



NEWSLETTER OCTOBER/NOVEMBER/DECEMBER 2004

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EDITORIAL

Again an interesting year has passed for the International Society for Military Law and the Law of War. The international conference held in Brussels from 29 September to 1 October 2004 was a great success. Participants and speakers from Africa, Asia, the Middle East, North America and Europe were assembled to exchange their knowledge and experience on the role of NGOs in international problem solving. This conference, organised by the Belgian National Group under the auspices of our association, enabled our members to identify possible roles in that regard for our association with consultative status with the United Nations' Economic and Social Council. It also established or enhanced valuable contacts for future projects with organisations outside our association, e.g. with the United Nations.

Our association's Board of Directors has also been reinforced with a number of highly respected and renowned members; I heartily congratulate and welcome LtGen XU CHUGEN (China), Mrs. U. FROISSART (Germany), Prof. Dr. Georg NOLTE (Germany), Prof. Dr. S. OETER (Germany) and Col Dr. A. AWAD (Lebanon), as new members of the Board of Directors. I am looking forward to our co-operation in the Board of Directors.

On the other hand, I have to announce that the following persons have resigned:

- Mr. G. VAN GERVEN (Belgium) as Director of the Documentation Centre;
- Prof. Dr. U. GENESIO (Italy) as member of the Board of Directors
- Mr. F. GODET (Switzerland) as member of the Board of Directors
- LtCol J. McCLELLAND (United Kingdom) as member of the Board of Directors

I would like to thank them all for their substantive contribution to the objectives of our association and hope to meet them again in the near future, e.g. at our association's activities.

The next major undertaking for our association will be the VIth Seminar for Legal Advisors to the Armed Forces, in Strasbourg from 23 to 27 November 2005. The Director of the Seminar, BrigGen J.P. SPIJK (The Netherlands), will organise this Seminar with the help of LtCol J.-C. SCHMITT (France) and the General Secretariat. So far, the following interesting themes have been identified to deal with:

- Legal uncertainties at the beginning of a peacekeeping operation;
- Command responsibility in multinational settings;
- Legal issues regarding detention;
- The changing roles of the military during peacekeeping operations.

All suggestions in this regard can be sent to the Director of the Seminar through the General Secretariat.

Merry Christmas and a happy new year!

Ludwig VAN DER VEKEN
Secretary-General

NEWS

The General Secretariat has sent the **questionnaire for the preparation of our XVIIth Congress** in 2006 to the National Groups and to the Ministers of Defence. The chosen overall theme of the Congress is "The Rule of Law in Peace Operations" and it will focus on the legal issues regarding mandates, rules of engagement etc. Answers have been asked by 31 March 2005.

Dr. F. KRÜGER-SPRENGEL informed the Board of Directors that the European Working Group on Non-Lethal Weapons has launched an **electronic discussion group on legal issues related to non-lethal weapons**. If you are interested in joining this discussion group, please see www.non-lethal-weapons.com.

The **Interallied Confederation of Reserve Officers** (Confédération Interalliée des Officiers de Réserve), "CIOR", is an umbrella organisation that brings together a number of national reservist associations of NATO and Partnership for Peace (PfP) countries. The CIOR was founded in 1948. NATO's Military Committee has approved document MC 248/1 that regulates co-operation on military matters between NATO and the CIOR. Each year, the CIOR holds a congress in one of its member countries. Amongst its other activities, it organises two competitions in the field of the Law of Armed Conflict (LoAC): a multidisciplinary Military Competition (since 2000) and a competition for "Young Reserve Officers" (since 1997). In July 2004, the competitions took place in Austria-Vienna. In the multidisciplinary Military Competition fifty-five teams (of three reserve officers each) from 17 countries took part in a "real-time test", integrated in a first-aid test. The question was how to treat wounded military, friendly and foe forces? The teams also had to solve 30 practical/theoretical LoAC problems in a limited time frame. The Belgian 03 team was the winner, followed by the UK 01 and UK 06 teams. The Young Reserve Officers had to solve 30 LoAC problems in 15 minutes. There were 41 competitors from 14 countries and the competition was won by 2Lt (R) I. TOMLIN from Scotland. Both competitions were well-organised and successful. The results were rather good and the spirit off all the competitors was very constructive. The CIOR-Presidency is very pleased that the International Society for Military Law and the Law of War has recognised the importance of the CIOR LoAC competitions since 2002. On behalf of the Society (and also of the Austrian National Group), Lt Col(R) Dr. J. SPROCKEELS (Belgium) - one of the founding fathers of the CIOR LoAC competitions- presented the very appreciated trophies and prizes of the Society in Vienna.

RECENT JURISPRUDENCE

European Court of Human Rights, *Issa and others v. Turkey*, Application no 31821/96, 16 November 2004

The applicants complained of the alleged unlawful arrest, detention, ill-treatment and subsequent killing of their relatives in the course of a military operation conducted by the Turkish army in northern Iraq in April 1995 and made complaints under articles 2, 3, 5, 8, 13, 14 and 18 of the European Convention on Human Rights. Turkey said that no Turkish soldiers had advanced within 10 kilometres of the area in question.

The applications were rejected on the purely factual basis that the applicants had failed to establish "to the required standard of proof that the Turkish forces had conducted operations in the area in question" (§ 81). The substantive complaints therefore did not have to be examined because the Court was not satisfied that the men who had died were within the article 1 jurisdiction of Turkey (§ 82).

Nevertheless, the judgement contains some interesting statements. In particular, the Court held in §§ 74-75 that:

"74. The Court does not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State

and clearly does not fall within the legal space (*espace juridique*) of the Contracting States (see the above-cited *Bankovic* decision, § 80).

75. However, notwithstanding the large number of troops involved in the aforementioned military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq. [...]”

The full text of the judgement is available at www.echr.coe.int.

United Kingdom, High Court of Justice, Queen’s Bench Division, Divisional Court, *R (Al-Skeini and others) v Secretary of State for Defence* [2004] EWHC 2911 (Admin), 14 December 2004

This case concerns the claims of six relatives of Iraqi citizens who have died in provinces of Iraq under UK control when it was an occupying power there. The first five claimants’ relatives were shot in armed incidents involving UK troops. The sixth claimant’s relative died in a military prison in British custody.

The claims are for judicial review, on the basis that the European Convention of Human Rights (ECHR) applies to these claims by reason of the Human Rights Act 1998.

The judgment only concerns two preliminary issues, namely (1) whether the deaths took place within the jurisdiction of the UK and, consequently, within the scope of the ECHR and the Human Rights Act and (2) whether, if so, there has been a breach of the requirements under articles 2 and 3 of the Convention regarding an adequate enquiry into those deaths.

The judgment holds – after consideration of the jurisprudence of the European Court of Human Rights - that a state party’s jurisdiction within article 1 of the Convention is essentially territorial, but that exceptionally such jurisdiction extends to outposts of the state’s authority abroad, such as embassies and consulates. According to the court, this exception can apply to a prison operated by a state party in the territory of another state with the consent of that state, but it does not apply to the total territory of another state which is not itself a party to the Convention, even if that territory is in the effective control of the first state. Consequently, only the case of the sixth complainant (death in a UK prison in Iraq) was within the UK’s jurisdiction and thus within the scope of the Convention and the other claims must fail. The judgement reaches the same conclusion regarding the scope of the Human Rights Act. Finally, the court decides that the enquiries that have taken place into the death of the sixth claimant’s relative are not adequate in terms of the implied procedural requirements of articles 2 and 3 of the Convention.

The full text of the judgement is available at

www.bailii.org/ew/cases/EWHC/Admin/2004/2911.html and at

www.redress.org/news/Judgment%20Al%20Skeini%2014%20Dec%202004.pdf. For a summary, see www.lawreports.co.uk/qbdece0.2.htm and

www.publicinterestlawyers.co.uk/iraq_litigation.htm. Excerpts of the decision will be published in the *Military Law and the Law of War Review* of 2004.

SPECIALISED COMMISSIONS

Committee for the History of Military Law and the Law of War

In an (e-mail based) discussion process with members of the Board of Directors earlier this year the President of this committee, Prof Dr. S. OETER (Germany), proposed two topics for the Committee’s meeting at the 2006 Congress. The proposal was revised according to some proposals made by the members of the Board of Directors and now reads as follows:

1. The Laws of Military Occupation

Recent developments (not only in Iraq) have brought a renewed interest in the traditional laws of military occupation. The Committee should discuss in depth the historical development and past experiences with the application of the traditional rules on military occupation, in particular when occupying a country for its reconstruction (Germany, Japan, but also more recent cases); the

experiences with the operation of the Fourth Geneva Convention; as well as the deficits and problems in the international legal regime of military occupation. Of particular interest is the division of competences between the Occupying Power and the remaining civil authorities of the occupied State and the powers of the occupant concerning law enforcement.

2. Use of Force in Occupied Territories and during Peace Operations

There is a lack of clarity concerning the scope of permitted force to be exercised by an Occupying Power. As long as remnants of the armed forces of the territorial sovereign, but also rebel and guerrilla forces are the objective of military operations, the usual rules for combat operations will apply. It is less clear which standards apply in other situations, in particular as far as the Occupying Power simply tries to preserve law and order against civil unrest and terrorist activities. The Committee should look into the historical experiences with that kind of problems and should try to clarify the traditional standards concerning this subject-matter. The problem becomes even more complex with modern peace operations. Cases of peace enforcement with a subsequent phase of post conflict peace building under the coverage of an international military force have raised the question whether the laws on military occupation should not apply to such situations also. The need for such an international legal regime seems obvious, but it is less evident in which specific cases the rules can be applicable at all, since not every presence of an international force will create a case of belligerent occupation. At the same time, it is evident that the traditional rules need some modification if applied to peace operations, in particular to UN mandated peace operations.

As a preparation for the work of the Committee, Prof. Dr. S. OETER is planning an expert workshop in Summer/Autumn of 2005 in order to identify the issues which will be discussed in detail at the Congress 2006.

Committee for International Humanitarian Law

The President of this Committee, LtCol S. FOURNIER (Canada), has already obtained the agreement of the members of his committee to discuss the following two topics at our next Congress in 2006:

- a. From Combat Operations to Peace Operations and Beyond; and
- b. The Status of Detainees (Prisoners) in Peace Operations – Rules for Detention.

Committee for Military Criminology and Criminal Law

During the XVIIth Congress of the Society, the Committee for Military Criminology and Criminal Law will primarily study the use of military forces as police forces and the restoration of the system of justice in post war situation. A transnational questionnaire will be sent to the National Groups in order to gather some further information about the involvement of the different countries in such activities. The results will be presented and discussed during the working session. All contributions are welcome and can be submitted to the President of the committee (Prof. Dr. P. THYS, School of criminology, Faculty of Law, University of Liège, Belgium, pierre.thys@ulg.ac.be).

ANNOUNCEMENTS OF CONFERENCES, SEMINARS, ETC.

The **3rd European Symposium on Non-Lethal Weapons** will be held in Ettlingen (Germany) from 10 to 12 May 2005. One of the main topics will be the legal and public acceptability of non-lethal weapons. For more information see www.non-lethal-weapons.com.

The Belgian National Group will organise a one day conference in French and Dutch (no translation) in Brussels (Belgium) on 20 January 2005. The theme will be “**Child Soldiers**”. For more information, please contact the General Secretariat.

INTERESTING PUBLICATIONS

Dr. R. ARNOLD, *The ICC as a new instrument for repressing terrorism*, Transnational Publisher, 2004, ISBN 1-57105-328-X

UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford UP, 2004, ISBN 0-19-924454-5

Y. DINSTEIN, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge UP, 2004, ISBN 0521542278

C. GRAY, *International Law and the Use of Force*, Oxford UP, 2004 (2nd ed.), ISBN 0-19-927131-3

J. GARDAM, *Necessity, Proportionality and the Use of Force by States*, Cambridge UP, 2004, ISBN 0 521 83752 9

M.C. BASSIOUNI (ed.), *The Statute of the International Criminal Court and Related Instruments: Legislative History, 1994-2000*, Transnational Publishers, 2004, ISBN 1-57105-148-1

W.A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge UP, 2004 (2nd ed.), ISBN 0521537568

International Criminal Tribunal for Rwanda, *Reports of orders, decisions and judgements 1999 / Tribunal pénal international pour le Rwanda, Recueil des ordonnances, décisions, jugements et arrêts 1999*, Bruylant, 2004, ISBN 2-8027-1904-1 (incl. CD-ROM)

R. ZIMMERMANN, *La coopération judiciaire internationale en matière pénale*, Bruylant, 2004 (2nd ed.), ISBN 2-8027-1866-5

A. MOORE (ed.), *Police and Judicial Cooperation in the European Union*, Cambridge UP, 2004, ISBN 0 521 60557 1

C. FIJNAUT, J. WOUTERS & F. NAERT (eds.), *Legal Instruments in the Fight Against International Terrorism. A Transatlantic Dialogue*, Martinus Nijhoff, 2004, ISBN 90 04 13901 X

S.J. KIRSCHBAUM (ed.), *Terrorisme et Sécurité Internationale*, Bruylant, 2004, ISBN 2-8027-1877-0

S. JOSEPH, J. SCHULTZ & M. CASTAN, *International Covenant on Civil and Political Rights - Cases, Materials, and Commentary*, 2004 (2de ed.), Oxford UP, ISBN 0-19-925807-4

F. COOMANS & M. KAMMINGA (eds), *Extraterritorial Application of Human Rights Treaties*, Intersentia, 2004, ISBN 90-5095-394-8

E. BENVENISTI, *The International Law of Occupation*, 2004, Princeton UP, ISBN: 0-691-12130-3

The long-awaited ICRC study on *Customary International Humanitarian Law* edited by J.-M. HENCKAERTS & L. DOSWALD-BECK should appear in 2005 at Cambridge UP (multiple volumes & editions)

In the *liber amicorum* titled *Crisis Management and Humanitarian Protection*¹ written for the occasion of our Senior Vice-President Dr. D. FLECK's 65th birthday in February 2004, Dr. A. PORETSCHKIN wrote an article in German about our association

¹ Horst Fischer, Ulrike Froissart, Wolff Heintschel von Heinegg, Christian Raap (eds.), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection*. Festschrift für Dieter Fleck, BWV Berliner Wissenschafts-Verlag, 2004, ISBN 3-8305-0568-X

FROM THE GENERAL SECRETARIAT

In our efforts to economise, the newsletter is circulated electronically as an e-mail attachment, to the largest extent possible. If you have e-mail but have not yet notified us, please send your e-mail address to soc-mil-law@planetinternet.be.

Issues of the newsletter are circulated by e-mail and fax only, except for specific members who requested and subsequently were granted a departure from this policy by the Secretary-General.

Please send us any information that could be useful for future newsletters and/or our website.

Do not hesitate to forward any of your articles that could be published in the Military Law and the Law of War Review to the Director of Publications. You may inform your colleagues that the Military Law and Law of War Review also publishes articles of non-members.