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SPECIAL INTEREST ARTICLES

Introduction

Dear Fellow NATO Legal Professionals and Persons Interested in NATO,

This issue of the NATO Legal Gazette contains a short report on the June NATO Legal Conference; a book review by our prolific contributor, Mr. Vincent Roobaert; an update on the UN Contact Group on Piracy Off The Coast of Somalia by Commander Kimberlie Young; recommendations on improving NATO's operational claims process by Lieutenant Colonel Jacek Stochel; and the first of two articles about Ukraine's relationship with the European Union and NATO by Ms. Klara Tothova.

Because many changes in NATO legal personnel occurred since Issue 20, we spotlight six members of our community. Readers are invited to review the General Interest Section for, among other items, the links to two recent papers on the effect caveats are having on the Alliance. For your calendars, please note that at the NATO School the next Operational Law Course will be held from 26 to 30 April 2010 and the Legal Advisers Course will be held from 17 to 21 May 2010.

Best Wishes from Belgium,
Sherrod Lewis Bumgardner
Legal Adviser, Allied Command Transformation Staff Element Europe

Participants in the 2009 NATO Legal Conference at Eurocorps

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2009 NATO Legal Conference

Mr. Lewis Bumgardner, ACT/SEE Legal Adviser
Ms. Annabelle Thibault, ACT/SEE Intern

The 2009 NATO Legal Conference occurred in the wonderful city of Strasbourg, France, from 8-12 June 2009 hosted by Lieutenant General Pedro Pitarch, Commanding General of Eurocorps and Mr. Roland Ries, Mayor of Strasbourg. Distinguished speakers included General James Mattis, Supreme Allied Commander Transformation; Mr. José Maria Aznar, former Prime Minister of Spain and President of *Fundacion para el Análisis y los Estudios Sociales*, [Foundation for Analysis and Social Studies]; judges from the International Criminal Court (ICC); the International Criminal Tribunal For the Former Yugoslavia (ICTY); the European Court of Human Rights (ECHR); the Special Court for Sierra Leone; the International Committee of the Red Cross, the Office of the United Nations High Representative for Human Rights; and other eminent legal professionals and academics.

Eighty-five Legal Advisers and legal professionals from NATO Commands, Agencies, Centers of Excellence, the Ministries of Defence of Albania, Croatia, Israel, New Zealand, and Colombia attended the Conference and were joined on its first day by 30 jurists and government officials of Strasbourg and the Government of France.

Conference participants considered four themes during the week: **NATO's Future**, **Transnational Justice**, **the Law of Armed Conflict**, and **Legal Knowledge Sharing**. Beginning with welcoming remarks on Tuesday morning by Lieutenant General Pitarch, General Mattis and Mr. Aznar highlighted the first session of the conference with their views of **NATO's Future**, challenges, opportunities, international security relationships, and the role that law and the legal community plays in this time of change. A lively panel discussion followed moderated by Mr. Stephen Rose, Legal Adviser for the Supreme Allied Commander Transformation, with General Mattis, Mr. Aznar, Lieutenant General Pitarch, and Dr. Jean-Yves Haine, Professor of Political Science at the University of Toronto.

Dr. Haine opened the afternoon session with a thought-provoking presentation on the geostrategic and political realities NATO faces, especially in its relationship with the European Union. The distinguished author and one of the first NATO civilian legal advisers, Mr. Serge Lazareff, International Arbitrator and Avocat à la Cour, provided a compelling, powerful presentation about the responsibility of NATO legal advisers to find solutions to the legal challenges faced by NATO commanders. He reminded the audience that today's threats to the Alliance are neither more complex nor more deadly than what NATO faced sixty years ago. As the final speaker of the session, Mr. Gert-Jan Van Hegelsom, Legal Adviser to the Director General of the European Union Military Staff and the Representative of the Council Legal Service to the European Union Military Committee, provided a sweeping overview of the many activities undertaken by the European Union as part of the European Security and Defence Policy. He concluded by stressing that NATO and the European Union must work together, emphasizing the importance of legal dialogue so the two organizations may accomplish complementary actions that benefit common security. These day's activities concluded with a welcoming reception hosted by the City of Strasbourg in its magnificent Marriage Hall.

Transnational Justice was Wednesday morning's focus in the first of three sessions held in the historic Marriage Hall of Strasbourg. Mr. Daryl Mundis, ICTY Senior Prosecuting Trial Attorney and three learned jurists gave presentations followed by a panel moderated by Mr. Frederik Harhoff, Judge *ad litem* at ICTY. As he did at the 2008 NATO Legal Conference, Mr. Mundis updated the NATO legal community on the most prominent developments at ICTY and other transnational tribunals that have relevance for the Alliance. Mr. Pierre Boutet, Presiding Judge of Trial Chamber I of the

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Special Court for Sierra Leone and the former Judge Advocate General of Canada followed with a comprehensive lecture about the mandate, jurisdiction, and important decisions of the Special Court for Sierra Leone.

Ms. Nina Vajic, Judge at the European Court of Human Rights, provided a thoughtful and extremely useful review of the case-law and rulings of the ECHR that have legal significance for the Alliance. Judge Dr. jur. h. c. Hans Peter Kaul, Judge and Vice President of the International Criminal Court, gave the last presentation of the morning with a learned and impassioned commentary on the progress of the International Criminal Court and the importance of the Rome Statute. A wonderful afternoon session composed of a lecture and tour of the European Court of Human Rights followed; the conference participants enjoyed a narrated boat trip though the historic rivers and canals of the city, while returning to the centre of Strasbourg.

The third day of the 2009 NATO Legal Conference dealt with the **Law of Armed Conflict**, International Humanitarian Law and Human Rights Law. The accomplished speakers on Thursday represented the United Nations, the ICRC and the Israeli Ministry of Defence followed by a panel discussion moderated by Mr. Thomas Randall, Legal Adviser to the Supreme Allied Commander Europe.

Ms. Mona Rishmawi, Legal Adviser to the United Nations High Commissioner for Human Rights, opened the session with a discussion on current developments in Human Rights Law that have direct relevance to NATO. Placing emphasis on the importance of protecting civilians in armed conflict situations and detainees, Ms. Rishmawi discussed the current conflicts NATO is involved in and the larger realm of Human Rights Law challenges observed by the Office of the High Commissioner. Dr. Jean-Marie Henckaerts, Legal Adviser in the International Committee of the Red Cross Legal Division and head of the ICRC project on Customary International Humanitarian Law, provided a presentation on continuing work of the ICRC's study of Customary International Humanitarian Law. Finally, Colonel Liron Libman, Head of the International Law Department in the Military Advocate General's Headquarters of the Israeli Defence Forces, spoke on the application of the Law of Armed Conflicts during Israeli's recent battle with Hamas in the 2008-2009 conflict in the Gaza Strip. Another spirited discussion period followed with many questions asked of the panelist by conference attendees.

Mr. Baldwin de Vidts, Legal Adviser to the Secretary General of the North Atlantic Treaty Organization, started the Thursday afternoon program with a presentation on the situation of NATO at its 60th anniversary. Dr. Sybille Scheipers, Academic Director of Studies, Programme on the Changing Character of War, Oxford University, then provided an extremely useful lecture on how the status of unlawful combatants evolved throughout history. The 2009 NATO Legal Conference dinner was held on Thursday evening featuring generous servings of the local dish, choucroute accompanied by delightful Alsatian beverages.

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The events on Friday were conducted in a NATO-only format to encourage frank discussions about difficulties and challenges faced by the NATO legal community. To discuss **Knowledge Sharing** within the Alliance Ms. Catherine Gerth, Head of the Archives and Information Management at the NATO Headquarters, opened the session with a talk on NATO Information Management Framework. This presentation was followed by short presentations from Legal Advisers from NATO Agencies or Military Headquarters about current legal developments unique to NATO and of interest to all. The 2009 NATO Legal Conference concluded at mid-day on Friday, 12 June. All participants agreed that the attractiveness of Strasbourg, the hospitality of Eurocorps, the support provided by the Mayor, and the impressive list of speakers, contributed to make the 2009 NATO Conference a memorable and successful event.

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Mr. Aznar, Former Prime Minister of Spain and President of Fundacion para el Análisis y los Estudios Sociales, Mr. Rose, HQ SACT Legal Adviser, and Mr. Munoz, SHAPE Legal Office

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General Mattis, Mr. Rose, LTCol Sattler(NATO School)

Briefing at the European Court of Human Rights

Reception at the City Hall of Strasbourg

Book Review: International Law and the Proliferation of Weapons of Mass Destruction [1]

Mr. Vincent Roobaert, Assistant Legal Adviser, NC3A [2]

In July 2009 the *Arctic Sea*, a Russia-owned freighter carrying a load of timber, allegedly disappeared on its way from Finland to Algeria. While the initial press reports indicated that the ship might have been hijacked, subsequent press releases – some of which have since been disputed - speculated that the ship was also carrying Russian-made surface to air missiles for a purchaser in the Middle East. Although it is unlikely that all facts surrounding this matter will ever be clarified, the story of the *Arctic Sea* again serves as a reminder of the risks associated with the illegal proliferation of weapon technology and the resulting potential modification of the balance of powers in the regions where this technology would be used.

In a previous issue of the NATO Legal Gazette, Daniel Joyner's book "*Non-Proliferation Export Controls. Origins, Challenges and Proposal for Strengthening*" was reviewed. That book focused on the informal multilateral export control regimes such as the Australia Group and the Nuclear Supplier Group. However, it did not address the treaty-based export control rules. In his latest work, *International Law and the Proliferation of Weapons of Mass Destruction,* Mr. Joyner analyses the treaty based non-proliferation regimes and the means of enforcing those rules. The author's main thesis is that there has been a shift in State policies towards non-proliferation. While States put more emphasis on the treaty rules in the past to enforce non-proliferation policies, there has been a trend towards more forceful enforcement of these rules.

Mr. Joyner's book is divided into three main parts. Part I reviews non-proliferation law. Part 2 takes a look at the role of the United Nations in non-proliferation. Finally, Part 3, devoted to counter-proliferation policy, uses cases studies to support the author's thesis that States have now decided to move towards a more compelling enforcement of non-proliferation rules.

In the first part of the book, the author critically examines the three main non-proliferation treaties, namely the Nuclear Non-Proliferation Treaty, the Biological Weapons Convention and the Chemical Weapons Convention. As part of his examination, Mr. Joyner also introduces the informal non-proliferation regimes described in his earlier book, such as the Zangger Committee, the Nuclear Suppliers Group, the Missile Technology Control Regime and the Australia Group. The author does not limit his analysis to the treaty regimes that expressly deal with non-proliferation. To the contrary, he also addresses the rules found in other instruments, such as those adopted by the World Trade Organization.

The second part of the book is devoted to the enforcement of the rules by the United Nations bodies: the General Assembly, the Security Council and the International Court of Justice. The author considers the 2004 UN Security Council Resolution 1540 concerning non-proliferation of weapons of mass destruction. He describes how this resolution creates new law while reviewing the limits to the Security Council powers to determine the validity of this resolution. Moving to the International Court of Justice, Mr. Joyner looks back at the cases brought so far to the International Court of Justice and the role that the Court could take in reviewing the validity of Security Council decisions.

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[1] Daniel H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction,* Oxford University Press, 2009 (ISBN: 978-0-19-920490-8*)*.

[2] This review only sets out the opinion of the author and not those of NATO, NC3A or the NATO Member States.

Book Review : International Law and the Proliferation of Weapons of Mass Destruction

The last part of the book is devoted to the rise of counter-proliferation, i.e. forceful means to prevent proliferation. This is done mainly through two case studies: the intervention in Iraq and the Proliferation Security Initiative. Mr. Joyner concludes that the law on the use of force is in a state of crisis and that changes are required if it is to remain relevant, such as the inclusion of soft law and non-binding commitment on non-proliferation.

There is no doubt that Mr. Joyner's book is highly relevant for all interested in the field of international law and security. As the event mentioned above shows, the need for a strong non-proliferation regime remains as acute today as ever. Mr. Joyner's book is clear, well structured and does not avoid the hard questions facing the actors of the security community including the challenges facing non-proliferation law today.

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Working Group 2 of the Contact Group on Piracy off the Coast of Somalia

CDR Kimberlie Young, JADC, USN, HQ SACT Staff Legal Adviser

Pursuant to United Nations Security Council Resolution 1851[1], the Contact Group on Piracy off the Coast of Somalia (CGPCS) held its first plenary meeting at United Nations Headquarters in New York on 14 January 2009. Created to combat piracy by facilitating discussion and coordinating actions between nations and organizations, the CGPCS periodically reports its progress to the Security Council. At this first meeting the CGPCS established four working groups (WG):

1. WG 1, chaired by the United Kingdom with support from the International Maritime Organization (IMO), focuses on activities related to military and operational coordination and information sharing and the establishment of a regional coordination centre,
2. WG 2, chaired by Denmark with support from the UN Office of Drugs and Crime, focuses on judicial aspects of piracy,
3. WG 3, chaired by the United States with support from the IMO, focuses on strengthening, shipping, self-awareness, and other capabilities,
4. WG 4, chaired by Egypt, works to improve diplomatic and public information efforts on all aspects of piracy.

Currently 43 nations and seven international organizations, including NATO, take part in the Contact Group with two industrial groups participating as observers. This article focuses on the activities of WG 2. For the complete reports of the four plenary sessions of the Contact Group and the eight meetings of the four working groups see: http://www.marad.dot.gov/news_room_landing_page/horn_of_africa_piracy/horn_of_africa_piracy.htm

Working Group 2 --First Meeting: 5 March 2009

Charged to consider the judicial issues relating the arrest, detention, and prosecution of pirates, WG 2 held its first meeting at the United Nations Office of Drugs and Crime (UNODC) in Vienna, Austria. The purpose of this WG meeting was to identify specific ways to ensure the prosecution of suspected pirates and to produce recommendation for the Contact Group. To accomplish this WG 2 focused four topics: national legislation; the exercise of jurisdiction; capacity building; and its future work.

Acknowledging that national will to prosecute pirates is largely a political question, discussions began about the legislative capability of countries to prosecute pirates. The Working Group urged nations that had not already done so to criminalize piracy and establish appropriate jurisdiction over the crime through their national legislation. To exercise jurisdiction over the crime of piracy most domestic legislation requires some type of nexus to the nation. In circumstances where this does not exist the concept of universal jurisdiction found in Article 105 of the United Nations Convention on the Law of the Sea (UNCLOS) was urged as an option. The Working Group resolved that all States should consider prosecuting pirates in four instances when:

- their national(s) are victims;
- their national(s) are suspected of committing piracy;
- targeted ships were flying their flag; and
- their ships apprehend pirate ships.

While discussion occurred as to whether Article 105 of UNCLOS actually grants universal jurisdiction or reflects customary international law, there was agreement

[1] See: http://www.un.org/News/Press/docs/2008/sc9541.doc.htm

Working Group 2 of the Contact Group on Piracy off the Coast of Somalia

that for the signatory nations of UNCLOS all States had an obligation to cooperate to repress piracy. Arrangements between States and with international organizations were encouraged to facilitate arrests, the gathering, transferring and protection of evidence, and prosecution of suspected pirates. For nations whose law allows prosecution, items of concern included the transfer of suspects from the apprehending nation to the place of trial, the cost and timeliness of prosecution, and post-sentence immigration issues.

To build regional capacity, States, including States with naval forces in the region, that were neither apprehending nor prosecuting pirates were requested to provide logistics or funding to help transfer suspected pirates to States that would undertake prosecution. States and relevant international organizations such as the International Maritime Organization (IMO) and UNODC were called upon to assess the short and long term needs of affected States in the region. Based upon this assessment, to build an enduring capacity, States would be called upon to provide assistance to the regional states, including Somalia, that would enter into agreements to prosecute and incarcerate pirates.

Working Group 2 identified seven subjects for future work:

- reporting to the Contact Group progress made by states to criminalize piracy and exercise jurisdiction;
- consideration of the issues related to the transfer of suspected pirates to States willing to undertake prosecution; and
- describing evidentiary standards for prosecution.

In the longer term,

- the possible establishment of an international trust fund to help pay for the cost of prosecution;
- the possibility of embarked law enforcement officers on commercial vessels (shiprider arrangements);
- a regional or international mechanism for the prosecution of suspected pirates;
- a possible compilation of the international legal basis for the prosecution of suspected pirates.

For the delivered conclusions of the chairman for this first meeting of Working Group 2 see:
http://www.marad.dot.gov/documents/wg2-Vienna_Meeting-chair-summary-March_5-2009.pdf

Second Meeting 5-6 May 2009

Working Group 2 continued its efforts in Copenhagen, Denmark, to identify practical and legally sound solutions to ensure prosecution of suspected pirates. The United Nations Office of Drugs and Crime (UNODC) presented a report that summarized national responses to a questionnaire sent to all nations in the Contact Group that identified practical and legal challenges to the prosecution of suspected pirates such as:

- no uniform definition of the crime of piracy among nations;
- only half of the Contact Group nations invoke universal jurisdiction to prosecute piracy related offenses; and
- wide national differences in the rules for detention and investigations.

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Representatives from the International Police Organization (INTERPOL), an international organization with 188 member countries, spoke about the need for information sharing and INTERPOL's ability to assist with its analytical expertise, international notification system, databases on pirates and stolen vessels, and ability to help freeze assets and follow ransom money. The International Maritime Organization (IMO) provided information about its guidelines on handling piracy.[2] The Working Group also received a presentation from the European Union on its maritime Operation Atalanta, which based on its bilateral agreement with Kenya, recently turned over a total of 27 suspected pirates for prosecution there.

The second day of the Working Group meeting began with a presentation by the Commander of the Danish navy vessel *HDMS Absalon* that capture pirates in February, 2009. Because the Danish Navy possesses duel authority for both military and law enforcement missions, the experience of the *HDMS Absalon* offered practical perspectives on the distinction between fisherman and pirates (ladder, small boat, heavy weapons)and the handling of apprehended and detained pirates. Discussion continued about the use of law enforcement detachments on board commercial vessels (shipriders) as a possible short-term solution and the use of private armed guards. The shiprider concept was determined to merit further examination while few favored the adding private armed guards as a option because of their expense, the need for training, the requirement of permission from the flag state, insurance costs, and liability issues. Also discussed was the use of military personnel on civilian vessels which Denmark and Belgium have done. This concept, however, was not favored by many.

The meeting ended with a review of possible regional or international mechanisms to resolve piracy issues. Indentified future work included:

- terms of reference for an international trust fund;
- a generic template for use by interdicting states for collecting evidence in piracy incidents;
- an invitation to UNODC to continue gathering information about relevant national legal systems including in coastal states; and
- consideration of the issues relating to the detention of suspected pirates and the application of human rights instruments.
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The conclusions of the chairman for the second meeting of Working Group 2 are at: http://www.marad.dot.gov/documents/WG2-2nd_Meeting_chair-conclusions-May_5-6-2009-mtg.pdf

Third Meeting 26-27 August 09

Gathering for two days in Copenhagen, Denmark, Working Group 2 continued its structured consideration of six topics: 1) the legal basis for prosecution of suspected pirates; 2) ongoing national prosecutions; 3) support for prosecution and capacity building; 4) international, regional, or other mechanisms for the prosecution of suspected pirates; 5) apprehension and detention and; 6) future action by Working Group 2 and the Contact Group. In this meeting the Working Group agreed that its task is to provide specific, practical and legally sound guidance to the Contact Group on legal issues related to the fight against piracy and the prosecution of suspected pirates. To fulfill this task the Group agreed to develop practical tools for nations and organizations participating in the counter-piracy effort such as checklists, guidelines, templates and legal summaries. This toolbox is to be available to Contact Group members via the internet.

[2] See: http://www.imo.org/Facilitation/mainframe.asp?topic_id=362

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Dr. Douglas Guilfoyle, University College London presented a compilation ("Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes") of the international legal bases for prosecution of suspected pirates. The purpose of the compilation was to promote common understanding of relevant provisions in international law and encourage States to make use of those documents in their future anti-piracy work. The UN Office of Legal Affairs also provided a statement on international law on piracy. Delegations agreed that the compilation provided very useful guidance on these issues.

Nations reported on their progress to further piracy prosecution and sharing lessons learned. While greater number of cases are being brought before courts –12 currently proceeding in Kenya and 100 pending— lessons learned show that challenges remain when collecting and handling evidence, securing testimony, and addressing the many issues related to detention.

The meeting continued with numerous informational briefing on topics such as the handover procedures to Kenya for persons suspected of piracy, templates for evidentiary standards and shipriders, bilateral arrangements and memorandums of understanding between apprehending states and prosecuting states, further consideration of an International Trust Fund to help provide expenses to prosecute suspected pirates and the relevant international human rights standards that should be applied to persons detained as suspected pirates.

The conclusions of the chairman for the third meeting of Working Group 2 are at: http://www.marad.dot.gov/documents/WG2-2nd_Meeting_chair-conclusions-May_5-6-2009-mtg.pdf

The Fourth Plenary Meeting of the Contact Group On Piracy Off the Coast of Somalia occurred in New York on 10 September 2009 under the Chairmanship of Japan. Denmark presented the results of Working Group 2's three meetings. The Contact Group took note of the extensive work provided and urged nations to make use of the gathered advice to improve the effectiveness and legality of counter-piracy efforts. The Contact Group requested Working Group 2 to continue its consideration of international and regional mechanisms to assist national prosecutions. The Contact Group concluded its meeting with plans to continue its work in January 2010 in New York under the Chairmanship of Norway.

The full communiqué for this fourth plenary meeting may be found at: http://www.marad.dot.gov/documents/CGPCS_Fourth_Plenary_Meeting-Sept_10,_2009.PDF

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NATO Operational Claims

LTC Jacek Stochel – LEGAD POL (A)

Engagement of NATO within military operations brings about the need to find a solution with regard to settlement of claims *ex delicto* for damage caused by the NATO troops during such operations. NATO is aware that the success of military operations increasingly depends on cooperation with civilians and international organizations with a focused Effects Based Approach to Operations (EBAO). An appropriate solution to NATO operational claims, particularly involving privately owned property, is one of the most sensitive issues for EBAO.

As a possible solution, NATO has created at the strategic level regulations for liability for damages in situations where neither NATO SOFA nor PfP SOFA are applicable.[2] Such regulation, although established on a proper legal basis, is not always suitable for practice. Applying the regulation in practice causes a lot of problems as stated by practitioners.[3] Hence, more than ever, it is necessary to create a NATO Operational Claims Office, perhaps at the SHAPE level, that can take into account the operational realities in a particular theater of operations, advocate for operational claims at the strategic level, develop a standard of administrative programs for conducting operational claims, serve as a point of contact for operational claims information, train deploying units or individuals, be a reach-back recourse for deployed operational claims and a potential fund manager, resource for planners, and a repository for operational claims information and files.[4]

The first practical attempt to regulate a claims procedure for damages caused by NATO troops was undertaken during the International Force (IFOR) Mission in Bosnia.[5] As a NATO operation, NATO bore liability for damages.[6] In all subsequent missions as a rule, NATO was not responsible for any damages. Mostly because of public opinion, this standpoint has been modified during the mission.[7]

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[1] Col. Jody Prescott, *EBAO and NATO Operational Claims*, THE THREE SWORDS MAGAZINE, 10/2007.

[2] NATO CLAIMS POLICY FOR DESIGNATED CRISIS RESPONSE SITUATION , Annex 1, AC/119-N (2004) 0058 (May 19, 2004), hereinafter NATO CLAIMS POLICY .

[3] *See* Jody M. Prescott, *Operational Claims in Bosnia-Herzegovina and Croatia* , ARMY LAW., June 1998, s. Vichneveteskaia , *ISAF Claims in a Nutshell*, NATO's Legal Gazette, 16/2008, LONE KJELGAARD, *HQ ISAF CLAIMS OFFICE*, NATO LEGAL GAZETTE , 11, 12, 19/09.

[4] NATO LEGAL DESKBOOK DRAFT 2008, 240, not published.

[5] *Agreement between the Republic of Bosnia and Herzegovina and the North Atlantic Treaty Organization (NATO) concerning the Status of NATO and its Personnel*, Nov. 23, 1995, hereinafter *Dayton SOFA*.

[6] In accordance with the *Dayton SOFA* claims for damage or injury to government personnel or property, or to private personnel or property of the Republic of Bosnia and Herzegovina shall be submitted through governmental authorities of the Republic of Bosnia and Herzegovina to the designated NATO representatives. See, *Dayton SOFA,* art. 15, *supra* note 5.

[7] See *Military Technical Agreement between the International Security Force ("KFOR") and the Government of the Federal Republic of Yugoslavia and the Republic of* and Serbia), followed by the UNMIK/KFOR JOINT DECLARATION, CJ (00) 0320 (Aug 17, 2000), the *Military Technical agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan,* Jan 2, 2002), para. 10, modified by the Exchange of Letters between the Government of Afghanistan and the NATO Secretary General, Sep.5/Nov. 22, 2004, followed by the *SOP 1151: Claims Against ISAF,* March 5, 2003*,* updated in 2007.

NATO Operational Claims

Similar to NATO SOFA[8], the NATO Policy states that claims between or among NATO/Partnership for Peace Troop Contributing Nations and NATO, including NATO Operational Headquarters, are waived. The waiver includes claims for damages and/or loss to property in-theatre and claims for injury or death suffered by personnel.[9] Claims between or among non-NATO/PfP Troop Contributing Nations and between or among those countries and NATO/PfP Troop Contributing Nations and NATO, including NATO Operational Headquarters, will be waived pursuant to separate agreements.[10] Non-admissible are claims arising from combat, combat-related activity or operational necessity[11]; also non-admissible are claims from the host nation(s) for damage to or loss of property or for death or injury of members of its armed services while such members are engaged in the performance of official duties. This principle should normally be reflected in an agreement between NATO and the relevant host nation(s).[12] A third category of claims that are not admissible are claims presented more than six months after the claimant has, or could have, reasonably discovered the damage.[13]

There is no doubt that a procedure for the settlement of claims against NATO, including the NATO Operational Headquarters, is proper and accurate.[14] However, with regard to Troop Contributing Nations, application of the rules to settle claims poses difficulties.

All claims adjudicated by Troop Contributing Nations, including subrogation claims, are subject to the TCNs' law and regulation.[15] Very often, states settle claims on a voluntary basis and pay compensation. Despite the recommendations that settlement of claims and compensation should be relevant to the politico-economic situation, and should not create differences between TCNs, some states have no claims program or see no reason why they should pay claims during this sort of operation. Others, despite awareness of an obligation to compensate, lack funds for this purpose.[16] Understandably, an inconsistent approach to claims causes confusion and resentment between the Troop Contributing Nations and more strategically, the harmed local population.

For this reason, it is necessary to consider the creation of a universal claims procedure to be implemented by all NATO countries in order to avoid differences, especially in the treatment of the local population that can negatively affect the NATO mission.

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[8] From a legal perspective, the unilateral extension of the territorial reach of this treaty through regulations is of doubtful validity.

[9] NATO Claims Policy, *Section C. Waivers, supra* note 4.

[10] *Id.*

[11] NATO regulations do not give a definition of these terms.

[12] NATO Claims Policy, *Section D Non-Admissible Claims Under the Present Policy, supra* note 4.

[13] *Id.*

[14] Note that in current regulations NATO HQs may also consider claims for which there is no identifiable Troop Contributing Nation responsible or any claims that a Troop Contributing Nation has refused to pay if the non-payment could negatively affect to NATO mission. NATO Claims Policy, *Section F, Claims Against NATO, Including the NATO Operational Headquarters - Categories of Claims, supra* note 4.

[15] NATO Claims Policy, *Section E, Claims against TCNs, supra* note 4.

[16] *See American Commander's Emergency Response Program (CERP).*

NATO Operational Claims

First of all, we have to define damages *ex delicto* which can be caused during NATO operations. The main classification is damage caused during the execution of the official (mission) duties and those which are not done in execution of these duties. For a definition of "on-duty" we have to look at national laws and regulations. Some states require that their armed services fulfill their official duties 24 hours per day. Other states allow their forces to be in an off-duty status, even in an area of operation (AOR). If national regulations of a state allow the soldier staying in AOR, but not on-duty, it should be held liable for damages, even if they have been caused by off-duty service members. However, even in such cases, the members of the armed services should be subject to exclusive jurisdiction of that contributing nation and the compensation should be done by *ex-gratia* payments. Because of ongoing conflicts, the legal system may not give enough safeguards or generally the state's legal system may not ensure a commonly accepted proceeding security.

The next classification is based on place-- where the damage was caused. We have to divide the object of damages into, on one side, public (state/governmental) property and on the other side private persons and property, including third persons and their property.

As a general rule NATO and any Troop Contributing Nations should not be responsible for damage or loss of public property, or for death or injury to members of governmental bodies while such members are engaged in the performance of official duties. Similarly to UN Missions, it should be assumed that the risks of an operation are conducted for the benefit of the country in which the forces are deployed. The host state should provide the necessary infrastructure for supporting the mission. If this is not possible because of operational necessity, the host state should compensate their citizens for any losses arising from NATO activities; NATO may participate with compensation by *ex-gratia* payments, if it is necessary for the mission.

Waiver of claims for damage to state property should also include death or injury to members of governmental bodies[17] with an exception for damage caused by gross negligence or willful misconduct, that can negatively affect the NATO mission. It is clear that moral obligation for compensation exists when a person is killed or injured. Such cases especially can negatively affect the NATO mission. NATO should compensate the damages on *ad hoc* basis, but the case should be processed by the headquarters and be accepted by superiors.

Activities that may cause damages in the course of the execution of official duties should be divided into two groups.

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[17] According to NATO policy, this only refers to the armed services personnel and this principle should normally be reflected in an agreement between NATO and the relevant host nation(s), NATO CLAIMS POLICY, *Section D, Non-Admissible Claims Under The Present Policy supra* note 4. Taking into account the NATO experience it is not appropriate to reduce waiver for damages against armed services of host nations. Current operations show that not only armed service is engaged in operation but also other paramilitary or police forces.

NATO Operational Claims

The first group contains: combat activities, combat-related activities and operationally necessary activities. Again, the NATO Policy does not contain definitions of those terms.[18] Only the EUFOR Mission has attempted to do this.[19] Damages caused during combat activities, combat-related activities and operationally necessary activities should be waived and only if the damage negatively affects the NATO mission should the HQ compensate it by *ex-gratia* payment. But if the damage negatively affects the NATO mission and was caused by gross negligence or willful misconduct by members of a Troop Contributing Nation, the Troop Contributing Nation should compensate for the damage or injury caused.

The second group contains non-combat activities, including, among others, personal injury, death, personal property damage, and damage to real estate property (houses, buildings, fields, crops, trees, etc.) that occurs in connection with training, field exercises, maneuvers or other activities which are distinctly military in nature. In this case, financial regulations of some countries do not include compensation in *ex-gratia* payments, or do not foresee to pay operational claims. However, to deal with this circumstance, a special procedure should be created. Primarily, Commanders in the AOR (whether at brigade or battalion level) must establish a good relationship with the local population, regardless of whether there is a legal responsibility to compensate such claims. Investigations as well as decisions regarding compensation should be made by Operational Headquarters. We can also consider participation in compensation by Troop Contributing Nations that cause damage, but such a solution has to be accepted by all Allies. In addition, especially where there is no legal basis for it, compensation should be done first by repairing the harm done, if possible. If compensation is to be paid it should be determined in accordance with local compensation standards and customs.

The solutions indicated above are only proposals which derive from observing NATO experience in that domain. However, because of national restrictions and different views on participation in NATO missions as well as different financial capacity, it is clear that for greater operation effectiveness, it is advisable to improve the NATO claim policy.

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[18] For example in UN Practice, "'operational necessity' must meet four cumulative conditions: the force commander, who holds the discretionary power to decide on the operational necessity of any given measure, must be convinced that an operational necessity exists; that the measure itself is strictly necessary and not just a matter of mere convenience or expediency; that it is part of an overarching operational plan and not the result of a rash individual action; and that the damage inflicted will be proportional to what is strictly necessary to achieve the operational goal. See Daphna Shraga, Current Development: UN peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage, 94 A.J.I.L. 411 (2000).

[19] Prescott, 7, supra note 1.

Ukraine at the doors of Euro-Atlantic Structures

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This article seeks to describe the structure and dynamics of the legal framework for Ukraine's possible integration into the Euro-Atlantic area. The views expressed in this article are conclusions reached by the author as part of an independent academic project and do not reflect any official position or views of either NATO, EU, or Ukrainian authorities. In the spirit of academic freedom and free exchange of ideas, this article is included to illustrate the complexities and difficulties that can arise when the EU and NATO engage bordering nations across a broad spectrum of legal, economic, social, military and political issues. Of particular relevance for our legal community is the discussion of the role of the '*acquis communautaire*' in the development process, the difficulty of drafting appropriate and enforceable standards in the various agreements, and the challenge of integrating legal systems with different historical backgrounds. These are generalized issues that we all need to be mindful of when working with non-Alliance nations interested in forging a closer relationship with the Euro-Atlantic security structure.

Exploring the Legal Frameworks for *Rapprochement of* Ukraine with the North Atlantic Treaty Organization (NATO) and the European Union (EU).

As Ukraine pursues 21st Century security and economic interests that go beyond its relationship with Russia, the legal details of how it may get cozy with NATO and the EU unveils the possibilities of its *rapprochement* with the two organizations. This article attempts to describe the nuts and bolts of the legal framework for Ukraine's possible integration into the Euro-Atlantic area.

Introduction:

NATO and the EU are the spine of today's Euro-Atlantic area and interlock to create the Euro-Atlantic security structure. While NATO remains the core of European security, the EU contributes to stability by shaping states economically and politically.

The success of NATO's and the EU's enlargement has created a more stable and secure Euro-Atlantic area that reaches from the Caucasus to the Pacific Ocean, an intertwined creation of unity, democratic security and economic benefit. Undeniably, and with particularly good effect in Central and Eastern Europe, the two organizations have been catalysts of positive change with NATO often regarded as a step ahead of EU membership. However, for reasons internal and external to the European-Atlantic area, the current debate about NATO and EU enlargement has shifted from the question of how and when the two institutions will enlarge, to whether the enlargement, beyond the original candidates, will occur at all. Notwithstanding this thorny debate, the two organizations remain outward-looking and constantly deepening their relations with their *environs.* Of the geographically strategic bordering nations of the Euro-Atlantic area, Ukraine is a country in the centre of interest of the EU and NATO.

Since 1991, when Ukraine re-emerged on the mental map of Europe after decades of stagnation and geopolitical fluctuations, the country has proceeded with baby steps towards integration with the West. Straddling the Black Sea and trans-Caucasian region where energy supplies to Europe converge, Ukraine connects the nations of the EU and NATO with the Middle East, the Caspian zone, and Central Asia, all areas of a vital importance for NATO and EU security interests.

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Regional developments of the past decade have dramatically changed the situation of Ukraine. Following their respective enlargements, members of NATO and EU now join frontiers with Ukraine bringing out new prospects and possibilities. One consequence of the changed political climate is Russia's increasing sensitivity to the influence of the EU and NATO on Ukraine. The Russian factor is a constant in all activities by the EU and NATO with Ukraine. Although the Alliance emphasized on numerous occasions that any decision regarding membership is an unconditional exercise of sovereignty and international agreement by NATO and the country concerned --not subject to veto from any third party— any consideration of enlargement of the Alliance becomes a discussion of the possible Russian response. A Cold War cadaver remains in the closet, suppressing the appetite for enlargement of the two organizations.

With the collapse of the Soviet Union and the independence of Ukraine in 1991, the country's relations with NATO and the EU became institutionalized although more in form than substance. Numerous factors determined this. Institutionally NATO and the EU offered cautious and prudent frameworks, effectively throwing the ball into Ukraine's court for a sovereign reaction. Domestically, internal factors, such as uncertain public opinion, the absence of a common position among the leaders about Ukraine's geopolitical orientation, lagging economic, judicial, and defence reforms all contributed to languor in the national embrace of NATO's and the EU's measured offerings. Domestic declarations and rhetoric reaching out towards the two organizations lacked meaningful follow-up. Although Ukraine continuously urges NATO and the EU to adopt more inclusive and engaged policies, its own integration efforts are full of zigzags and deviations. Without the implementation of meaningful internal reforms neither organization has thus far considered Ukraine a fully qualified candidate country for membership.

With this historical and geo-political background as context, it is important to recognize that the aspirations and the requirements to join the two organizations differ and that the two organizations use different tools and methods to deal with countries that aspire for membership. Clearly, NATO membership has proved more easily achievable for candidate countries than the EU accession. This is because the Alliance criteria are more flexible and possess attainable specifics. By comparison the EU approach requires uniformity to the existing EU regimes. However, regardless of the distinctive traits, the driving logic behind enlargement for both organizations is the same. The prospects of membership in both organizations are dependent on and subject to the success of reforms by the aspiring country.

For the moment, NATO and the EU are willing to forge ahead with deepening the relationship with Ukraine while discreetly avoiding a direct answer to the question of membership. In order to avoid complete exasperation of their partner in Kyiv, NATO and the EU offer solid bases for cooperation and that should lead Ukraine on its path into the Euro-Atlantic structures. The analysis of these guidelines will be conducted from two perspectives. First, the nature and character of these documents and their ability to mould the development in Ukraine will be reviewed and discussed. Second, a review of steps made by Ukraine in its effort to reach rapprochement with NATO and the EU will be conducted.

Because the aspirations for EU membership were expressed earlier and more persistently than aspirations for NATO membership and also because EU – Ukraine cooperation offers more substantive material for analysis, the description of EU – Ukraine cooperation will be first discussed in this issue describing a general picture of the constraints and obstacles Ukraine faces on its way westwards. The next edition of the NATO Legal Gazette will contain an analysis of NATO – Ukraine cooperation.

Ukraine at the doors of Euro-Atlantic Structures

Overview

For Ukraine the door to the European Union 'is neither closed nor open'. This description of relations between the EU and Ukraine has continued for more than a decade of cooperation. The EU avoids offering or excluding membership while Ukraine continuously seeks to be embraced. This ambiguous and unbalanced relationship continues in the current negotiations for a new framework for relations between the EU and Ukraine, the New Enhanced Agreement (NEA). As these discussions about Ukraine's future continue, it is an opportune time to analyze the shape and character of EU – Ukraine relations, the results brought by the past ten years of cooperation and an opportune time to attempt to draw conclusions about the future of Ukraine's integration within the EU. The issues are numerous, including not only the membership but the meaning and significance of the past as well as future changes made in Ukraine prompted by its desire to cooperate with the EU.

Ukraine first expressed its interest to join the EU in 1994. Cooperation became a reality in 1998. Since then, the relationship has continued and evolved, albeit hardly as a success story. Central to this saga are the differences in the two partners' expectations about cooperation. For the EU, cooperation with its *environs,* the neighboring countries on its Eastern border, includes a wish to promote stability, security and prosperity, without making the full investment of a membership offer. For now, cooperation with Ukraine corresponds to these priorities. From Ukraine's perspective, cooperation with the EU is seen as analogous to membership. Any collaborative activities with the EU that have not been stepping stones to membership are unsatisfactory. Moreover, Ukraine considered itself too important to be ignored by Europe. Ukraine was myopic when it failed to understand that democratic development and economic performance mattered far more to the EU than size, seashore, geo-political location and a refusal to re-integrate with Russia. When the 2004 Orange Revolution unexpectedly occurred, suggesting for the first time in the history of Ukraine that democracy had taken root, hopes for a new chapter in EU – Ukraine relations were high. Although the leading political personalities changed, national thinking on how to deal with the EU did not. Consequently, the EU keeps reminding Ukraine that the prospect of membership remains distant.

Agreements

European Union – Ukraine relations have their legal basis in the **Partnership and Cooperation Agreement (PCA)** signed in June 1994.[2] In general, PCAs aim at establishing a political dialogue, facilitating economic relations between the EU and the partner country, promoting democratic reforms and human rights and establishing a legal order that guarantees the rule of law. The Preambles of PCAs intentionally omit any reference to 'the process of European integration' or 'the objective of membership in the EU'.[3] These agreements are presented as ends in themselves, rather than an interim step towards accession.

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[1] Statement of Benita Ferrero-Waldner, External Relations Commissioner, European Commission Delegation Press Event, 13 January, 2005, available at http://europa.eu.int/comm/external_relations/us/news/press_wash130105.pdf.

[2] EC – Ukraine PCA (OJ L 49/3, 1998).

[3] Roman Petrov, *Legal Basis and Scope of the New EU – Ukraine Enhanced Agreement. Is there any room for further speculation?* EUI Working Papers 2008/17 available at http://cadmus.eui.eu/dspace/bitstream/1814/8709/1/MWP_2008_17.pdf, p.6

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The Partnership and Cooperation Agreement (PCA) concluded between the EU and Ukraine followed this general scheme. On the economic side, the PCA marks an important step in helping to bring Ukraine in line with the legal framework of the Single European Market and the World Trade Organization. The Agreement contains a number of evolutionary clauses, including a '*rendezvous*' clause with the possibility to study the feasibility of a free trade area,[4] and provides a wide-ranging cooperation in the industrial, commercial and scientific fields. On the political side, the Ukraine PCA establishes an institutional framework based on annual meetings at the Presidential and ministerial levels under the form of the EU – Ukraine Summit and the Cooperation Council.

In the context of future developments of the EU – Ukraine relations, Art.51 of the PCA is of the utmost importance. This Article explicitly states the approximation of Ukrainian legislation to EU standards is a pre-condition for strengthening the links between Ukraine and the EU. Ukraine should therefore arrange its legislation to be increasingly compatible with that of the EU. The transposition clause of Art. 51 must be read in connection with Art. 4 of the Ukraine PCA, that envisages the beginning of negotiations on the establishment of a free-trade area that advances market-oriented economic reforms.

This pattern of conditions for development and intensification of relations between the EU and Ukraine is unsuitable for two reasons. First, only one Article of the whole agreement deals with the question of transposition. Art. 51 of the PCA requires Ukraine only to 'endeavor to ensure' the compatibility of its legislation to EU law in the priority areas of company law, financial services, environment, consumer protection. Second, Art. 2 of the PCA contains the essential elements of the agreement for future relations: respect of democratic principles, human rights and the principles of market economy. In the first case the requirement to approximate is of a soft law nature, lacking whatever control of compliance. In the case of essential elements the PCA refers to international treaties and documents,[5] thereby depleting the obligation of preciseness. Further, the PCA makes no reference to the *acquis communautaire*[6] . This is a major flaw that reduces Ukraine's urgency to pursue transposition. If we compare the Ukraine PCA with the European Agreements (Agreements signed with Countries that became members of the EU in 2004) that include a reference to the *acquis,* the achievement of long-term economic and political goals was strengthened.[7]

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[4] Art. 4 of EC – Ukraine PCA.

[5] Art.2 of the EC – Ukraine PCA refers to the Helsinki final act, Charter of Paris for New Europe and CSCE Bonn Conference documents.

[6] The body of common rights and obligations which bind all Member States together within the European Union. It includes principles and political objectives of the Treaties, the legislation adopted in application of the treaties and the case law of the Court of Justice, the declarations and resolutions adopted by the Union, measures relating to the common foreign and security policy, measures relating to justice and home affairs, international agreements concluded by the Community and those concluded by the Member States between themselves in the field of the Union's activities.

[7] Kirstyn Inglis, *The Europe Agreements compared in the light of their pre-accession reorientation*, Common Market Law Review, 37, 2000, p.4.

As a result no clear specification as to what has to be done by Ukraine to activate the evolutionary clauses and thereby establish a free trade area with the EU is to be found. In large, the PCA simply contains minor economic incentives and a low-credibility menace to withhold them if the obligations under the agreement are not respected.[8]

For Ukraine, the adoption of the PCA was a solid legal basis to start cooperation with the EU. In the beginning, the commitments Ukraine assigned itself seemed feasible. In June 1998, President Kuchma signed a Strategy on Ukraine's Integration with the EU.[9] The membership in the EU was declared as the long-term foreign policy goal and the Strategy identified the main directions on Ukraine's way to European integration, such as adaptation of the legislation of Ukraine to the *acquis communautaire*, protection of human rights, economic integration, political consolidation and the strengthening of democracy. Beyond this ambitious strategy, the institutional framework built up to take concrete steps for European integration possessed little potential for success. The Ministry of Foreign Affairs was supposed to pursue Ukraine's European direction on a day-to-day basis and the Ministry of Justice was responsible for carrying out the task of assuring the transposition. The Ukrainian legal system based on the inherited socialistic logic required substantive transformation to achieve the changes envisaged and frequently served as a barrier to advancement. At the same time, diverse governmental offices and agencies were set up to help pursue the integration goals but none of these institutions were granted the power to issue binding decisions. In reality, the semi-presidential constitutional framework and then-President Kuchma's authoritarian tendencies elevated the Office of the President to the supreme institution in domestic as well as foreign policy matters. Thus, this dispersed and weak institutional framework of bodies, together with an overly strong Presidency, became an obstacle to the substantial change.

The main aim of the PCA can be interpreted as being an ambition to draw Ukraine closer to the Internal Market by working jointly in the areas of goods, services and capital. Indeed, the EU announced that it seeks to reach out to Ukraine mainly through the economic aspects of cooperation. Analysis of documents evaluating the implementation of the PCA[10] reveals that this message was either not heard or not understood in Ukraine. Ukraine violated almost all key provisions of the PCA covering the areas of economic cooperation, including most-favored nation treatment, freedom of transit, prohibition of quantitative restrictions on imports, as well as many provisions on business and investment. Furthermore, by calling for intensification of transposition of Ukrainian legislation, the report revealed that transposition attempts were not very fruitful. Moreover, Ukraine failed to deliver reforms in areas like the judiciary system, freedom of the media and civil society. As one can see, the early years of EU – Ukraine cooperation were marked by Ukraine's complete failure to deliver the reforms needed for the *rapprochement* with the EU.

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[8] Art.102 of the EC – Ukraine PCA.

[9] Kataryna Wolczuk, *Integration without Europeanization, Ukraine and its Policy towards the EU*, EUI Working Papers, 2004/15, p.6.

[10] Joint report on the implementation of the Partnership and Cooperation Agreement between the EU and Ukraine, March 2003, available at http://209.85.229.132/search?q=cache:LIn1nwyCrF0J:www.ukraine-eu.mfa.gov.ua/data/upload/publication/eu/en/2126/02_pca_report_e.doc+joint+report+on+the+implementation+of+the+partnership+and+cooperation+agreement+between+EU+and+Ukraine&cd=2&hl=en&ct=clnk

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The further evolution of relations between the EU and Ukraine took place in the greater context of new tools of the EU external policy initiatives called the **Common Strategies**.[11] Based on the provisions of the existing PCAs, the strategies sought to specify areas of cooperation of mutual interest and develop further engagements. The EU Common Strategies on Ukraine was adopted by the Helsinki European Council on December 11, 1999. The major objectives of the strategy included support for the democratic and economic transition, progressive transposition of national legislation, and foresaw the possibility of studying the circumstances of the establishment of a free-trade area.[12] The strategy also aimed to strengthen cooperation in the area of Common Foreign and Security Policy.[13] However, once the fancy cover of the document was opened, its vague nature and the lack of intention to take relations with Ukraine to a new quantitative level are striking. Foremost, the strategy fell short of making an explicit statement that Ukraine would be considered as a possible member upon its fulfillment of outlined conditions. The document was perceived by Ukraine as one-sided and outdated. However, the cooperation in the Common Foreign and Security Policy matters was indeed the high-point of the partnership between the EU and Ukraine. The country has aligned itself with most of the EU foreign policy declarations and taken part in two EU-led Police Missions and cooperated on diverse regional issues, particularly in the Black Sea region. However, as for the adaptation process and the pursuit of goals in European matters, these were continuously exercised solely within the executive branch under the guidelines of the President.

Overall between 1998 and 2004, in spite of its own proclamations expressing the desire to pursue European Union membership, the actual repercussions of the PCA's on domestic policy-making in Ukraine were few. The lack of coordination, monitoring and an overall immaturity to comply with European standards took its toll on Ukraine's ability to advance towards the EU.

A new and deeper phase in relations between the EU and Ukraine was anticipated with the introduction of the European Neighborhood Policy in 2004. The policy's launch coincided with the Orange Revolution[14] during which the access to power of new elites was expected to have far-reaching effects on Ukraine's policy towards the EU. The policy aimed to avoid the division of newly enlarged Europe and to promote stability and prosperity in the neighboring countries. The objective of the policy was to enhance political dialogue between the parties in return for substantive political and legal reforms, with the ultimate goal of opening up certain sectors of the Internal Market of the EU.[15]

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[11] Presidency conclusions, Helsinki European Council, 10 and 11 December 1999, available at http://presidency.finland.fi/netcomm/news/showarticle2370.html. Except Ukraine, the EU has concluded Common Strategies with Russia and Mediterranean countries.

[12] §61 of the CS on Ukraine, Part 2 of the CS on Ukraine and § 20 of the CS on Ukraine.

[13] Part 2 of the CS on Ukraine.

[14] Orange Revolution is a term commonly used for protest that followed the first round of Presidential election in Ukraine in November 2004. After the vote rigging in the first round, the protests lead to the second round of election, resulting in the election of the opposition leader Viktor Yuschenko. For more detailed analysis of the events see, for example, Anders Aslund and Michael Mc Faul, *Revolution in Orange: the Origins of Ukraine's Democratic Breakthrough*, Carneige Endowment (2006).

[15] COM(2004) 373.

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The objectives of the European Neighborhood Policy were to be met through the implementation of priorities set out in individual Action Plans. The EU and Ukraine signed the Action Plan in February 2005.[16]

The Action Plan clarifies what Ukraine's commitments are towards the EU and how they should be carried out. The issue of transposition of Ukrainian legislation constitutes one of the top priorities, with a list of directions in which the transposition should be carried out. These include internal reform based on strengthening the democracy, respect for human rights, the principle of separation of powers and judicial independence. Furthermore, areas of economic and social reform and development are targeted, with a strong emphasis on the implementation of the General Agreement on Tariff and Trade rules. This framework was introduced in the 'post- Orange' Ukraine that was anything but stable, where elites preoccupied with power struggles after the Revolution were distracted from pursuing clear political leadership on European matters.

In spring 2005, the Government adopted a Road Map on the Implementation of the Action Plan, but no long-term strategic framework on European Integration was endorsed. Notwithstanding the political situation, Ukraine was able to progress and attempted to pursue those reforms that were taking it closer to the next level in the relations with the EU, the New Enhanced Agreement. With this project in sight, law-making became more targeted. Economic reforms were pursued rather thoroughly. While no revolution happened in the area of transposition of Ukrainian law, the accomplishments were appreciated by the EU.

In December 2005 the Council of the European Union granted market economy status to Ukraine. Close cooperation with the World Trade Organization (WTO) resulted in conclusion of several bilateral protocols with WTO members. New regulations were adopted to liberalize access of foreign investors to Ukrainian market and a decrease of import and export tariffs has been carried out.[17] Regrettably, the positive improvements were neutralized by multiple setbacks. Due to obstruction in Parliament, adoption of a set of laws related to the liberalization of trade, much needed for finalizing the WTO accession, was repeatedly postponed. The active interference of the Government in the economy was a far cry from the anticipated liberalization laid out in the Action Plan. Regardless of these deficiencies, because the EU had repeatedly praised overall economic progress as the culmination of economical achievements, the accession to the WTO came in February 2008.

In the political area the intensified political dialogue caused by regular EU – Ukraine Summits and EU – Ministerial meetings benefited both parties. The 2006 parliamentary and 2007 pre-term parliamentary elections were held to be free and fair. In the area of protection of human rights and fundamental freedoms, the Ukrainian government joined several multilateral conventions.[18] Visa-facilitation and readmission agreements were a major contribution to people-to-people contacts. However, some of the more sensitive issues were neglected. The reform of the judiciary did not materialize, leaving it the most non-transparent branch of power in Ukraine. A constitutional reform that would contribute to the much needed stabilization of the political climate was not accomplished in spite of the repeated calls for it.

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[16] Recommendation No.1/2005 of the EU – Ukraine Cooperation Council of 21/02/2005 on the implementation of the EU – Ukraine Action Plan.

[17] Roman Petrov,'Past and Future Action on Approximation of Ukrainian legislation to that of the EU', p.5.

[18] E.g. European convention of remedies to victims of crimes, Civil Law Convention on corruption.

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Beginning in 2008 several new regional initiatives were introduced to forge deeper ties with the EU's flanks. The Eastern Partnership (EP) is one of them. The initiative aims to breathe a new life in the relations between the EU and the six Eastern European Neighbors[19] and to remedy the drawbacks of the European Neighbor Policy.[20] The Eastern Partnership proposal is a brainchild of Poland and Sweden, the traditional advocates of membership bid for Ukraine. The idea originally aimed to create a policy that would be an antechamber before full membership in the club. Two forces drive this proposal. The first is to balance the southern dimension of the ENP, the Union for the Mediterranean. The second is to deal with greatly diversified spheres of interest in the EU that became a reality after the 2004 and 2007 enlargements.[21] The Eastern Partnership (EP) was launched in May 2009 during the EU Prague Summit creating a framework for acceleration of political association and economic integration, omitting, however, the promise of membership. The added value of the Eastern Partnership initiative is hard to detect. The proposal builds on the principles and logic of the European Neighborhood Partners while introducing only cosmetic changes.[22] The Eastern Partnership does not cause a shakeup of the bilateral relations between Ukraine and the EU. Nevertheless, the possibility of economic integration with the EU and opportunity to reinforce relations with its neighbors could have positive repercussions on development in Ukraine. That noted, from Ukraine, all elements contained in the ENP were either already implemented or are about to be implemented. Thus the overall attractiveness of the EP is considerably weakened because the EU's membership offer to Ukraine has become the real litmus test of the EU's genuine interest.[23]

In addition to the policy framework contained in the Eastern Partnership, the EU concurrently had to address its bilateral agreement with Ukraine. The expiration of the original legal basis for relations, the 1994 Partnerships and Cooperation Agreement, together with the overall progress made in Ukraine in the implementation of the EU – Ukraine AP, the conducted reforms, crowned by the successful holding of parliamentary elections in September 2007 and the Ukraine's accession to the WTO in 2008, all led to the start of negotiation on the New Enhanced Agreement in March 2007.[24] The debate about the new agreement is getting considerable attention because it will set the standard for the new generation of agreements negotiated under the European Neighbor Policy.[25]

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[19] For the purposes of the Eastern Partnership following countries participating in the ENP are included: Armenia, Azerbaijan, Belarus, Georgia, Moldova, Ukraine, COM(2008) 823, p.2.

[20] As the main drawbacks of the ENP are considered to be the geographical scope, the absence of real incentives for participating countries, the use of pre-accession conditionality and the presumption of common values between the EU and the neighboring countries.

[21] Whereas the preoccupations of Member States like Italy, France or Spain are situated behind the southern boundaries of the EU, UK, Germany, Sweden and particularly the new member states in Central and Eastern Europe fancy enhanced involvement of the EU Eastward.

[22] For example the involvement of the Committee of the Regions, the European Economic and Social Committee, Comprehensive Institution-Building Program, COM(2008) 823 final, p.3, p.12.

[23] Kataryna Wolczuk, *Ukraine and its relations with the EU in the context of the European Neighborhood Policy*, in Sabine Fisher (ed.), *Ukraine Quo Vadis?*, Chaillot Paper, No.108, February 2008, p.88.

[24] The official negotiations between Ukraine and the EU on the new enhanced agreement started on 5th March, 2007, see, for example, European Commission IP/07/275.

[25] Communication from the Commission concerning European Neighborhood Policy envisages new contractual links replacing the current bilateral Action Plans, COM(2004) 373 final of 12 May 2004, p. 3.

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For Ukraine these new policies offer political association, economic integration, and a clear reference to the conditions a country needs to fulfill in order to be eligible for the EU membership.[26] Participation in the Single Market of the EU is the immediate goal and full EU membership is the long-term goal. During negotiations of the New Enhanced Agreement Ukraine fought fiercely to obtain an Association Agreement. This was motivated because the Association Agreement was seen as an additional stepping stone to enlargement despite the primary law and jurisprudence[27] clarifying that an association only creates a privileged link with a non-member country participation of the associated state in the Community system.[28]

Several opportunities are created for Ukraine by having a possibility to negotiate an Association Agreement. First of all, the broad wording of Art. 310 European Community Treaty,[29] governing association, implies great flexibility as to the content of the agreement. The scope of the agreement will be very ambitious, covering, for the first time, all three pillars of the EU. The core of the New Enhanced Agreement is announced to be a Free Trade Area. Moving from economic 'cooperation' to economic 'integration', an Association Agreement that contains deep free trade provisions provides the necessary framework for a country to prepare its integration with the internal market of the EU and possibly for future accession.[30]

It is worth noting that all countries that acceded to the EU in 2004[31]and 2007,[32] created free trade zones and custom unions under their respective agreements with the EU before becoming members. Thus, economy seems to be the best place to begin for further integration. A Free Trade Area extends EU economic regulation in areas such as competition policy, state aids, establishment and the movement of capital and labor. The elimination of non-tariff barriers plays an important role in helping EU neighbor companies to have access to the internal market of the EU.[33]

Rapid and sustainable economic growth can be anticipated. Economic actors in the Ukraine would be integrated into the EU market in the similar way as European Economic Area members are. Ukrainian products and services would have the same position on the market as EU products with the result being that Ukraine could enjoy many advantages of the EU's internal market even without becoming a member.

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[26] Art. 49 of the Treaty of European Union.

[27] Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719.

[28] Council of the European Union, Council conclusions concerning negotiations of a New Enhanced Agreement between the EU and Ukraine, 2776th, External Relations Council meeting in Brussels, 22 January 2007, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/92493.pdf.

[29] Art.310 EC states 'The Community may conclude with one or more States or international organization agreements establishing an association involving reciprocal rights and obligations, common action and special procedure'.

[30] Alan Mayhew, 'The EU – Ukrainian Summit, the Association Agreement and the New Practical Instrument: implications for Ukraine: January 2009,' p.4.

[31] Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic, Slovenia.

[32] Bulgaria, Romania.

[33] Alan Mayhew, 'The EU – Ukrainian Summit, the Association Agreement and the New Practical Instrument: implications for Ukraine: January 2009', p. 5.

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This level of ambitions comes together with challenges. Adoption of the internal market *acquis* may be burdensome, if not nearly impossible in Ukraine. With an unreformed judiciary and legislature that are hostages of political fights, efficient harmonization of all branches of government will be a rather difficult task. A lower technical level of Ukrainian industries may present an obstacle for their ability to compete with those within the EU. Imports to Ukraine will be subject to the EU's external tariffs which could particularly harm Ukraine's commercial relations with Russia. Finally, because Association requires as a procedural prerequisite the unanimous vote at the Council, this is more than a mere technical legal matter. Attitudes towards an appropriate course of European integration for Ukraine vary among the Member States and for some nations, the time may still not be right for even this step. However, until the Free Trade Area is in place it is hard to predict the full extent of its influence on Ukraine. The substantive part of the agreement has a potential to incite deeper integration of Ukraine in the EU internal market and bring Ukraine one step closer to the EU. Practice may be a bit more arduous. But all in all, the agreement, if duly implemented, may bring positive changes in Ukraine.

The forgoing analysis describes how the Ukraine's democratic, political and economic transformation could not be brought to fruition because of the political instability and the lack of institutional and structural changes. The realization for Ukraine's political leadership, that closer integration with the EU requires many small steps, came slowly and painfully as its many membership pleas fell on deaf ears. The future does appear more hopeful. Stripped of its optimistic cover, the Eastern Partnership is as little as a face-lift of the previous external policies. The Eastern Partnership and the current Easter Neighbor Policy have the same Achilles' heel. They do not create a satisfying alternative to *modus operandi* for countries that although not being ready for the club's full membership yet, wish to have a different label than a simple 'neighbor.' As for the New Enhanced Agreement, the reality is that the EU is offering the lowest possible scale of cooperation it can, without completely exasperating its partner in Kiev. Nevertheless, from a pragmatic point of view, if Ukraine is able to genuinely engage in the reforms outlined in these frameworks, positive moderate changes can be brought to Ukraine. Thus, without making a definitive prediction, it is clear that for Ukraine not all roads of cooperation with the EU will lead to membership.

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Spotlight

Major Kenneth Hobbs, Legal Adviser, NATO School

Name: Kenneth L. Hobbs (Ken)

Rank/Service/Nationality: Major, United States Air Force

Job title: Legal Adviser

Primary legal focus of effort: Providing the NATO School Commandant timely, on-target legal advice and supporting the School's educational mission through lectures at the NATO School and elsewhere.

Likes: Good food, good company and good books, not necessarily in that order. Travel.

Dislikes: Dishonesty, greed, envy.

When in Oberammergau, everyone should: Take a hike into the mountains, the scenery is incredible.

Best NATO experience: The camaraderie that I've experienced in my short time here at the NATO School.

My one recommendation for the NATO Legal Community: We should persuade NATO to have a single repository (or one per SC and one for HQ NATO) for publications, maintained online.

Hobbs.Kenneth@natoschool.nato.int

Spotlight

Colonel James Wise, Legal Adviser, IMS

Name: James R. Wise

Rank/Service/Nationality: Colonel, United States Air Force

Job title: HQ NATO International Military Staff Legal Adviser

Primary legal focus of effort: International agreements/negotiations.

Likes: Wife and children, fine food, good wine, good friends, and travel.

Dislikes: Long meetings.

When in Brussels, everyone should: Visit the Grand Place.

Best NATO experience: Engaging on extraordinarily interesting and complex legal issues.

My one recommendation for the NATO Legal Community: Relax. You aren't in Kansas anymore.

Wise.james@hq.nato.int

Spotlight

Mrs. Andrée Clemang, Legal Adviser, NAMSO

Name: CLEMANG Andrée

Rank/Service/Nationality: CIV/Luxembourger

Job title: NATO Maintenance and Supply Organisation (NAMSO) Legal Adviser

Primary legal focus of effort: International Agreements and Contracts, as well as Civilian Personnel Policy issues

Likes: Everything about her new job.

Dislikes: Time - Days are too short for handling all the work required by this nice job.

When in Capellen, everyone should: Enjoy NAMSA's friendly atmosphere.

Best NATO experience: The 2009 NATO Legal Advisers Conference in Strasbourg!!!

My one recommendation for the NATO Legal Community: Keep spirits high and unite for organizing again such interesting and convivial happenings as the Strasbourg Conference, which benefitted from an excellent cooperation with EUROCORPS.

a.clemang@namsa.nato.int

Spotlight

Colonel Michael Scholze, Legal Adviser, HQ KFOR

Name: Michael Scholze

Rank/Service/Nationality : Colonel, Army, Germany

Job title: HQ KFOR Chief LEGAD

Primary legal focus of effort: Operational Law

Likes: Family, History, Sports

Dislikes: Cell phones, different computer systems in one office

When in Kosovo, everyone should: Be aware to change his driving habits in the daily traffic when coming home.

Best NATO experience: My normal job (Chief LEGAD NATO NRDC GE/NL)

My one recommendation for the NATO Legal Community:

Communitate valemus ! (Together we are strong!)

scholzem@hq.kfor.nato.int

Spotlight

LTC Carolina Kalf, Assistant Legal Adviser, IMS

Name: Carolina Kalf

Rank/Service/Nationality : LtCol, Royal Netherlands Airforce

Job title: Deputy Legal Adviser International Military Staff

Primary legal focus of effort: Legal advice in support of the Military Committee,

Likes: Amsterdam (my hometown), history, movies, cats, reading etc.

Dislikes: Ironing

When in Brussels, everyone should: Stop by for a cup of coffee, have a lookout for the dog on the Oude Graanmarkt!

Best NATO experience: Deployment to Kandahar AFB, being directly 'on top of' Air Operations.

My one recommendation for the NATO Legal Community: Communicate.

Kalf.carolina@hq.nato.int

Spotlight

Ms. Klara Tothova, Legal Intern, ACT/SEE

Name: Klara Tothova

Rank/Service/Nationality : Slovak/ Civilian

Job title: SHAPE - ACT/SEE Intern

Primary legal focus of effort: External Relations of the European Union

Likes: Travel, French cuisine, Going to movies, John Irving

Dislikes: Milk and rain

When in Mons, everyone should: enjoy the proximity of Paris and Brussels

Best NATO experience: the NATO School course for Legal Advisers

My one recommendation for the NATO Legal Community: Share information

Klara.tothova@shape.nato.int

HAIL

&

FAREWELL

Hail

SHAPE : CDR Sheila Archer (CAN) joined in August 2009

JFC Brunssum : WG CDR Mark Phelps (GBR) joined in September 2009

JFC Brunssum : Capt Benoit Boutilie (FRA) joined in September 2009

JFC Naples : Maj Adrienn Szilagyi (HUN) joined in August 2009

JFC Naples : Capt Virginie Lotti (FRA) joined in August 2009

JFC Naples : Capt Cyrille Pison (FRA) joined in August 2009

CC-Air HQ Ramstein : WG CDR Tim Billingham (GBR) joined in September 2009

CC-Land HQ Heidelberg : Col Walter Weedman (USA) joined in September 2009

ARRC : Maj Lee Burney (GBR) joined in September 2009

Rapid Reaction Force : Col Philippe Bardet(FRA) joined in September 2009

JFTC : CDR Wieslaw Gozdziewicz (POL) joined in October 2009

JHQ Lisbon : Capt Julien Madre (FRA) joined in October 2009

Farewell

JFC Brunssum : WG CDR Kevin Sanders (GBR) left in August 2009

JFC Naples : Maj Attila Varga (HUN) left in August 2009

JFC Naples: Capt Julie Marionneau (FRA) left in August 2009

CC-Air HQ Ramstein : WG CDR Andrew McKendrick (GBR) left in September 2009

GENERAL INTEREST/NATO IN THE NEWS

- The speech which the NATO Secretary General Anders Fogh Rasmussen made on the new strategic concept at Vilnius University on October 9, 2009 can be found at:

  http://www.nato.int/cps/en/natolive/opinions_57938.htm

- The 15 Nations participating in NATO's Alliance Ground Surveillance (AGS) programme have completed the signature process of the Programme Memorandum of Understanding (PMOU). More information can be found at:

  http://www.nato.int/cps/en/natolive/news_57711.htm?mode=pressrelease

- For its 60th anniversary, NATO publishes anecdotes about its history; find out about the first SACEUR, when the title Secretary General was first used, the NATO Science Programme and more:

  http://www.nato.int/60years/anecdotes.html

- Mr. Chatzidakis was appointed General Manager to NAMSA in July 2009. Mr. Chatzidakis replaces Mr. Munzner who managed NAMSA for the past five years. The NATO Maintenance and Supply Agency (NAMSA) is NATO's principal logistics support management agency. Its main task is to assist NATO nations by organizing common procurement and supply of spare parts. More info on:

  http://www.namsa.nato.int/news/42_e.htm

- An article on NATO which touches on the civilian casualty issue in Afghanistan was published on the American Society of International Law website.

  http://asil.org/rio/nato_sum09.html

- The 55th annual session of the NATO Parliamentary Assembly will take place in Edinburgh, United Kingdom from November 13 to 17, 2009. 340 parliamentarians from the 28 NATO member countries from North America and Europe as well as delegates from partner countries and observers will gather to discuss security issues of common concerns to all countries.

  http://www.nato-pa.int/

"Total absence of humor renders life impossible"

Colette

GENERAL INTEREST/NATO IN THE NEWS

- The San Remo Institute has published 'Addressing the Resurgence of Sea Piracy: Legal, Political and Security Aspects'. Please consult: http://www.iihl.org/iihl/documents/Final_report.pdf

- Information on The Afghanistan Independent Human Rights Commission can be found at: http://www.aihrc.org.af/english/

- Afghanistan has acceded to the two Additional Protocols of the Geneva Convention in June 2009. More information on: http://asil.org/rio/nato_sum09.html and http://www.icrc.org/Web/Eng/siteeng0.nsf/html/afganistan-news-240609!OpenDocument

- Articles about the 60th anniversary of the Geneva Conventions: http://edition.cnn.com/2009/WORLD/europe/08/11/geneva.conventions.anniversary/index.html

  http://edition.cnn.com/2009/WORLD/europe/08/11/geneva.conventions/index.html

- The Saint Group is a security sector specialist that provides training to private, government, and non-government organizations in Europe. For an overview of their course offerings see: http://saint-claire.org/PMC.html

- Two papers on caveats were published recently "NATO at war : Understanding the Challenges of Caveats in Afghanistan" and "Caveats, Values and the Future of NATO Peace Operations" which can be read at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1450476

  http://www.socialsciences.uottawa.ca/cepi-cips/eng/policybriefs.asp#saideman_6

"The cause is hidden. The effect is visible to all"

Ovid

UPCOMING EVENTS

- The VIIth Seminar for Legal Advisers to the Armed Forces will take place in Riga, Latvia, from 25 to 30 May 2010. This event is organized by the International Society for Military Law and the Law of War. The theme of this seminar is: "Commanders and Legal Advisers in International Operations". **Registration needs to be done before 10 December 2009**. More information can be found at: http://www.soc-mil-law.org/

- The next Operational Law Course will be held at the NATO School from 26 to 30 April 2010. The next Legal Advisers Course will be held at the NATO School from 17 to 21 May 2010.

  For more information on courses and workshops, please visit www.natoschool.nato.int

- **Call for papers for the 2010 Lieber Society Military Prize**. Papers must be submitted in English (or translated into English if written in another language), have no more than 35 pages and must be received **by January 2, 2010.** More information on: http://www.asil.org/callforpapers/callforpapers2009.pdf

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