Société Internationale de Droit Militaire
et de Droit de la Guerre (a.i.s.b.l.)

International Society for Military Law
and the Law of War (a.i.s.b.l.)

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## EDITORIAL

Dear member,

The length of the present issue of our newsletter reflects the multitude of contemporary challenges facing military law and the law of war. This is especially clear in the section on recent developments, legislation and jurisprudence, which has benefited from the work of several of the Society's interns and from contributions by various members, for which the Society is very grateful. We are also pleased to be able to report on several activities by national groups, as well as on the Law of Armed Conflicts Competitions for Reserve Officers and the Ciardi prize.

Ludwig Van Der Veken

Secretary-General

## NEWS

### Law of Armed Conflicts Competitions for Reserve Officers

The Interallied Confederation of Reserve Officers (Confédération Interalliée des Officiers de Réserve), "CIOR", is an umbrella organisation, founded in 1948, that brings together a number of national reservist associations of NATO and Partnership for Peace (PfP) countries. NATO's Military Committee has approved document MC 248/1 that governs 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 has organised 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" (highest rank is Captain) since 1997. In August 2005, the competitions took place in Belgium.

In the multidisciplinary Military Competition (Elsenborn) fifty-three teams (of three reserve officers each) from 18 countries took part in a "real time LoAC 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 18 practical/theoretical LOAC problems in a very limited time frame. An International 07 team with Capt. C. Johnson (UK), Lt. A. Tenhiala (Fin) and Cdt. G. Coatanhay (Fr) was the winner, followed by the UK05 and UK06 teams.

The Young Reserve Officers (Ghent) had to solve 15 LoAC problems in 45 minutes. The rather difficult multiple choice test was developed in cooperation with Lt. Col. Eric Drybooms, from the Belgian "Institut Royal Supérieur de Défense". There were 42 competitors from 12 countries and the competition was won by the Danisch Lt. Sandra Pihl Heise. There were 36 participants who passed the test and they all received a nice diploma on behalf of the Society.

Both competitions were well- organised and succesfull. The results were rather good and the spirit of all competitors was very constructive and enhanced the interest in the LoAC, an essential military skill.

The CIOR-Presidency, with as Chairman LCL (R) Dr. J. Schraut, and the organising legal Committee (Chairman Maj (R) Dr. K. Bernauw) were very pleased that since 2002 the International Society for Military Law and the Law of War has recognised the importance of the CIOR LoAC competitions, propably the largest in the world. On behalf of the Society, Lt. Col. (R) Dr. Iur. J. Sprockeels – organiser and one of the founding fathers of the CIOR LoAC competitions- presented in Elsenborn and Ghent the very appreciated trophies and diplomas of the Society, emphasising the goals of the International Society.

### Ciardi Foundation Scientific Prize

The Italian *Prof. Giuseppe **Ciardi** Foundation* will award its scientific **prize** in 2006, amounting to 1.559,31 €. The prize is intended to reward any substantial and original study dealing with Military Law, Law of War or any matter connected with and related to these types of law. According to the rules established by the *Ciardi* Foundation, the works (written either in English, French, German, Italian or Spanish) must be presented and published as book and not in form of article after 1 January 2003, and forwarded in three copies (deadline: 1 January 2006) to « *Fondazione Prof. Giuseppe Ciardi, Presidenza – Dott. Raffaello Ciardi, c/o Gruppo Italiano della Società di Diritto Militare e della Guerra, viale delle Milizie 5/c – Roma, Italia*». The composition of the jury in charge of adjudication of the prize will be further communicated, while the results will be announced at the next XVII° Congress of the International Society for Military Law and the Law of War.

## RECENT DEVELOPMENTS, LEGISLATION & JURISPRUDENCE

**Note**: *ILIB* stands for *International Law in Brief*, available at http://www.asil.org/resources/e-newsletters.html#lawinbrief and *Sentinelle* (French) is available at http://www.sfdi.org.

### Security Council Extends the Mandate of the UN Assistance Mission for Iraq (UNAMI), Condemns the Recent Attacks in the Country and Renovates the Sanctions against Al – Qaida and the Taliban Forces

The UN Security Council (hereafter "the Council"), following a formal request by the Secretary - General (letter available at http://daccessdds.un.org/doc/UNDOC/GEN/N05/452/16/PDF/N0545216.pdf?OpenElement), on August 4 adopted Resolution 1619 (S/RES/1619 (2005), available at http://daccessdds.un.org/doc/UNDOC/GEN/N05/457/82/PDF/N0545782.pdf?OpenElement), in which, reaffirming, *inter alia*, that "the United Nations should play a leading role in assisting the efforts of the Iraqi people and Government in developing institutions for representative government", it decided to extend the mandate of UNAMI for a further period of twelve months. The mission's mandate would cease before upon specific request forwarded by the Iraqi Government. The UN Mission absorbs at present around 260 civilian and military personnel based in Iraq. These number of the mission's staff is expected to rise further in 2005 with the opening of the new facilities in Erbil and Basrah.

On the same day, with Resolution 1618 (S/RES/1618 (2005) – available at http://daccessdds.un.org/doc/UNDOC/GEN/N05/452/10/PDF/N0545210.pdf?OpenElement), the Council also condemned the current series of "shameless and horrific " terrorist attacks in Iraq, calling

on Member States to cooperate in stopping the flow of terrorists in and out of Iraq and preventing the interruption of the ongoing political process. That cooperation should be also finalized to prevent the trafficking in arms and the financing backing terrorist groups. As an answer to the recent murders of two diplomats coming from Islamic countries, the Council called on the international community to completely support the Iraqi Government in its obligation to protect the diplomatic community, UN staff and other foreign civilian personnel working in Iraq.

Resolution 1617 (S/RES/1617 (2005) – available at http://daccessdds.un.org/doc/UNDOC/GEN/N05/446/60/PDF/N0544660.pdf?OpenElement, passed on July 29. It extends the sanctions against Al-Qaida, Usama bin Laden, the Taliban and their associates for a further period of 17 months, because of the continuing threat they pose to international peace and security. The resolution orders all UN member States to take the measures previously imposed by resolutions 1267 (1999), 1333 (2000) and 1390 (2002) regarding the freezing of assets, bans on travel and a weapons embargo. Also, the Council made clear which activities or acts are to be considered for "an association" with the previous individuals or groups: "participation in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of; supplying arms to; recruiting for; or otherwise supporting acts or activities" not just of Al-Qaida, Usama bin Laden or the Taliban, but even of any affiliate cell, splinter or derivative group".

*(M. Tondini)*

**The United Nations Security Council Passes a Resolution in Response to the 7 July London Bombings**

The UN Security Council unanimously adopted Resolution 1611 (2005) (text available at http://daccessdds.un.org/doc/UNDOC/GEN/N05/411/79/PDF/N0541179.pdf?OpenElement), in which it condemns without reservation the terrorist attacks in London on 7 July 2005, reinvigorating the obligations of the member States under resolution 1373 (2001) to cooperate actively in efforts to find and bring to justice the perpetrators, organizers and sponsors of any terrorist acts. The Council "expresses its utmost determination to combat terrorism", quoted as "a threat to international peace and security".

*(M. Tondini)*

**UN Security Council Enhances Protection of Children in Armed Conflict**

On 26 July, the Security Council adopted Resolution 1612 on Children and armed conflict. In this Resolution it reaffirms its previous Resolutions on this topic (resolutions 1261 (1999), 1314 (2000), 1379 (2001) 1460 (2003) and 1539 (2004)), strongly condemns the recruitment and use of child soldiers by parties to armed conflict in violation of international obligations applicable to them and all other violations and abuses committed against children in situations of armed conflict (§ 1) and calls upon all parties concerned to abide by the international obligations applicable to them relating to the protection of children affected by armed conflict (§ 15). In addition, it takes a number of concrete measures. These include especially the establishment of a monitoring and reporting mechanism on children and armed conflict proposed by the Secretary-General (§§ 2-3) and of a working group of the Security Council to review the reports of this mechanism and progress in the development and implementation of action plans mentioned in paragraph 7 of the resolution and to consider other relevant information presented to it (§ 8) and a continued inclusion of specific provisions for the protection of children in the mandates of UN peacekeeping operations (§ 12).

The Resolution also welcomes the efforts undertaken by United Nations peacekeeping operations to implement the Secretary-General's zero-tolerance policy on sexual exploitation and abuse and to ensure full compliance of their personnel with the United Nations code of conduct, requests the Secretary-General to continue to take all necessary action in this regard and urges troop-contributing countries to

take appropriate preventive action including pre-deployment awareness training, and to take disciplinary action and other action to ensure full accountability in cases of misconduct involving their personnel (§ 11). Pursuant to this zero-tolerance policy, the UN announced on 20 July that two Ethiopian soldiers in Burundi who were found in breach of the code of conduct were being repatriated. See on this topic also *ISMLLW Newsletter* 2005/2.

The Resolution is available at http://www.un.org/Docs/sc/unsc_resolutions05.htm and is briefly discussed in *Sentinelle* No. 30. The *Report of the Secretary-General on children and armed conflict* (UN Doc. S/2005/72, 9 February 2005) is available at http://www.un.org/Docs/sc/sgrep05.htm.

*(F. Naert)*

**Amendment to Convention on Protection of Nuclear Material Adopted**

On 8 July a Conference convened to strengthen the 1980 Convention on the Physical Protection of Nuclear Material adopted several amendments to this convention, which will enter into force for each State Party that deposits its instrument of ratification, acceptance or approval of the amendments on the thirtieth day after the date on which two thirds of the States Parties have deposited their instruments of ratification, acceptance or approval with the depositary. See http://www.iaea.org/NewsCenter/Features/PhysicalProtection/index.html, with further links.

*(F. Naert)*

**ICC Prosecutor Reports to UN Security Council on Darfur**

On 29 June 2005 the Chief Prosecutor of the International Criminal Court (ICC) addressed the UN Security Council on the ICC's investigation of the situation in Darfur (see http://www.icc-cpi.int/press/pressreleases/108.html), which was referred to the ICC by Security Council Resolution 1593 (see ISMLLW Newsletters 2005/1 en 2005/2). The Report details the work undertaken so far and also addresses the question of Sudan's efforts to prosecute suspects in light of the ICC's complementary jurisdiction (see also the comment on the Sudanese domestic trial below). It is available at http://www.icc-cpi.int/library/cases/ICC_Darfur_UNSC_Report_29-06-05_EN.pdf and is discussed in *ILIB* of 29 July 2005.

*(F. Naert)*

**ICTY Appeals Chamber Adopts Three Judgments**

The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has adopted three judgments (all available at http://www.un.org/icty). On 18 July, the Court, even though it partially accepted one of the grounds of appeal, confirmed the sentence imposed by the Trial Chamber in *Prosecutor v. Milan Babic*. For a brief discussion, see *ILIB* of 25 August 2005 and *Sentinelle* No. 30. Two days later, it dismissed the appeal and confirmed the sentence in *Prosecutor v. Miroslav Deronjic.* For a brief discussion, see *ILIB* of 25 August 2005 and *Sentinelle* No. 29. Finally, on 30 August, the Appeals Chamber also upheld the sentence in *Prosecutor v. Miodrag Jokic* in spite of annulling some of the Trial Court's conclusions. For a brief discussion, see *Sentinelle* No. 31.

*(F. Naert)*

**European Court of Human Rights Condemns Use of Lethal Force to Arrest Small Criminals posing no Threat**

On 6 July the European Court of Human Rights (sitting in Grand Chamber) held that Bulgaria violated the right to life, including in combination with the prohibition of discrimination (Articles 2 and 14 of the European Convention on Human Rights). The case concerns the killing of two Bulgarian conscripts

of Roma origin by the military police in July 1996 when they were fleeing from the police who came to arrest them after they had escaped from detention for absence without leave.

The most interesting part of the judgment is the Court's opinion on the regulation of the use of force (§§ 93-109), where the Court finds that (a legal framework permitting) the use of lethal force to arrest someone for a minor offence and who does not pose a threat is incompatible with the right to life under the Convention. The Court *inter alia* stated generally that:

> "1. … the legitimate aim of effecting a lawful arrest can only justify putting human life at risk in circumstances of absolute necessity. The Court considers that in principle there can be no such necessity where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost (…)".
>
> "2. In addition to setting out the circumstances when deprivation of life may be justified, Article 2 implies a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework defining the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the relevant international standards (…). …, the national legal framework regulating arrest operations must make recourse to firearms dependent on a careful assessment of the surrounding circumstances, and, in particular, on an evaluation of the nature of the offence committed by the fugitive and of the threat he or she posed".
>
> "3. … law-enforcement agents must be trained to assess whether or not there is an absolute necessity to use firearms not only on the basis of the letter of the relevant regulations but also with due regard to the pre-eminence of respect for human life as a fundamental value (see the Court's criticism of the "shoot to kill" instructions given to soldiers in *McCann and Others*, …, §§ 211-214)".

The judgment (*Nachova and Others v. Bulgaria*, 6 July 2005) is available at http://www.echr.coe.int/echr and is briefly discussed in *ILIB* of 19 July 2005.

The judgment may, e.g., be relevant in the controversy that has arisen concerning the UK 'shoot to kill' policy vis-à-vis suspected terrorists after the shooting by British police, on 22 July in London, of a Brazilian man who later appeared to be innocent (see e.g. http://news.bbc.co.uk/1/hi/uk/4713753.stm).

*(F. Naert)*

**Argentina Supreme Court Revokes Immunity for the Officers Charged with Crimes Committed During the so called "Dirty War" (1976-83)**

In a sentence issued on 14 June by a 7-1 vote (text in Spanish at http://www.csjn.gov.ar/documentos/verdoc.jsp), with one abstention, the Argentine Supreme Court voided laws passed in 1986 (Law No. 23,492) and 1987 (Law No. 23,521) granting immunity for officers involved in disappearances, torture and other crimes during the former regime in the country. The court judged the proscriptions as contrary to present international norms requiring the protection of human rights and the punishment of any violation by the State. The judgment follows the August 2003 vote of the Argentine Parliament to give constitutional status to the just ratified U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (available at http://www.icrc.org/ihl.nsf/0/d9f5ba047e4af9e4c125641e004add28?OpenDocument). The ruling came in the case of *Julio Simon*, a former policeman accused of being involved in the disappearance of two persons and of taking their daughter, as his own. Under Argentine law, the decision can be taken as precedent in other cases and, quoting legal experts, the Court's decision would pave the way to other trials. *Associated Press* reports that more than 3,000 current military officers could be implicated in the decision. The Argentine Supreme Court cited the *Barrios Altos* case (available at http://www.corteidh.or.cr/seriecpdf_ing/seriec_83_ing.pdf) as a legal precedent for its decision. In the *Barrios Altos* case, the Inter-American Court of Human Rights in 2001 declared the two amnesty laws

introduced by the Government of Peruvian President *Alberto Fujimori* in 1995 incompatible with the American Convention on Human Rights and hence without legal effect. The United Nations Human Rights Committee has affirmed repeatedly that amnesties applied to gross violations of human rights are incompatible with the 1966 International Covenant on Civil and Political Rights (ICCPR).

In August 2003, both Chamber of Deputies and Senate voted to repeal the amnesty laws, but, under Argentine constitutional law only the Supreme Court could give the final approval. Previously, in 2001 some Federal Courts declared the amnesty laws unconstitutional, in rulings later appealed to the Supreme Court. In a sentence, issued on March 6, 2001, federal judge *Gabriel Cavallo* ruled the unconstitutionality of the amnesty laws, followed by another federal judge the next October. The Federal Court of Buenos Aires unanimously confirmed both decisions. This judgment was appealed to the Supreme Court by former officers accused of torture and disappearances. In August 2002, Attorney General *Nicolás Becerra* recommended the Supreme Court to endorse the Federal Court of Buenos Aires decision. On 7 March 2003, judge *Carlos Skidelsky*, ruling on a case involving the December 1976 killing of twenty-two political prisoners in *Chaco* province, became the third federal judge to assert the unconstitutionality of the amnesty laws.

Full story at http://hrw.org/english/docs/2005/06/14/argent11119.htm. For a brief discussion, see also *ILIB* of 28 June 2005 and *ISMLLW Newsletter* 2005/2.

*(M. Tondini)*

**Supreme Court of Canada, *Mugesera v. Canada*: International and Domestic Criminal Law Converge**

On June 28, 2005, the Supreme Court of Canada (the Court) released *Mugesera v. Canada (Minister of Citizenship and Immigration)* [2005] SCC 40, http://www.lexum.umontreal.ca/csc-scc/en/. In addition to clarifying aspects of domestic procedural law, the Court, for the purposes of Canadian law:

- established the essential elements of the crimes of incitement to genocide (par. 82 – 89) and counselling murder (the Court found that a murder must result before the domestic crime of incitement to murder is raised to the level of an international crime at par. 136);
- determined whether inciting hatred could amount to persecution (it can, par. 150); and
- established the constitutive elements of a crime against humanity (pars. 152 – 175).

In doing so, the Court explicitly relied on international jurisprudence as developed at the two *ad hoc* tribunals, overturning those aspects of its earlier war crimes-related decision *R. v. Finta* [1994] 1 S.C.R. 701 that did not accord with modern international law standards (par. 126, 143, 144).

In 1992, Mr. Mugesera, a Rwandan and an active member of a hard-line Hutu political party, delivered a speech urging fellow Hutus to remove the threat allegedly posed by Tutsi people by killing them and throwing their bodies into the Nyabarongo river. Soon after, he fled to Canada, where he obtained permanent residence status in 1993. In 1995, the Minister of Citizenship and Immigration commenced status revocation proceedings against him, alleging that making the speech constituted incitement to murder, genocide and hatred and was a crime against humanity. An immigration adjudicator found the allegations valid, and issued a deportation order against Mr. Mugesera. The decision was upheld by the Immigration and Refugee Board Appeal Division (IAD). The Federal Court dismissed the application for judicial review, save for the crime against humanity allegation. The Federal Court of Appeal (FCA), in a surprising decision, dismissed all allegations and set aside the deportation order.

I would like to briefly highlight two aspects of the Supreme Court Decision: the Court's reliance on international precedent when determining Canadian domestic law, and its emphasis on context when deciding whether hate speech constituted a domestic or international crime. For a fuller discussion on the decision, see Rikhof, Joseph; *Hate Speech and International Criminal Law: The Mugesera Decision by the Supreme Court of Canada*, J of Int'l Crim Justice Vol. 3, Issue 5 (Autumn, 2005). For a brief discussion, see also *ILIB* of 19 July 2005 and *Sentinelle* No. 29.

The Court clearly enunciated the rationale for relying on international precedent in determining substantive issues when it stated at par. 178:

"In the face of certain unspeakable tragedies, the community of nations must provide a unified response. … The interpretation and application of Canadian provisions regarding crimes against humanity must therefore accord with international law. Our nation's deeply held commitment to individual human dignity, freedom and fundamental rights requires nothing less".

The Court pointed out that the two *ad hoc* international tribunals have "generated a unique body of authority" concerning customary international law and, while acknowledging that such authority is not binding upon the Court, recognized that "the expertise of these tribunals and the authority in respect of customary international law with which they are vested suggest that their findings should not be disregarded lightly by Canadian courts applying domestic legislative provisions … which expressly incorporate customary international law." (par. 126)

The Court made particularly insightful findings concerning the importance of context in determining when incitement rose to the level of a crime and whether incitement to hatred constituted a crime against humanity. The Court relied on findings of fact by the IAD concerning the historical, political and social situation in Rwanda at the time of the speech, and on *Prosecutor v. Akayesu*, 9 IHRR 608 (ICTR Trial Chamber 1998) and *Prosecutor v. Nahimana*, ICTR-99-52-T-I (2003) in deciding at par. 106 that "[a]s is the case with the crime of incitement to genocide, the crime of incitement to hatred requires the trier of fact to consider the speech objectively but with regard for the circumstances in which the speech was given, the manner and tone used, and the persons to whom the message was addressed." The Court continued at par 109:

".. [The FCA] failed to acknowledge that the audience to which the speech is addressed is a relevant factor in determining the nature of the speech itself. If the manner in which the audience is likely to perceive the speech is not taken into account, the harm targeted by these offences may not be prevented".

This finding became particularly important when determining whether Mr. Mugesera's speech, delivered in the social and political environment which existed in Rwanda at that time, amounted to persecution as a crime against humanity. After reviewing the case law, the Court asked whether the speech was a "gross or blatant denial of fundamental rights on discriminatory grounds such that it was equal in gravity to … other [persecutorial acts] (par. 145).

Relying on *R. v. Keegstra* [1990] 3 S.C.R. 697 and *Prosecutor v. Ruggiu* 39 ILM 1338 (ICTR) (2000), the Court stated that hate speech always denies the fundamental rights of the target group, but it will only be in "particular instances" that this denial would reach the level of persecution (par. 147). The fact that Mr Mugesera's speech encouraged acts of extreme violence, including extermination, and that it was delivered "in a volatile situation characterized by rampant ethnic tensions and political instability which had already led to the commission of massacres" and which "created in its audience a sense of imminent threat and the need to act violently against an ethnic minority", raised this particular instance of hate speech to the level of persecution as a crime against humanity (par. 148). The fact that the speech targeted a group defined by its ethnicity and political affiliation met the "requisite discriminatory intent" element of persecution (par. 149).

The Supreme Court's heavy reliance on international precedent to interpret Canadian domestic law originating in international law is a logical and healthy development. International-sourced domestic law is becoming the norm, particularly in areas related to human rights, humanitarian law and certain aspects of criminal law; essentially law which addresses fundamental human rights. By drawing on international precedent, domestic courts can ensure that such rights benefit from a consistent standard of protection and enforcement. In *Mugesera*, the Canadian Supreme Court is sending a strong signal that Canadian enforcement officials and prosecutors charged with enforcing international criminal law can rely on international standards and precedents in their efforts to put an end to impunity for the world's worst crimes.

*(J. McManus)*

**French Position on the « War on Terror » and the Combatant Status**

« War on Terror », an American Inspired Notion

The notion of « War on Terror » is above all an American concept that expresses a political vision and that has been developed after the September 11, 2001 attacks. Within the framework of this war that started against Afghanistan during operation « *Enduring Freedom* », the detainees have not been conferred prisoner of war status and have been denied the regular combatant status beforehand.

New categories have consequently been created by the American legal authorities: the category of « enemy combatant » for the US prisoners and the category of « unlawful combatant » for the others.

French Position towards this Concept

As to the American concept of « war against terror », France has adopted a remarkable position. This position has in particular been expressed in the « Information Report » presented by the Foreign Affairs Commission of the « Assemblée Nationale » (National Assembly) on 6 July 2004 as a conclusion of the activities of an information mission on International Co-operation on the fight against terrorism.

This report shows indeed that, according to the French position, « war against terror » is not exactly a war. In this respect, the term « war » is inappropriate and even counterproductive according to the report insofar as a war rhetoric implies a division of States into good and bad and the category of Rogue States which has been developed by the American Administration, fits in with this logic. This rhetoric can, on the other hand, jeopardise international co-operation indispensable to the fight against terrorism because a State denounced as « bad » will resist co-operation whereas its assistance can be useful (for instance, Iran that has been included in the Axis of Evil by the American government). Moreover, according to Mr Paul QUILES, vice-chairman of the Foreign Affairs Commission of the National Assembly, the term of « war on terror » is not appropriate because war implies territorial claims or the will to seize power, which is not the objective pursued by the Al Qaeda terrorist network. Consequently, France makes a distinction between the « fight against terrorism » which it supports and « war on terror » which it rejects. It is directly affected by terrorism because it has been the target of several attacks, both in its territory and abroad.

In France, terrorism has been defined as specified crimes « *where they are committed intentionally in connection with an individual or collective undertaking the purpose of which is seriously to disturb the public order through intimidation or terror* » (article 421-1 of the French Criminal Code, translation available at http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm ). In France, police and the judiciary are in charge of the fight against terrorism. The use of military means can sometimes be useful within the framework of this fight but it is in no way a « war » against terrorism. The military aspect should not be at the centre of this fight. In this context, France considers that the United Nations should play a key role, and in particular the Security Council. That is the reason why France has been actively participating in the activities of United Nations Counter-Terrorism Committee (CTC) and has been fully supporting the International Convention for the Suppression of the Financing of Terrorism adopted at its initiative in 1999 and entered into force in April 2002.

The French Position Towards the « Unlawful combatant » Status and the Detention of French Nationals on the Guantanamo Bay Base

As to the notion of « unlawful combatant » created by the American Administration, France is directly affected since a number of its nationals have been treated as unlawful combatants and have consequently been sent to military prisons located in Afghanistan and on the Guantanamo Bay military base in Cuba. " Quai d'Orsay" -led missions (French Ministry of Foreign Affairs) went to the Guantanamo Bay base in order to identify the number of French nationals detained by the American authorities. The first mission was organised from 26 to 29 January 2002 and contributed to the identification of two Frenchmen; the second mission, from 26 to 31 March 2002, identified four of them; and a third mission that went to Cuba from 19 to 24 January 2004, identified a last French

national, which brought to seven the total number of detainees on the American Guantanamo Bay base. Four of the seven French detainees were released on 27 July 2004 and the last three on 7 March 2005.

On 28 June 2004, the American Supreme Court has reached a decision on the fate that should be reserved for Guantanamo Bay's detainees. According to this Court, these prisoners have the right to challenge their detention in an American civilian court, in compliance with the Habeas Corpus. The Habeas Corpus Act is a bill that was passed by English Parliament in 1679 in the reign of Charles II of England pursuant to which any arrested person should be brought to justice within three days so that it can be determined whether or not that person should be released. Consequently the Court has ruled that although the Guantanamo detainees are not American citizens, they have the right to submit their case to the American tribunals, despite Guantanamo Bay being located outside US territory. The Supreme Court has indeed pointed out that, in compliance with the lease agreement concluded between the Cuban and American authorities, the American authorities have been granted complete jurisdiction over the Guantanamo territory.

The French judiciary has reached a decision after Guantanamo Bay's French detainees had returned to France. The first four detainees who have been released have been investigated for participation in a criminal organisation relating to a terrorist enterprise. The last three detainees were taken in police custody as soon as they arrived in France for the same reason, and one of them was released the day after, since the police officers in charge of the investigation have not found any element making it possible for them to suspect him of terror enterprise even though the American authorities had detained him in Guantanamo Bay for three years.

The French Position within a Multilateral Framework: a More Clear-cut Denunciation

Consequently we can notice that the French position towards the American conduct in the framework of war on terror has been rather cautious and has not been clear-cut. This position is sharper when France takes a stand within a multilateral framework.

The OSCE has indeed adopted a resolution related to the prisoners held by the United States at the Guantanamo Bay base. In this resolution, the OSCE deplores the fate reserved for unlawful combatants and urges the American government to present the detainees before a competent tribunal and to secure the rights they are, in principle, entitled to in compliance with the prisoner of war status. Moreover the OSCE member countries wanted to point out that they are opposed to the use of the death penalty that has been banned in France since 1981.

France has also taken a stand on this issue through the Council of Europe, of which several other member states also have nationals at Guantanamo Bay. In July 2003, the Council of Europe Parliamentary Assembly adopted Resolution 1340 in which it expresses its concern about the conditions in which the individuals held in the custody of the United States in Afghanistan are detained. It is of the opinion that this detention is unlawful insofar as the status of these individuals has not been defined. According to the Assembly, « *The United States refuses to treat captured persons as prisoners of war; instead it designates them as "unlawful combatants" – a definition that is not contemplated by international law* ».

Consequently, the French authorities are sceptical about the use of the notion « war on terror » and prefer to use the term « fight against terrorism », which excludes qualifying this fight as an armed conflict. However, France remains a partner of the United States within the framework of this fight .That is the reason why it takes a rather cautious stand on the denunciation of the fate reserved for the Guantanamo Bay detainees. This is also understandable that France wants to keep good relations with the United States, which were already put to the test with the outbreak of the conflict in Iraq in 2003.

Sources Consulted :


- Foreign Policy statements of the French Ministry of Foreign Affairs and press statements by the Quai d'Orsay's spokesman available at www.diplomatie.gouv.fr;
- File on terrorism on the website of the French Ministry of Foreign Affairs.
- Website of the French National Assembly www.assemblee-nationale.fr and more in particular the website of the Foreign Affairs Commission;

- Website 'Actualité et Droit International': www.ridi.org ('News and International Law');
- Website of the French Society of International Law: www.sfdi.org;
- Website of the US Department of Defense: www.defenselink.mil;
- Websites of French dailies le Monde (www.le-monde.fr) and Libération (www.liberation.fr);
- Article published in the Wikipedia Encyclopedia on the war on terror: www.fr.wikipedia.org;
- *Le terrorisme et le droit international*, Séminaire de Droit militaire et de Droit de la guerre, Journées d'étude des 8 et 9 mai 2003, Session 2002-2003.('Terrorism and International Law, Seminar of Military Law and the Law of War, Proceedings of the conference of 8 and 9 May 2003').

*(H. Bahloul)*

**French Court Condemns Mauritanian Officer for Torture**

On 1 July, the French *Cour d'Assises* in Nîmes condemned, by default (the officer had been arrested in France but had fled after being conditionally released), a Mauritanian officer for torture committed in Mauritania in 1990-1991. The competence of the Court was *inter alia* based on article 689 of the code of criminal procedure in combination with the 1984 UN Torture Convention (the text of this code, as well as that of the penal code, is available, in English, French and Spanish, at http://www.legifrance.gouv.fr).

For a brief discussion, see *Sentinelle* No. 28 and http://www.fidh.org/IMG/pdf/Elyouldahjuin2005_dpi200.pdf.

*(F. Naert)*

**German Appeals Court Decides on Kosovo Bombing Case**

On 28 July the Higher Regional Court at Cologne ('Oberlandesgericht') handed down a judgment (Case No. 7 U 8/04, available at http://www.olg-koeln.nrw.de in German) in the 'Varvarin bridge case'. The case concerned a claim for compensation against the German State for the bombing of a bridge in Varvarin (Serbia) in May 1999. The Court confirmed the lower court's rejection of the claim.

However, the judgment contains some interesting findings. In particular, while the Court confirmed that an individual claim to compensation cannot be based on applicable international humanitarian law, it held that a claim can be brought on the basis of German law. Furthermore, the Court accorded the German authorities a wide margin of appreciation in the conduct of war and held that the courts could only scrutinize decisions relating thereto when they are manifestly arbitrary or contrary to international law. Pursuant to this finding and the facts of the case, the claim was rejected.

The case is discussed in English and German in BOFAXE No. 295 of 2 September 2005 (available at http://www.ruhr-uni-bochum.de/ifhv/publications/bofaxe/index.html).

*(F. Naert)*

**Prosecution of Saddam Hussein Advances**

The prosecution of former Iraqi President Saddam Hussein before the Iraqi Special Tribunal (http://www.iraq-ist.org) is proceeding. He has been questioned by Investigative Judges of the Tribunal and has been charged by the Tribunal. The first charges will reportedly concern a massacre in the village of Dujail in 1982.

Developments in the case are *inter alia* discussed in A. Dworkin, 'Saddam Charged by Iraqi Tribunal', 18 July 2005, http://www.crimesofwar.org/onnews/news-saddam2.html; *ILIB* of 28 June 2005 and L. Sadat, 'New Developments Regarding the Prosecution of Saddam Hussein by the Iraqi Special Tribunal', ASIL Insight, 5 August 2005, http://www.asil.org/insights/2005/08/insights050805.html.

*(F. Naert)*

**New controversial anti-terrorism legislation adopted in Italy**

On 22 July 2005 Italian Council of Ministers approved a first decree including anti-terrorist measures in response to the terrorist attacks in the London public transport services on 7 July (Decree No. 144/2005). The decree was suddenly amended and turned into ordinary law by the Parliament on the following 1 August and published the day next on the Official Gazette (Law No. 155/2005 – official text in Italian available at http://www.camera.it/chiosco_parlamento.asp?content=/parlam/leggi/home.htm; a summary in English is also available at http://www.legislationline.org/view.php?document=62737). The law passed includes measures to make data retention compulsory until 31 December 2007, limits the judicial oversight over cases of persons subjected to security measures, and generally it increases powers for the Executive in expulsions and investigative activities. It further expands the definition of terrorist conduct in line with the definition adopted at an EU level (at the Council of Europe level, on 8 June 2005 Italy signed the Council of Europe Convention on the Prevention of Terrorism as well as the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism), and increases punishment for individuals contravening restrictive measures imposed upon them.

The law also introduces new crimes related to international terrorism (the previous was art. 270*bis* of the criminal code), such as the recruitment or training of terrorists or the transmission of information that may be used to commit violent acts for terrorist purposes, while increasing sanctions for the *apologia* of the crime. The period during which suspects can be interrogated by Police Authorities without legal assistance also increased from 12 to 24 hours. Moreover, the law provides more strictly rules for telecommunication service providers (a license subject to the establishment of procedures to comply with data retention and user monitoring provisions), a prior authorisation for people "importing, trading, transporting and using" detonators and explosives or instructing people in their use, and for the starting of flight activities over Italian territory. Sanctions for possession, use and manufacturing of false documents are increased, as well as those against people "taking part in public demonstrations … in public spaces … using helmets or with the face partially or completely covered". The possession of a false document will result in an immediate arrest (it is considered as an evidence of the likelihood of a fleeing).

The most controversial articles of the law are: article 3 (*new norms in the matter of expulsions of foreigners for prevention of terrorism purposes*) and article 4 (*new norms for the empowerment of the intelligence activities*). Under those provisions, the Prefect (who is not a judicial but an executive authority) retains the power to expel from Italy a foreigner (even if he resides in Italy legally) on *prima facie* evidence that the person poses a security threat to Italy. Against the expulsion orders is it possible to issue a petition to an administrative court (*TAR – Regional Administrative Tribunal*), but the order remains immediately executing. The intelligence agencies, upon a specific request of the Prime Minister successfully validated by the general prosecutor in the competent court of appeal, have the power to carry out "preventative telephone interceptions", if they are considered "indispensable" to prevent terrorist or subversive activities.

Those *nouvelles* attracted the criticisms of those who see in that a wide departure from generally international recognized standards and principles of law concerning the right of liberty and undertaking of indicted persons. In particular they would be in breach of Principle 1 of the Basic Principles on the Role of Lawyers, Principle 17(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and Rule 93 of the European Prison Rules. For the administrative expulsions, they would be in a flagrant violation of art. 13 and 14 of the Basic Principles on the Role of Lawyers, as well as art. 13 of the 1966 International Covenant on Civil and Political Rights and article 5 of the European Convention on Human Rights. They would be even in breach of the international customary law principle of *non-refoulement* (affirming that none should be returned to any country where he or she is likely to face persecution or torture), furthermore provided in 1951 Convention on

the Status of Refugees (art. 33), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 3) and the European Convention on Human Rights (art. 3 – even if the principle is not itself specifically mentioned in the Convention) (see Amnesty International public statement at http://web.amnesty.org/library/index/engEUR300112005?open&of=eng-ITA).

The new legislation appears even unconstitutional, contravening Italian Constitution article 13(3), as recently enshrined by the Italian Constitutional Court (sentence No. 222/04, at § 6 – available in Italian at http://www.governo.it/GovernoInforma/Dossier/immigrazione/sentenza_222_2004.pdf) in an analogous case concerning the possibility to deport illegal immigrants to their respective countries without a prior favourable judgement by a competent national judicial authority. In fact, because of the deprivation of liberty for the individuals subjected to administrative measures, the judiciary (meaning the ordinary courts and not the administrative ones) couldn't be excluded from the review of the expulsion order. The Constitutional Court's sentence has been even welcomed by the UN Commission on Human Rights (see http://www.cestim.it/15politiche-italia/italy_en.pdf, at § 79) while the same principle has been lately recalled by the British House of Lords ruling a case of suspects of terrorism activities detained without judicial oversight (see http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm).

At the moment in Italy, as a consequence of 203 persons arrested since 2001 (data available in Italian at http://www.interno.it/assets/files/8/2005814122915.pdf), there have been just 3 convictions (two in a first degree trial in July 2005, one after a plea agreement with the Prosecutor) for the crime of "international terrorism". On 17 August, as an immediate consequence of the new laws passed, two foreigners have been sentenced both to a sanction of one year in prison for the possession of false documents.

*(M. Tondini)*

**Dutch Appeals Court Acquits Dutch Sergeant-Major in Case concerning Iraq Shooting Incident**

On 27 December 2003, a Quick Reaction Force of the Dutch forces participating in the Stabilization Force in Iraq (SFIR) was dispatched to recover a trailer and container which had toppled over on a major supply route and to avoid them being looted. When a crowd closed in on the forces, the Dutch Sergeant-Major in charge felt compelled, after other warnings and warning shots in the air failed to have any effect, to fire a warning shot in the ground. One Iraqi was, however, killed due to a ricochet.

After an investigation into the incident by the *Marechaussee* (military police with law enforcement powers), the Sergeant-Major was arrested and charged with a violation of military standing orders resulting in the death of a person and alternative of involuntary manslaughter. He was acquitted in first instance by the military chamber of the district court at Arnhem. The acquittal was later confirmed by the Appeals Court. The judgments *inter alia* address the legal nature of the ROE, the Aide-Memoire (a simplified version of the ROE for non-commissioned officers) and the Soldier's Card (a much simplified instruction card issued to all personnel).

The appeals judgment in this case, *Eric O.*, Hof Arnhem, 4 May 2005, Parketnr. 21-006275-04, is available in Dutch at http://www.rechtspraak.nl.

*(F. Naert)*

**Three Members of the Sudanese Armed Forces Convicted by Sudan War Crimes Court**

Sudan's War Crimes Court, established in Darfur's main city of El Fasher in June (more info available at http://news.bbc.co.uk/2/hi/africa/4091146.stm and *ILIB* of 28 June 2005), sentenced on 13 August three members of the Sudanese armed forces to five years in prison on charges of "waging war" (see http://www.sudan.net/news/posted/12146.html). The same Court will rule soon on an army lieutenant and a corporal alleged for premeditated murder. The sentence represents the first decision handed down by the special tribunal established for the alleged Darfur war crimes, in the attempt to avoid the

jurisdiction of the ICC, which was requested by the UN Security Council for the first time on 31 March 2005 in Resolution 1593 (2005) (text of the resolution available at http://www.un.org/News/Press/docs/2005/sc8351.doc.htm; see also *ISMLLW Newsletters* 2005/1 and 2005/2 and *supra* on the ICC). Sudan official news agency *SUNA*, quoting Sudanese officials, reported that some 160 indicted persons would appear before the Sudanese court to try alleged war crimes committed in the western region of Darfur. The sentence has been subject to wide critics, especially from human rights activists and groups (i.e. *Damanga Coalition*. See at http://sudantribune.com/article.php3?id_article=11221).

ICC Prosecutor Luis Moreno-Ocampo still holds a list of 51 individuals named by the United Nations International Commission of Inquiry as suspects of grave international crimes in Darfur as well as the archive of the Commission itself. Moreover, on July 31, John Garang, head of the Sudan People's Liberation Movement/Army (SPLM/A), the main southern rebel group, died in an helicopter crash. The Ugandan presidential helicopter was carrying Garang back to Sudan from a meeting with Ugandan President Yoweri Museveni. UN Secretary-General Kofi Annan, in a report to the UN Security Council, has recently accused Sudanese rebels of taking part in kidnappings, extortions and thefts, in a "descent into lawlessness", damaging the already unstable Darfur (full coverage at http://apnews.myway.com/article/20050817/D8C1HUA80.html).

*(M. Tondini)*

**Crimes against humanity and crimes of war in the Swiss criminal law**

On 17 August, the Swiss Federal Council authorised the Federal Department of Justice to open a consultative procedure for the necessary modifications to the present federal criminal law in order to introduce in the national legal system a stricter codification of crimes against humanity and war crimes. The *Projet* and the *Rapport explicatif* are available on line at http://www.ofj.admin.ch/f/index.html). The *Projet* codifies crimes against humanity, including voluntary homicide, extermination, slavery, deportation, imprisonment, torture, sexual crimes and apartheid committed during a widespread or systematic attack against civilian population. The Swiss criminal law does contain provisions punishing those offences yet, but does not recognise the aggravation of the same conducts when perpetrated as part of an attack against a civilian population.

The actual national criminal law disciplines war crimes through a general reference to international humanitarian law (Geneva and Hague Conventions). According to a clarifying *ratio*, in the future, Swiss criminal code will provide for explicit offences related e.g. to the attacks against civilian targets or the use of prohibited method or means of war. The crime of genocide will be instead submitted to a number of limited modifications, given the fact it was introduced in the Federal criminal law in 2000.

The ordinary Courts would have jurisdiction over cases not involving military personnel (passive or active subjects of the crime), while the military justice would have jurisdiction in other cases or in time of war or armed conflict, whether the martial law applies on both civilian and militaries.

The aim of this new legislation is to line up the internal criminal law system with the Statute of the International Criminal Court, ratified by Switzerland in 2001 (for additional information on the matter see International Society for Military Law and the Law of War, *Compatibility of National Legal Systems with the Statute of the Permanent International Criminal Court*, Recueil XVI, Brussels, 2003, pp. 417 – 460).

*(M. Tondini)*

**British Court Convicts an Afghan Citizen for Torture Perpetrated in Afghanistan**

*Farayadi Sawar Zardad*, a 42 year old Afghan citizen**,** was convicted on 18 July 2005 to two 20-year terms to run concurrently by a British Court in London (judgement held at the *Central Criminal Court*, universally known as the *Old Bailey*, England's most important crown court). The convict was charged

of conspiracy to commit torture and to take hostages in Afghanistan between 1991 and 1996 (story's full coverage at http://news.bbc.co.uk/1/hi/uk/4695353.stm). The Metropolitan Police's Anti-Terrorist Branch started investigating *Zardad* in March 2001, after BBC's *Newsnight* programme tracked him down to a home in south London. In fact, following the establishment of the Taliban regime in Afghanistan, he left the country and entered the UK in 1998, seeking political asylum. The police investigations included trips to Afghanistan by officers to collect witness accounts and documentary evidence, and witness testimonies transmitted to court by satellite video-link, with a technique used for the first time in the UK. A previous trial was held in 2004, but the jury failed to reach a verdict and a retrial was ordered.

The jury accepted the prosecutor's arguments retaining torture (which is a violation of section 1(1) of the Criminal Law Act 1977, available at http://www.swarb.co.uk/acts/1977Criminal_LawAct.shtml) as a crime of universal jurisdiction, as decided by the House of Lords on 24 March 1999 in Pinochet case No. 3 (available at http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm). Moreover, as parties to 1984 United Nations Torture Convention (available at http://www.hrweb.org/legal/cat.html), Afghanistan and the UK are bound by the obligations that flow from it. That means for the UK to have an obligation under the UN Convention to "extradite or prosecute" the alleged. As long as no request for extradition was received by the Afghan authorities, under the Convention, the UK is empowered to prosecute *Zardad*.

The Court agreed that hostage taking (a violation of section 1(1) of the Criminal Law Act 1977) is also a crime of universal jurisdiction. Section 1-3 of the Hostage Taking Act 1982 implements the International Convention against the Taking of Hostages. Section 134 of the Criminal Justice Act 1988 (available at http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880033_en_1.htm) states that a public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties. *Zardad*'s official capacity was proven by the fact he was often described as a 'war lord' in charge of a vital piece of territory about 80 km outside of the capital Kabul on a vital supply road between Afghanistan and Pakistan in the period of the alleged crimes. At that time, military checkpoints run by *Zardad's* militia were the sites of numerous offences of hostage-taking and torture.

One of the key legal challenges of the case had been to prove that, although Zardad did not necessarily administer torture himself, he was still responsible through the men he controlled at his checkpoints. On the point, *Zardad* himself told the Court he had not tortured anyone but had given orders against torture. In an attempt to get discredit on the witnesses, *Zardad*'s lawyer, Anthony Jennings QC, argued that they might belong to rival factions and have their own interests for giving evidence, while any wrongdoing that may have occurred was the result of the work of local intelligence services.

For a brief discussion, see *Sentinelle* No. 29.

*(M. Tondini)*

**British Soldiers Charged with War Crimes for Inhumane Treatment of Detainees in Iraq**

Three British servicemen have been charged with war crimes related to the inhumane treatment of detainees in southern Iraq (for a complete coverage of the case see http://news.bbc.co.uk/1/hi/uk/4698251.stm). It is noteworthy that they do not appear before the International Criminal Court in The Hague which would only come into play if Britain were "unwilling or unable" to prosecute soldiers. However, the British authorities are not declining to take the men to court, since the three soldiers will be brought before a British court martial pursuant to the provisions of the UK's domestic International Criminal Court Act 2001 (available at http://www.oup.co.uk/pdf/bt/cassese/intcrimlaw/ch19/2001_uk_icc.pdf). It is thought to be the first time the Act has been used although inhumane treatment of a person protected by the Geneva Conventions has been an offence under English law since 1957. Eight other British soldiers, including a former

colonel, have been charged under domestic law and will face military tribunals in connection with the alleged abuse of Iraqi detainees.

This action is a clear demonstration of the UK's commitment to uphold the rule of law on the basis of its domestic legislation. Therefore, despite the potential adverse effect on the morale and image of the Army, this action has been endorsed. The very fact that British troops maintain a very high standard, is considered to be one of the main reasons why the Army should not hesitate to investigate and prosecute whenever these standards are not upheld. The underlying thought appears to be that this is what every country should be doing: hold its own accountable persons under its own law.

*(G. Seurs)*

**UK-Jordan Memorandum of Understanding on Deportations**

A ***Memorandum of Understanding*** has been signed between the Government of the United Kingdom and the Government of Jordan (available at http://www.statewatch.org/news/2005/aug/uk-jordan-MOU.pdf) regarding rules of human treatment for arrested persons following deportation in both Countries. The memorandum applies "to any person accepted by the receiving state for admission to its territory following a written request by the sending state". It provides that if a subject is arrested, detained or imprisoned following his return", he will enjoy "adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with internationally accepted standards". Moreover, the arrested or detained person "will be brought promptly before a judge or other officer authorized by law" to rule on the lawfulness of the detention. See also *ILIB* of 25 August 2005.

The "MOU" is clearly an attempt of the UK Government trying to avoid the limits to the deportation procedures imposed to the British law by both the 1966 International Covenant on Civil and Political Rights and the European Convention on Human Rights, and recently arisen during a judgment before the House of Lords (*Judgment A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, 16 December 2004, [2004] UKHL 56; available at http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm; see also *ISMLLW Newsletter* No. 1/2005).

*(M. Tondini)*

**Selected Developments in the United States**

There have been several significant developments in the United States since our last newsletter. The courts upheld the president's authority to use military commissions and to indefinitely detain U.S. citizens who are determined to be "enemy combatants" in the war on terrorism. In addition, the Congress has considered several legislative items, to include strengthening the president's authority to detain enemy combatants and loosening the restrictions on the use of riot control agents during combat.

**The Hamdan Case**

The United States (U.S.) Court of Appeals for the District of Columbia Circuit: Salim Ahmed Hamdan v. Donald H. Rumsfeld, et al., Case No. 04-5393, July 15, 2005. Text available at http://www.asil.org/pdfs/Hamdanv.Rumsfeld.pdf. For a brief discussion, see also *ILIB* of 19 July 2005 and *Sentinelle* No. 29.

The U.S. Court of Appeals for the District of Columbia reversed the district court's verdict (available at http://www.dcd.uscourts.gov/04-1519.pdf) and upheld the president's authority to use military commissions to try enemy combatants. The case involves Salim Ahmed Hamdan, who was Osama bin Laden's former driver and was captured in Afghanistan in late November 2001 by Northern Alliance militiamen and delivered to U.S. forces after the payment of a reward. Sometime in 2002, Hamdan was transferred to the detention facility on Guantanamo Bay, Cuba, and has remained there ever since.

In April 2004, Hamdan filed a habeas corpus petition. On 8 November 2004, the U.S. District Court for the District of Columbia decided partly in favor of Hamdan, ordering that he be tried by court-martial unless a competent tribunal determined that he was not entitled to prisoner of war status under the III Geneva Convention of 1949 (for an analysis of the case, see http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_hamdan.htm).

On 15 July 2005, the U.S. Court of Appeals for the District of Columbia (hereafter "the Court"), upon application by the U.S.Government, issued several holdings that have sparked considerable debate. The Court asserted that even though the 1949 Geneva Convention protects individual rights, an individual cannot enforce those rights those rights in court. In addition, the Court found that even if Hamdan could enforce his rights under the 1949 Geneva Convention before national courts, such rights would not apply to him. First, he was not entitled to prisoner of war status because he failed to meet the requirements of Article 4. Second, the Court held that the 1949 Geneva Convention "does not apply to al Qaeda and its members" because al Qaeda is neither a State, nor a Party to the Geneva Conventions (hereafter GC).

Hence, common article 2 GC does not apply to the present case.

Turning to common article 3 GC, the Court rejected its application to the war against terrorism and affirmed the president's determination that the conflict was "international in scope" and not confined to Afghanistan. In support, the Court noted that the conflict with al Qaeda has been global, to include the attacks on the U.S. In addition, the Court approved the president's decision to treat the conflict with the Taliban separately from the conflict with al Qaeda. The Court further made clear that Hamdan's common art. 3(1)(d) argument, which required sentences to be pronounced "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," was "by no stretch" a jurisdictional argument and was rejected. Instead, the issue should be framed as not "whether the competent military commission may try (the defendant), but rather ***how*** the commission may try him." (emphasis added).

Regarding the compatibility of the military commissions' rules of procedures with the Army Regulation 190-8 (particularly referring to para.1-1 (b)3, 1-5(a)2, 1-6(b), 1-6(c), available at http://www.cdi.org/news/law/190-8.pdf), the Court further found that nothing in the cited regulation suggests that the U.S. President is not a "competent authority" for determining prisoners' legal status. In fact, the Army Regulation provides that "all persons taken into custody by U.S. forces will be provided with the protections of the GPW (Geneva Convention Relative to the Treatment of Prisoners of War) until some other legal status is determined by competent authority" (para. 1-5(a)2). The Court held that there is nothing to suggest that the President is not a "competent authority" for these purposes.

Finally, the Court held that a military commission, as established by the President's November 13, 2001 Order, is a "competent tribunal." Therefore, Hamdan could assert his claim to prisoner of war status to the military commission at the time of his trial.

This case has been appealed to the U.S. Supreme Court and has been scheduled for consideration at the first Conference of the new Term, on Sept. 26, according to the Court's docket. The case is *Hamdan v. Rumsfeld*, docket 05-184.

**The Padilla Case**

On 9 September 2005, the U.S. Court of Appeals for the Fourth Circuit unanimously ruled against Jose Padilla, a U.S. citizen designated an enemy combatant, and held that the President has the authority to indefinitely detain him without trial. Text available at http://pacer.ca4.uscourts.gov/opinion.pdf/056396.P.pdf.

Padilla fought against the U.S. in Afghanistan and then escaped to Pakistan. He was then "recruited, trained, funded, and equipped by al Qaeda" to continue prosecuting the war in the U.S. On 8 May 2002, he was arrested at O'Hare International Airport in Chicago and the President then designated him an "enemy combatant" against this country who represents a "continuing, present and grave danger to the national security of the United States." Padilla has remained in military custody ever since.

The Court found that the Congressional Authorization for the Use of Force (http://news.findlaw.com/nytimes/docs/terrorism/sjres23.es.html) "unquestionably authorized" the President to detain an enemy combatant as a fundamental incident to the President's prosecution of the war against al Qaeda.

**Congressional Developments**

The U.S. Congress has considered several measures concerning international law and armed conflict, to include strengthening the President's authority to detain enemy combatants and loosening the restrictions on the use of riot control agents during combat.

The Congress is considering amendments to the 2006 Defense Authorization Bill to make the Combatant Status Review Tribunals and Annual Review Boards statutory law. These procedures are used at Guantanomo Bay to determine if individuals are unlawful enemy combatants, and whether they still possess valuable intelligence information or represent a continuing threat to the United States.

These amendments have been offered to further strengthen the President's authority by affirming executive actions through legislation. While the president has wide authority in conducting foreign affairs, the Constitution also grants the Congress several powers, to include the authority to "make Rules concerning Captures on Land and Water." U.S. CONST., art. I, § 8, cl. 11. Consequently, these amendments, if passed, would increase the legitimacy of the detentions by conferring legislative approval of the executive branch's actions.

A controversial amendment to the 2006 Defense Authorization Bill concerning riot control agents has been considered, but has not passed into law. This amendment stated that "it remains the long-standing policy of the United States" that riot control agents, such as tear gas, may be used by military personnel "in combat and in other situations for defensive purposes to save lives." If this description were approved, it would change U.S. policy dramatically and would likely violate the Chemical Weapons Convention and the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare ("Geneva Protocol of 1925"). The U.S. Policy for the use of riot control agents is found in Executive Order 11850, available at http://www.archives.gov/federal-register/codification/executive-order/11850.html.

**Additional Information on Guantanamo Prisoners and their Status under Humanitarian Law:**

J.J. Paust, 'There Is No Need to Revise the Laws of War in Light of September 11th', The American Society of International Law Task Force on Terrorism, November 2002, (available at http://www.asil.org/taskforce/paust.pdf); J.J. Paust, 'Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond', *Cornell International Law Journal*, Vol. 35, No. 3, 2002, pp. 533 - ...; J. Fitzpatrick, 'Jurisdiction of Military Commissions and the Ambiguous War on Terrorism'; J. Fitzpatrick, 'U.S. Military Commissions: One of Several Options'; M. J. Matheson, 'U.S. Military Commissions: One of Several Options', in *American Journal of International Law*, Vol. 96, No. 2, 2002, pp. 345 - 358; A. de Zayas, 'Human rights and indefinite detention', in *International Review of the Red Cross*, Vol. 87, No. 857, 2005, p. 15 - ... ; Y. Naqvi, 'Doubtful prisoner of war status', in *International Review of the Red Cross*, Vol. 84, No. 847, 2002, p. 571 - ... ; Human Rights First, 'Gonzales on Military Commissions', available at http://www.humanrightsfirst.com/us_law/etn/gonzales/briefs/brief_20041209_Gonz_%20MC.pdf. See generally International Committee of the Red Cross, The relevance of IHL in the context of terrorism', 21 - 07 - 2005 Official Statement (available at http://www.icrc.org/Web/eng/siteeng0.nsf/html/terrorism-ihl-210705, or International Committee of the Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', 28th International Conference, of the Red Cross and Red Crescent, Geneva, 2 - 6 December 2003 (available at http://www.icrc.org).

*(M. Tondini & S. Holcomb)*

**U.S. District Court Dismisses the Motions of a Guantanamo Prisoner for Inhuman Treatment**

The case *O.K. et al. v. George W. Bush et al.* (Civil Action No. 04-1136, July 12, 2005, available at http://www.dcd.uscourts.gov/opinions/2005/Bates/2004-CV-1136~13:34:54~7-12-2005-a.pdf), pending before the U.S. District Court for the District of Columbia, ended with the decision of the Court to deny the petition for preliminary injunctions in order to prevent further "interrogation, torture and other cruel, inhuman or degrading treatment" (Story available on *ILIB at* http://www.asil.org/ilib/2005/07/ilib050729.htm. The petitioner, a Canadian eighteen-year old citizen arrested in Afghanistan in 2002 (a minor at that date) following combat, claimed to have been shackled for hours in stress positions without access to a toilet, to have been used as a "human mop" to then clean up, to have been subjected to refrigerator-like temperatures and to have been thrown on the floor of his cell. The petitioner also claimed that military guards threatened to send him to jail in Egypt, where the guards said he would have been sexually assaulted. On his 2 July 2004 petition for a writ of habeas corpus, the applicant also challenged his detention and the conditions of his imprisonment in U.S. custody under several U.S. federal statutes and under international law.

The Court stated that the applicant failed to demonstrate that he would have suffered irreparable harm (p. 15) absent the relief requested (necessary in a judgement on a preliminary injunction), while he did not offer a plausible legal or evidentiary basis for the Court to the exercise the authority to forbid the interrogation of individuals captured in the course of ongoing military hostilities, intruding so dramatically on the prerogative of the Executive in the performance of the war power (p. 16). According to the Court's decision, the petitioner also failed to prove that he would face a real and immediate threat of repeated injury, since most of his allegations are relative to events presumably happened in 2003, in the meanwhile not offering any "reason to believe that this sort of misconduct is going to suddenly materialize again in the near future". The Court went also further, stating that "even if the petitioner were able to demonstrate that he possesses a right to be free from torture and that certain of his allegations would constitute violations of that right, he has not come forward with the showing necessary to secure the forward-looking order he seeks" (pp. 18 - 19), because "a plaintiff seeking an injunction cannot simply allege that he was previously subjected to the defendant's actions", showing that "there is a real and immediate threat of repeated injury in the future" (principles affirmed in Dist. of Columbia Common Cause v. Dist. of Columbia, 858 F.2d 1, 8 - D.C. Cir. 1988).

(*M. Tondini*)

**Former Abu Ghraib Commander Gives Interview**

Former *Abu Ghraib* Prison Commander, former Brigadier General *Janice Karpinski*, has alleged that US Secretary of Defense *Donald Rumsfeld* personally signed a memorandum authorizing extreme interrogation techniques used at Iraq's *Abu Ghraib* prison. In an interview (available at http://www.truthout.org/docs_2005/082405Z.shtml) with Thomas Jefferson School of Law Professor *Marjorie Cohn*, published on 24 August, she said that when she first visited the prison cellblock where the abuses were committed, the military's Criminal Investigation Division had removed everything except for a memorandum. It was "signed by Secretary of Defense *Rumsfeld*, authorizing a short list, maybe 6 or 8 techniques: use of dogs; stress positions; loud music; deprivation of food; keeping the lights on, those kinds of things. And then a handwritten message over to the side that appeared to be the same handwriting as the signature, and that signature was Secretary *Rumsfeld's.* And it said, "Make sure this happens", with two exclamation points. And that was the only thing that they had. Everything else had been confiscated".

*(M. Tondini)*

**USS Cole Families Can Sue Sudan for the Death of their Relatives**

A U.S. District Court ruled that the families of the 17 sailors killed in a terrorist attack on the USS Cole in the harbour of Aden, in 2000 can pursue a lawsuit against the government of Sudan (full story at http://www.cnn.com/2005/LAW/08/24/cole.suda.ap/). The families accuse Sudan of providing support, including diplomatic pouches used to carry explosives, and financing for the attack. The suit also

contends that Usama bin Laden and Sudan operated joint businesses and a bank that provided financing for the Cole attack. The link would be demonstrated by the fact that an al Qaeda operative would have shipped four crates of explosives to Yemen before the bombing and bin Laden himself would have entered the Country with an express order of the President of Sudan to avoid the payment of any taxes. The case is scheduled for trial on 7 March 2006, but probably it will be delayed. The families expect to receive $105 million from the Sudanese Government, which theirs attorneys hope to be paid through Sudanese assets frozen by the U.S. government.

In fact, differently from civil law countries, in which the immunity of the State from the civil jurisdiction is considered as a principle in international customary law, in the common law countries, as Britain or the U.S., the matter is fully disciplined by state laws. In the case of the U.S., the *Foreign States Immunities Act* (FSIA: 28 U.S.C. §§ 1602 et seq.; available at http://www.law.berkeley.edu/faculty/ddcaron/Documents/RPID%20Documents/rp04039.html) refers just to international treaty law (§ 1604) as a legal base to determine the eventual immunity, and, in any case, it provides for a wide range of general exceptions to the principle (§ 1605).

*(M. Tondini)*

**US Court Allows Sudan Case against Canadian Company to Proceed**

The U.S. District Court for the Southern District of New York adopted two decisions in the case of *Presbyterian Church of Sudan et al. v. Talisman Energy, Inc.*, in which current and former residents of Southern Sudan claim to be the victims of genocide and other violations of international law committed by the Canadian energy company, Talisman Energy, Inc and the Government of Sudan.

First, on 13 June 2005, the Court denied the defendant's motion for judgment on the pleadings and *inter alia* held that customary international law prohibiting violations of *jus cogens* norms such as genocide applies to private actors in addition to state actors. The judgment is briefly discussed in *ILIB* of 28 June 2005.

Second, on 30 August, the District Court judge allowed the lawsuit to proceed despite efforts by the United States and Canada to have it dismissed (see http://www.newsday.com/news/local/wire/newyork/ny-bc-ny--talismanenergy-ge0830aug30,0,5514368.story?coll=ny-region-apnewyork).

*(F. Naert)*

**Report on Representation of Victims before ICC**

*The* ***Redress Trust***, member of the ***Victims' Rights Working Group*** (VRWG), an affiliation of human rights organizations established in December 1997 (see http://www.vrwg.org/whoweare.html), published a report entitled "Ensuring the Effective Participation of Victims Before the International Criminal Court. Comments and Recommendations Regarding Legal Representation for Victims" (available at http://www.vrwg.org/Publications/2.html). The report, edited by *Clémentine Olivier* and *Carla Ferstman*, is the product of a research mission to the Democratic Republic of Congo in November - December 2004 and follows on from a series of meetings and discussions in The Hague between the International Criminal Court (ICC) and civil society groups and other experts. Moreover it reflects *Redress'* experience in representing victims before national and international bodies.

Composed by an introduction and three other chapters, the report mostly focuses on general advices and legal assistance provided for victims, the appointment of legal representatives and the role of legal representatives for victims in the pre-trial, trial and post-trial phases.

*(M. Tondini)*

**ANNOUNCEMENTS OF CONFERENCES, SEMINARS, ETC.**

The ***International Society for Military Law and the Law of War*** will hold its next **international congress** in Scheveningen (The Hague – The Nederlands) from 16 to 21 May 2006, entitled "The Rule of Law in Peace Operations". Registration will only be possible after the sending out of the invitations. Further announcements will be also published soon on the Society's website (http://www.soc-mil-law.org).

The **UK National Group** has organized a lecture on "Enforcing the Rules – A Military Prosecutors Perspective", based on operational incidents from Iraq, on 1 October in London (at the British Institute of International and Comparative Law, University of London, Clore House, 17 Russell Square, London) from 2 till 4 pm.

The **German National Group** is organising a Conference on "Einsatz der Bundeswehr im Ausland. Rechtsgrundlagen und Rechtspraxis" in Bonn on 17/18 November 2005. The conference is in German but international participants are most welcome. For more details, see the Society's website. To register, contact DGWHV@bmvg.bund400.de.

***Inter-University Centre for Legal Studies***, founded in 1999 by the *International Law Institute* at the *Georgetown University Law Center* in Washington DC, is organizing a seminar entitled "Legal Responses to Terrorism: A World Wide Comparative Law Survey". The seminar will take place from 5 to 9 December 2005 at the *International Law Institute*, 1055 Thomas Jefferson St., NW, Washington, DC (info request: Kiril Glavev at Tel: 202-247-6006, e-mail: kglavev@ili.org; Ben Feinberg at 703-562-4522, e-mail: bfeinberg@iucls.org; International Law Institute at Tel: 202 247 6006, Fax: 202 247 6010, e-mail: info@ili.org).

The objective of the course is aimed to offer a survey of the ways the various countries have used to respond to the threat of terrorism both before and after 9/11 (Great Britain, the Middle East, Sri Lanka, Turkey, South America, and India will be considered). Separate sessions will be devoted to the international role in combating terrorism performed by the United Nations, The Federal Bureau of Investigation and the U.S. State Departments. The course will also consider such generic issues as the international financing of terrorism, the advantages and risks involved in the use of computers, and the challenges facing the medical community, in dealing with the possible use of biological weapons by terrorists. The Course Advisors are *Professor Yonah Alexander*, Co-Director of the Inter-University Center for Legal Studies and director of the Inter-University Center for Terrorism Studies and *Professor Edgar H. Brenner*, Co-Director of the Inter-University Center for Legal Studies and legal counsel to the Inter-University Center for Terrorism Studies.

The cost of the seminar is $1900.00. Some scholarships are available. A certificate will be awarded upon completion.

## INTERESTING PUBLICATIONS

(hb = hardback/hard cover and pb = paperback/soft cover)

*Notes: The publications marked with * have been offered by their publishers or editors to the documentation centre of the International Society, where our members can consult them. A separate book review will be published in the Military Law and the Law of War Review 2005. The publications marked with ** have been offered by their publishers or editors to the documentation centre of the International Society, where our members can consult them.*

R. CAPLAN, *International Governance of War-Torn Territories. Rule and Reconstruction*, Oxford UP, 2005, ISBN 0-19-926345-0 (hb);

S. CHESTERMAN, *You, The People: The United Nations, Transitional Administration, and State-Building*, Oxford UP, 2004, ISBN 0-19-928400-8;

K. DÖRMANN, *Elements of War Crimes under the Rome Statute of the ICC*, Cambridge UP, 2003, ISBN 0521818524 (hb);*

H. DUFFY, *The 'War on Terror' and the Framework of International Law*, Cambridge UP, 2005, ISBN: 0521547350 / ISBN-13:9780521547352 (pb) & ISBN: 0521838509 / ISBN-13:9780521838504 (hb);

H. DURHAM & T. GURD (eds.), *Listening to the Silences: Women and War*, Martinus Nijhoff, 2005, ISBN 90 04 14365 3;

H. FISCHER & N. QUÉNIVET (eds), *Post-Conflict Reconstruction: Nation- and/or State-Building* (52 Bochumer Schriften zur Friedenssicherung und zum humanitären Völkerrecht), Berliner Wissenschaftsverlag, 2005, ISBN 3-8305-1003-9;

D.P. FORSYTHE, *The Humanitarians. The International Committee of the Red Cross*, Cambridge UP, 2005, ISBN 0 521 84828 8 (hb) / 0 521 612810 (pb);

D. GAMBETTA (ed.), *Making Sense of Suicide Missions*, Oxford UP, 2005, ISBN 0-19-927699-4 (hb);

K.J. GREENBERG & J.L. DRATEL (eds.), *The Torture Papers. The Road to Abu Ghraib*, Cambridge UP, 2005, ISBN-10: 0521853249 / ISBN-13: 9780521853248;

R. KERR, *The International Criminal Tribunal for the Former Yugoslavia. An Exercise in Law, Politics, and Diplomacy*, Oxford UP, 2004, ISBN 0-19-926305-1 (hb);

K. KHAN & R. DIXON, *Archbold: International Criminal Courts. Practice, Procedure and Evidence*, Sweet & Maxwell, 2005, ISBN 0421906200;

C. KU & H. JACKSON (ed.), *Democratic Accountability and the Use of Force in International Law*, Cambridge UP, 2003, ISBN 0521002079 (PB) (23 GBP in PB);*

R. LESAFFER (ed.), *Peace Treaties and International Law in European History. From the Late Middle Ages to World War One*, Cambridge UP, 2004, ISBN-10: 0521827248 / ISBN-13: 9780521827249;

S. LEVINSON (ed.), *Torture. A Collection*, Oxford UP, 2004, ISBN 0-19-517289-2 (hb);

S. LÜDER, *Völkerrechtliche Verantwortlichkeit bei Teilnahme an „Peace-keeping"-Missionen der Vereinten Nationen*, Berliner Wissenschaftsverlag, 2004, ISBN 3-8305-0592-2;

S. MASLEN, *Commentaries on Arms Control Treaties, Volume I. The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, Oxford UP, 2004, ISBN 0-19-926977-7;

J.F. MURPHY, *The United States and the Rule of Law in International Affairs*, Cambridge UP, 2004, ISBN 0521529689 (pb) / 0521822564 (hb);*

K. NABULSI, *Traditions of War. Occupation, Resistance, and the Law*, Oxford UP, 2005, ISBN 0-19-927947-0 (pb);

S.C. NEFF, *War and the Law of Nations. A General History*, Cambridge UP, 2005, ISBN-10: 0521662052 / ISBN-13: 9780521662055 (hb);

C. PHUONG, *The International Protection of Internally Displaced Persons*, Cambridge UP, 2005, ISBN 0 521 82686 1;

N. QUÉNIVET, *Sexual Offenses in Armed Conflict and International Law*, Transnational Publishers, 2005, ISBN 1-57105-341-7;

C. ROMANO, A. NOLLKAEMPER & J. KLEFFNER (eds.), *Internationalized Criminal Courts. Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford UP, 2004, ISBN 0-19-927673-0 (hb) / 0-19-927674-9 (pb);

G. SIMPSON, *Great Powers and Outlaw States*, Cambridge UP, 2004, ISBN 0521534909 (pb) / 0521827612 (hb);*

*Max Planck Yearbook of United Nations Law*, Vol. 9 (2005), Martinus Nijhoff, ISBN 90 04 14533 8;

*Yearbook of International Humanitarian Law*, Vol. 5 (2002), TMC Asser Press / Cambridge UP, ISBN-10: 9067041890 / ISBN-13: 9789067041898 (hb);

Furthermore, Cambridge University Press has donated the following publications that have already been mentioned in earlier editions of the newsletter: Y. DINSTEIN, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2004, ISBN 0521542278 (pb) / 0521834368 (hb);* and J. GARDAM, *Necessity, Proportionality and the Use of Force by States*, 2004, ISBN 0521837529 (hb);*

Similarly, Martinus Nijhoff (Brill), has donated a copy of E. MCWHINNEY, *The September 11 Terrorist Attacks and the Invasion of Iraq in Contemporary International Law. Opinions on the Emerging New World Order System*, 2004, ISBN 900414143X (pb).*

## FROM THE GENERAL SECRETARIAT

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.

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@scarlet.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.

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