regime and crystallization of the criteria for maritime delimitation, it also made a significant contribution to the development of international law. The arbitration awards provide a notable instance of the role of dispute settlement by an international court on the basis of law, including the 1982 UN Law of the Sea Convention. The Award is a milestone in the development of principles and rules of international

law governing the acquisition of territorial sovereignty as it confirms the pre-eminence of evidence of actual and effective occupation as a source of title to territory over claims of historic title. It sustains a low standard for what would constitute actual occupation as it relates to unsettled or inhospitable territory. At the same time, the Award provides a landmark decision substantiating the development of the modern law of equitable maritime boundary delimitation.

It confirms prominence of a single all-purpose maritime boundary and the governing role of equidistance (median line) as the equitable boundary between the opposite states. The Award substantiates the critical roles played in achieving the equitable result by considerations pertaining to baselines (normal and straight), islands, reefs and low-tide elevations, navigational factors and interests of third states, as well as by the principle of proportionality in terms of a posteriori test of the equitableness of a result arrived at by other means.

The Tribunal's treatment of islands, islets, rocks and low tide elevations confirms that their definition and entitlement granted or denied to these maritime features depend on the degree to which they distort an equidistant line and other factors (such as comparison of coastal lengths abutting on the claim area), rather than on their legal status per se. Although the resource related factors did not ultimately influence the actual course of the Eritrea/Yemen single boundary line, the Tribunal's respective holdings importantly



reappraise the international legal regime governing common mineral deposits on the one hand, and the role of fisheries factors in equitable maritime boundary delimitation on the other.

The implementation by Eritrea and Yemen of this regime, of which substantive content was defined in the 1999 Award as applying to artisanal fishing and as involving the right of free passage and other associated rights, provide an interesting evidence on practical implementation of the Islamic concept of territorial sovereignty. The Awards are undoubtedly to continue to provide a valuable model for successful settlement of disputes in the two interlinked major areas of the acquisition of territorial sovereignty and maritime boundary delimitation in the future.

We, in Bangladesh, are sitting far too long on the settlement of issues of the maritime boundary with both India and Myanmar. This is a good case study as the land of Bangladesh also dominates the seabed under the Bay of Bengal and our fishermen from all the coastal districts in a large number rely on fishing. Without which their very survival would be in stake and there are ample facts and figures in support of this.

Both India and Myanmar are known to be bent upon using equidistance line as the line for maritime boundary demarcation with Bangladesh. But with both countries our coastline does not lie as exactly as an adjacent coast as in case of other countries. So we must study the methods through which we can prove our

historic title or develop our case as relevant as special circumstances, or bring in the Islamic law as enunciated earlier, so as to get the advantage of the area likely to be lost due to following the equidistance line.

Time is running out from our side on the delimitation of maritime boundary primarily because of our ignorance on the importance of the issue both at the political level as well as at the level of the ministry. Only the Ministry of Foreign Affairs can probably justify such long silence and inaction over the issue of maritime boundary delimitation with both India and Myanmar.

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## India and Israel: Together in space

SIDDHARTH RAMANA

ON 20 January 2008, India and Israel successfully forged a partnership in the space sector when an Israeli spy satellite was launched into space by the Indian Space Research Organisation (ISRO). The Tejasar satellite was launched 9:15 am local time (0345 GMT) from the Sriharikota space station in southern India.

The significance of the satellite launch is magnified by the fact that this launch was earlier stalled owing to intense objections by Arab states which viewed the satellite to be a direct threat to their defence integrity. An earlier report in an Indian news media claimed that the satellite launch vehicle was dismantled at the behest of American pressure. Such was the pressure on the Indian government to not support the Israeli space aspirations, that according to a senior Indian intelligence official, the launch was "dismantled" completely to prevent even a future launch if the government changed its mind (DNA, 4 December 2007).

The satellite launch is another feather in the growing cooperation between the Jewish nation and India, an alliance which has culminated in Israel becoming the second largest defence supplier to India.

It makes sense for the Indians and the Israeli's to forge an alliance particularly in the space sector. India has been developing its space program as early as the 1950's and while initially catering to civilian purposes, ISRO has also been involved in upgrading India's military prowess. For example, the Agni missile is based on a successful civilian satellite launch vehicle. India can offer its space expertise in exchange for Israeli expertise in their Unmanned Ariel Vehicle Program or else work towards a commercial arrangement, which would significantly boost the international commercial viability of ISRO.

Indeed, the interest of Israel and India in space cooperation was broached when the two countries signed a cooperation agreement in November 2002. When visiting Israel in August 2003, Krishnaswami Kasturirangan, former chairman of the India Space Research Organization, expressed interest in the Israeli concept of small satellites and their employment, adding: "Israel has much to offer in terms of cooperative programs for the future." The Israeli Ofeq spy satellite had attracted Indian attention even before this visit.

Owing to Israel's precarious security environment, the need for high resolution and timely imagery from enemy territory has led them to develop exceptional imaging technology. Indeed, the Israeli Spy Satellite Ofek-7 was instrumental in helping destroy a suspected nuclear bunker in Syria in

September 2007.

The new satellite Tejasar is said to be technologically far superior to its Ofek predecessor. It would be the first satellite to incorporate Synthetic Aperture Capabilities. This feature allows the camera to take pictures of targets under cloudy and foggy

conditions (Jerusalem Post, 20 September 2007). It would therefore place Israel in the small list of countries with imaging radar reconnaissance satellites able to distinguish camouflaged vehicles from rocky terrain, for example, and to see at night and through clouds and foliage. In addition, the aperture radar has 1-meter resolution and differing spot, mosaic and strip modes. These modes provide a multitude of different radar aspect angles to illuminate targets on the ground. And while further technical details of the satellite remain confidential, it is believed that the satellite also carries a powerful panchromatic camera.

According to some, the Israeli decision to use an Indian launch vehicle is based on the inability of the Israeli Shavit booster to fire the 600lb satellite into space. However, Israeli critics have observed that the decision can be traced to Israel strengthening ties with a major power other than the US. (ABC News, 27 September 2007).

The launch is a boon for India, for according to details of an agreement, Israel would be sharing the satellite imagery with India and in addition, it would provide a financial windfall for ISRO. The need for such a satellite is being felt by India, which was given a rude shock in 1999, when armed Pakistani intruders established bases deep inside the Indian territory in Kargil. When the Indian satellites were used to map the positions of the insurgents, the pictures were hazy and did not reveal any ground level movement - an intelligence failure which proved critical (DNA, 4 December 2007).

In addition, the launch of the satellite made ISRO richer by about USD\$14 million. The launch provided an advertising impetus to the reputation of ISRO in the USD\$2.5 billion global commercial satellite launch services (Hindustan Times, 22 January 2008).

With reports that the satellite has already started transmitting high-resolution pictures, the Indian space establishment can be proud of its achievement. In addition, the Indian defence establishment can be commended for having successfully dodged the concerns of its Arab allies while pushing ahead with an alliance which would only mean a win-win situation for India.

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## Failure In Afghanistan would threaten Europe: Gates

Failure in Afghanistan would directly threaten European security, U.S. Defense Secretary Robert Gates warned Feb. 8 as he sought to mobilize NATO allies and more especially public opinion in Europe.

Gates, who arrived in this southern German city to attend an international security conference, said he would seek to convince reluctant Europeans of the need to send reinforcements to fight the Taliban in southern Afghanistan.

"Afghanistan not only was the source of attacks against the United States in 2001, but it is clear that al-Qaida and others in this area have played a role in these attacks that have taken place in Europe, so this is a direct security threat to Europe," said Gates.

"Part of my speech at the security conference will be oriented at Europeans, not their governments, in an effort to try to explain why their security is tied to success in Afghanistan" where NATO has deployed some 40,000 men, Gates said. Fresh from talks in Vilnius with fellow NATO defense ministers, he said he would also seek to convince Europeans that the Afghan threat was more serious than that from Iraq.

"I worry that for many Europeans the missions in Iraq and Afghanistan are confused... I think that they (the Europeans) combine the two, many of them have a problem with our involvement in Iraq and project that to Afghanistan and don't understand the very different kind of threat," he said.

The United States has deployed 160,000 soldiers in Iraq and 28,000 in Afghanistan.

The secretary's warning came as senior government officials in Berlin warned Friday that Germany was now a prime target for al-Qaida.

It also followed shortly on a U.S. intelligence report saying that al-Qaida, with bases in Pakistan and Afghanistan, had improved its ability to strike directly at the United States.

"Germany is at the center of al-Qaida's attention and in their line of fire. The facts have changed since last year," Germany's interior ministry spokesman Stefan Paris told reporters Feb. 8.

A state secretary in the interior ministry, August Hanning, had earlier told Die Welt newspaper that al-Qaida leaders had "decided to carry out attacks in Germany."

In early February, the U.S. intelligence community in a report to Congress warned that al-Qaida had improved its ability to identify, train and position operatives to attack the United States.

Gates has been attempting to convince European allies to send reinforcements to Afghanistan, especially to the south of the country where the Taliban have been making a comeback and where fighting has been heaviest in the past

months. A US-led force ousted them from power in 2001.

Speaking of France's likely decision to send extra troops to southern Afghanistan, Gates told reporters this would be a "very good signal" and "a most welcome contribution" to NATO's efforts.

French Defense Minister Herve Morin, speaking Feb. 7 in Vilnius, said France was prepared to help Canada in Afghanistan's restive south, though he gave no details.

Canada, whose 2,500 soldiers in Afghanistan have faced much of the brunt of recent fighting, has threatened to withdraw its troops next year unless NATO sends in a 1,000-strong additional contingent, along with helicopters and drones, to help them hold the line.

Poland and Germany have both declined to send troops to southern Afghanistan where Canadian, British, U.S. and Dutch forces are currently stationed.

Source: defensenews.com

## Indonesia trims Super Puma order, receives Kobra

The Indonesian Air Force (IAF) is planning to procure fewer on-order NAS-332 Super Puma multirole medium helicopters from state-owned Indonesian Aerospace in an effort to accelerate their delayed procurement, according to the Air Force Chief of Staff, Vice Marshal Subandrio.

In 1989 the IAF ordered 16 Super Pumas to replace its aging fleet of Sikorsky S-58Ts but the program has been hit by funding problems over the past few years, which has resulted in only seven units being received. Of these, it is understood that only four are operational due to a lack of spares.

However, on 8 January two days after the crash of an S-58T helicopter in Riau province in which one civilian died VM Subandrio said that the IAF would now require 12 Super Pumas in an effort to "speed up" the procurement. "Because of budget constraints," he said, the IAF would now only buy 12 helicopters.

Meanwhile, Indonesia has taken delivery of its first Kobra integrated low-to-medium-level air defence system from Poland's Bumar Group. Ordered for USD35 million by the Indonesian Ministry of Defence in July 2005, the system arrived in Indonesia in September 2007 and passed acceptance tests in November. Indonesian personnel trained on the system between September and December and it is now in operational service with an anti-aircraft unit of the Indonesian Land Forces. A second Kobra system will be delivered in early 2009.

Source: Jane's Defence Weekly