



NEWSLETTER OCTOBER/NOVEMBER/DECEMBER 2005

REF: ISMLLW 2005/4 E

EDITORIAL

Dear member,

From 23 to 27 November 2005 legal experts from 42 Countries all over the world convened in the Eurocorps Headquarters in Strasbourg for our VIth Seminar for Legal Advisors to the Armed Forces. Under the direction of Brigadier General Jan Peter Spijk (the Netherlands), this seminar offered the participants a wide variety of lectures on challenges for legal advisors in peacekeeping operations and the possibility to discuss these issues afterwards in an Arabic, English or French speaking working session. The results of the working groups were presented by rapporteurs designated by each working group.

This highly interactive approach, that is typical of the Society's Seminars, was once again clearly appreciated by the participants. A vibrant and currently relevant exchange of ideas between professionals about the mission of the International Security Assistance Force in Afghanistan as opposed to the tasks of the Forces involved in Operation Enduring Freedom was just an example in this respect. In light of its success, it has been proposed to hold the Seminar on a biannual basis, rather than on a tri-annual basis. This suggestion will certainly be considered by the Society's Managing Board and Board of Directors.

The issue of extraterritorial application of human rights, more specifically in the framework of peace operations, was discussed on Friday 25 November 2005 in the morning. The visit to the European Court of Human Rights on the evening of 25 November 2005 perfectly fitted in with the programme. The excellent presentation of Mrs. Aysegul Uzun (Turkey) of the Court during the visit confirmed the "to be continued" status of the issue. During our Congress in May next year, we will therefore continue exploring the implications of various national and international decisions regarding such extraterritorial application.

Ludwig Van Der Veken

Secretary-General

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>.

Note: *Unless quotes are taken from authentic documents in the same language, they are not authentic.*

International Agreements

UN Draft Convention on Forced Disappearances of Persons

The UN Working Group on Enforced or Involuntary Disappearances (the Working Group) has finished the drafting of a legally binding instrument on enforced disappearances of people, after arrest, detention, or abduction with the acquiescence of a Government.

The draft convention will be submitted to the Human Rights Commission, and subsequently to the General Assembly for their approval before being opened for signature and ratification next year.

The definition of enforced disappearances is entirely consonant with the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance, which states that enforced disappearance occurs when a person is deprived of liberty with the direct or indirect support or acquiescence of a Government, which then refuses to disclose the fate or whereabouts of that person.

The Working Group was established by the UN Commission on Human Rights in 1980 to assist the relatives of disappeared persons in ascertaining their fate and whereabouts. The panel also monitors the compliance of States with their obligations under the Declaration on the Protection of All Persons from Enforced Disappearance.

More information on the Working Group on Enforced or Involuntary Disappearances, is available at <http://www.ohchr.org/english/issues/disappear/index.htm>

(I.Heyndrickx)

Third Geneva Protocol on Additional Emblem Adopted

A diplomatic conference convened in Geneva on 5-7 December 2005 adopted Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Protocol III) late in the night of 7 December by vote (98 in favour and 27 against, including most Arab countries). The additional emblem does not replace the existing emblems recognized by the Conventions and Protocols but supplements these emblems. It is called the red crystal and is presented as a red frame in the shape of a square on edge, on a white background (see picture below). It is meant to provide a comprehensive solution to the emblem question and is free from any religious, political or other connotation. It should therefore pave the way to accession of national societies that do not use the red cross or red crescent to the International Federation of Red Cross and Red Crescent Societies. See http://www.icrc.org/Web/Eng/siteeng0.nsf/html/section_ihl_emblem!Open for more details. See also *Sentinelle* No. 46.

(F. Naert)



Protocol on Safety of UN and Associated Personnel Adopted

On 8 December 2005, the UN General Assembly adopted the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel (see <http://www.unis.unvienna.org/unis/pressrels/2005/sgsm10256.html>). Article II of the Protocol extends the scope of application of the 1994 Convention to “*all other United Nations operations [than those already covered by the Convention] established by a competent organ of the [UN] in accordance with the [UN Charter] and conducted under [UN] authority and control for the purposes of (a) Delivering humanitarian, political or development assistance in peacebuilding, or (b) Delivering emergency humanitarian assistance*”. However, this provision excludes permanent UN offices and allows a host State to make a declaration to the UN Secretary-General “*that it shall not apply the provisions of this Protocol with respect to an operation under article II (1) (b) which is conducted for the sole purpose of responding to a natural disaster. Such a declaration shall be made prior to the deployment of the operation*”.

The Resolution containing the Protocol does not yet appear to be on the UN website, but should be soon and the draft text, presumably adopted without changes, is contained in UN Doc. A/60/518, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/614/38/PDF/N0561438.pdf?OpenElement>). See also *Sentinelle* No. 43.

(F. Naert)

International Organizations

UN Celebrates 60th Anniversary, Adopts 2005 World Summit Outcome Document and Establishes Peacebuilding Commission

On 24 October 1945, the UN Charter entered into force. About one month before the 60th anniversary of this event, on 14-16 September 2005, the 2005 World Summit took place in New York. The outcome document of this summit is contained in UN General Assembly Resolution 60/1 (available at <http://www.un.org/Depts/dhl/resguide/r60.htm>).

The main contents are discussed in F.L. Kirgis, ‘International Law Aspects of the 2005 World Summit Outcome Document’, *ASIL Insight*, 4 October 2005 (<http://www.asil.org/insights/2005/10/insights051004.html>) and in *Sentinelle* Nos. 33 and 46.

Moreover, on 20 December 2005, the Security Council and General Assembly jointly established the Peacebuilding Commission envisaged by the Outcome Document. See Security Council resolutions 1645 and 1646 and General Assembly resolution 60/180 and generally <http://www.un.org/peace/peacebuilding/>. See also *Sentinelle* No. 47.

(F. Naert)

UN Security Council Supports Investigation into the Death of former Lebanese Prime Minister Hariri

In Resolution 1636 of 31 October 2005, the UN Security Council, having examined the report (UN Doc. S/2005/662, available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/563/67/pdf/N0556367.pdf?OpenElement>) of the international independent investigation Commission (“the Commission”) concerning its investigation into the 14 February 2005 terrorist bombing in Beirut that killed former Lebanese Prime Minister Rafiq Hariri and 22 others, decided to impose sanctions (freezing of funds and a travel ban) on all individuals

designated by the Commission or the Government of Lebanon as suspected of involvement in this terrorist act. It also decided that Syria must detain those Syrian officials or individuals whom the Commission considers as suspected of involvement in this terrorist act and make them fully available to the Commission; that the Commission shall have vis-à-vis Syria the same rights and authorities as mentioned in paragraph 3 of resolution 1595 (2005) and that Syria must cooperate with the Commission fully and unconditionally on that basis and that the Commission shall have the authority to determine the location and modalities for interview of Syrian officials and individuals it deems relevant to the inquiry. The Resolution is available at http://www.un.org/Docs/sc/unscl_resolutions05.htm and is briefly discussed in *Sentinelle* No. 40.

On 10 December 2005, the Commission issued a second report (Annex to UN Doc. S/2005/775, available at http://www.un.org/Docs/sc/unscl_presandsg_letters05.htm). On 15 December 2005, in resolution 1644, the Security Council decided to extend the Commission's mandate until 15 June 2006. The resolution is available at http://www.un.org/Docs/sc/unscl_resolutions05.htm and is briefly discussed in *Sentinelle* No. 46.

(F. Naert)

UN Security Council Authorizes Arrest of former President Taylor in Sierra Leone

In Resolution 1638 of 11 November 2005, the UN Security Council, acting under Chapter VII of the UN Charter, decided that “*the mandate of the United Nations Mission in Liberia (UNMIL) shall include the following additional element: to apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone [see <http://www.sc-sl.org/>] and to keep the Liberian Government, the Sierra Leonean Government and the Council fully informed*”. The Resolution is available at http://www.un.org/Docs/sc/unscl_resolutions05.htm and is briefly discussed in *Sentinelle* No. 41.

(F. Naert)

UN Security Council Working Group on Children and Armed Conflict Holds First Session

The newly-formed Security Council Working Group on Children and Armed Conflict met in its inaugural session on 16 November 2005 (see UN Doc. SC/8559 HR/4874, 21 November 2005, <http://www.un.org/News/Press/docs/2005/sc8559.doc.htm>). The Working Group was established pursuant to Security Council resolution 1612 of 26 July 2005 with the task of reviewing monitoring reports and progress on the implementation of Security Council-mandated action plans to promote the protection of children affected by armed conflict (see *ISMLLW Newsletter* 2005/3). See also *Sentinelle* No. 43.

(F. Naert)

Eritrea in Conflict with UN over Peacekeeping Operation

On 4 October 2005, Eritrea imposed restrictions on the activities of the United Nations Mission in Ethiopia and Eritrea (UNMEE, see <http://www.unmeeonline.org/> and <http://www.un.org/Depts/dpko/missions/unmee/>). The same day, the Security Council responded by calling “*upon the Government of Eritrea to immediately reverse its decision and to provide UNMEE with the access, assistance, support and protection required for the performance of its duties*” in a Presidential Statement (S/PRST/2005/47, available at http://www.un.org/Docs/sc/unscl_pres_statements05.htm). Eritrea did not comply and even imposed further restrictions. On 23 November 2005, the UN Security Council adopted Resolution 1640 demanding “*that the Government of Eritrea reverse, without further delay or preconditions, its decision to ban UNMEE helicopter flights, as well as additional restrictions imposed on the*

operations of UNMEE, and provide UNMEE with the access, assistance, support and protection required for the performance of its duties” (available at <http://www.un.org/Docs/sc/unscreolutions05.htm>). In this Resolution, the Security Council also noted with deep concern the high concentration of troops on both sides of the Temporary Security Zone, stressed that the continuation of the situation would constitute a threat to international peace and security, called on both parties to show maximum restraint and to refrain from any threat or use of force against each other and demanded that both parties return to the 16 December 2004 levels of deployment, beginning with immediate effect and completing this redeployment within 30 days, in order to prevent aggravation of the situation. Instead, on 6 December 2005, Eritrea decided that all UNMEE staff members of U.S., Canadian, European including those of Russian nationality, should leave the country within ten days. The Security Council responded by adopting Presidential Statement S/PRST/2005/59 of 7 December 2005, in which it “*unequivocally demands that Eritrea immediately reverse its decision without preconditions*” (available at <http://www.un.org/Docs/sc/unscrestatements05.htm>). Nevertheless, while the Security Council reiterated this demand on 14 December, it decided to temporarily adjust the mission and redeploy some of the mission personnel to Ethiopia (S/PRST/2005/62, available at <http://www.un.org/Docs/sc/unscrestatements05.htm>). See also <http://www.unmeeonline.org/> and *Sentinelle* Nos. 44 and 46.

(F. Naert)

Other ‘General’ UN Security Council Measures

The UN Security Council furthermore adopted Resolution 1631 of 17 October 2005 on Cooperation between the United Nations and regional organizations in maintaining international peace and security (available at <http://www.un.org/Docs/sc/unscreolutions05.htm>) and Presidential Statements S/PRST/2005/52 of 27 October 2005 on Women and peace and security and S/PRST/2005/64 endorsing the report and conclusions of the Counter-Terrorism Committee (both available at <http://www.un.org/Docs/sc/unscrestatements05.htm>). See on the former also *Sentinelle* No. 38.

(F. Naert)

UN Mission in Haiti Investigates Allegations of Excessive Use of Force by Peacekeepers

On 8 December 2005, the United Nations Stabilization Mission in Haiti (MINUSTAH, see <http://www.minustah.org>) announced that a preliminary investigation into incidents on 31 October 2005 involving mission staff has revealed elements that suggest MINUSTAH force members used excessive force and inappropriate body searches. It has therefore established a disciplinary commission to further deal with the case. See http://www.minustah.org/compress/comm13_1.pdf and *Sentinelle* No. 46.

(F. Naert)

International(ized) Tribunals

International Court of Justice Condemns Ugandan Intervention in DRC

On 19 December 2005, the ICJ delivered its judgment in the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. The Court *inter alia* found (by a majority of at least fourteen votes to three and even unanimously on various points) that:

“(1) *the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic,*

economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention; ...

(3) the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law;

(4) the Republic of Uganda, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law;

(12) the Democratic Republic of the Congo, by the conduct of its armed forces, which attacked the Ugandan Embassy in Kinshasa, maltreated Ugandan diplomats and other individuals on the Embassy premises, maltreated Ugandan diplomats at Ndjili International Airport, as well as by its failure to provide the Ugandan Embassy and Ugandan diplomats with effective protection and by its failure to prevent archives and Ugandan property from being seized from the premises of the Ugandan Embassy, violated obligations owed to the Republic of Uganda under the Vienna Convention on Diplomatic Relations of 1961;”.

The Court reaffirms several important findings on the law set out in its *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004, especially on occupation and the relationship between human rights and international humanitarian law and the scope of application of human rights instruments.

The judgment and a summary are available at <http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>. See also *Sentinel* No. 47 and *ILIB* of 4 January 2006.

(F. Naert)

Claims Commission Says Eritrean Attack against Ethiopia Violated UN Charter

In a partial award dated 19 December 2005 the Eritrea Ethiopia Claims Commission pronounced itself on the legality of the use of force (*jus ad bellum*) in the war between both countries in 1998. It ruled that “[l]ocalized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the [UN] Charter” and that “self-defence cannot be invoked to settle territorial disputes” (§§ 10-12). It also noted that Eritrea did not report its use of force as self-defence to the UN Security Council (§ 11). The Commission further held that the Eritrean incursion into Ethiopia near the town of Badme on 12 May 1998 with more than two brigades was not justified as self-defence and violated article 2, paragraph 4, of the UN Charter (§§ 14-16) and stated that Ethiopia reacted in self-defence (§ 19). Finally, the Commission rejected Eritrea’s claim that Ethiopia had issued a formal declaration of war (§ 17) and found that Ethiopia’s contention that subsequent Eritrean attacks were pre-planned and coordinated unlawful uses of force not proved (§§ 18-19).

The text of the award is available at <http://www.pca-cpa.org/ENGLISH/RPC/EECC/FINAL%20ET%20JAB.pdf>. See also *ILIB* of 4 January 2006.

(F. Naert)

European Court of Justice Upholds Legality of Anti-Terrorism Measures

On 21 September 2005, the Court of First Instance (which is a part of the Court of Justice of the EC/EU), handed down two judgments in cases brought by persons/associations targeted by EU anti-terrorism measures, which were based on UN Security Council resolutions. The judgements address many interesting points of European and international (human rights) law.

The judgements (in cases T-306/01, *Yusuf and Al Barakaat International Foundation v. Council and Commission* and T-315/01, *Kadi v. Council and Commission*) are available at <http://www.curia.eu.int> and are discussed in *ILIB* of 17 October 2005 and *Sentinelle* Nos. 35 and 36.

(F. Naert)

Developments concerning the International Criminal Court

The ICC reached a milestone when Mexico became the 100th State Party to ratify its Statute on 28 October 2005 (effective 1 January 2006). In addition, on 27 October 2005, Austria became the first State that has signed an agreement with the ICC on the enforcement of sentences. Moreover, on 14 October 2005, the ICC Prosecutor announced that the ICC had unsealed arrest warrants against 5 leaders of the Lords Resistance Army, an Ugandan rebel group - the Court's first arrest warrants ever (see also see *Sentinelle* No. 37). Meanwhile, in his Second Report to the Security Council (dated 13 December 2005 and available at http://www.icc-cpi.int/library/organs/otp/LMO_UNSC_ReportB_En.pdf), the ICC Prosecutor was of the opinion that the special courts set up by Sudan to try and preempt the ICC from dealing with the Darfur situation did not prevent the ICC from dealing with the cases it is investigating. Juan E. Méndez, the Special Adviser to the UN Secretary-General on the Prevention of Genocide, also seemed critical of the special court's effectiveness (see http://www.un.org/News/briefings/docs/2005/051216_Mendez.doc.htm). (On the ICC and Sudan, see various previous *ISMLLW Newsletters*.) Finally, the Assembly of States Parties to the ICC Statute convened from 28 November until 3 December 2005 in the Hague for the first part of its 4th session and *inter alia* adopted Code of Professional Conduct for counsel, Regulations for the Trust Fund for Victims and various financial decisions, including the Programme budget for 2006 (see <http://www.icc-cpi.int/asp.html> and see *Sentinelle* No. 45). See <http://www.icc-cpi.int> for more details.

(F. Naert)

ICTY Cases¹

First, on 30 November 2005 the ICTY handed down its first judgement on the merits in a case concerning Kosovo. On the one hand, the Court found Fatmir Limaj and Isak Musliu not guilty of all the charges against them and ordered that they be released. On the other hand, the Court found Haradin Bala guilty of torture, cruel treatment and murder, in relation to the mistreatment of three prisoners at the Kosovo Liberation Army (KLA) Llapushnik/Lapusnik prison camp, while dismissing seven other counts against him. See also *Sentinelle* No. 44.

Second, over four years after being publicly indicted, former Croatian General Ante Gotovina was arrested on 7 December 2005 in the Canary Islands by Spanish authorities and was transferred to the Detention Unit of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague on 10 December 2005. Gotovina is charged with various crimes which allegedly took place under his command against the Serb population during and in the aftermath of the August 1995

¹ See generally <http://www.un.org/icty>.

Croatian military offensive to establish Croatian authority over the Krajina region of Croatia. See *Sentinelle* No. 45.

Third, on 8 December 2005 Gojko Jankovic was transferred from the ICTY to Sarajevo to be tried by the War Crimes Chamber of the Court of Bosnia and Herzegovina, following a decision rendered on 15 November 2005 by the Appeals Chamber to uphold the decision to refer the case (see also *ISMLLW Newsletter* 2005/1-2 and *Sentinelle* No. 43). This referral, made pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, is part of the Tribunal's completion strategy, which includes referring some cases involving lower-level accused to national courts. On 29 September 2005, Radovan Stankovic had been the first accused to have been transferred to Sarajevo (see *Sentinelle* No. 36 and *ISMLLW Newsletter* 2005/2). Similarly, on 1 November 2005, the ICTY transferred the Rahim Ademi and Mirko Norac case to Croatia, following a decision adopted on 14 September 2005. This was the first case in which persons already indicted by the Tribunal have been referred to Croatia (see also *Sentinelle* Nos. 34 and 41).

Fourth, on 16 November 2005 the Trial Chamber acquitted Sefer Halilovic (see also *Sentinelle* No. 43 and *ILIB* of 1 December 2005) and fifth, on 7 December 2005 the ICTY sentenced Miroslav Bralo to 20 years' imprisonment for his role in various crimes committed in central Bosnia and Herzegovina in 1993 (see *Sentinelle* No. 45).

(F. Naert)

ICTR Cases²

On 19 September 2005, the ICTR Appeals Chamber confirmed the sentence in the case of *Jean de Dieu Kamuhanda v. The Prosecutor* (Case No. ICTR-99-54), despite vacating a few of the convictions (see also *Sentinelle* No. 36 and *ILIB* of 31 October 2005).

Furthermore, on 7 December 2005 *Paul Bisengimana* pleaded guilty to some charges and not guilty to others in a plea bargain. The Trial Chamber accepted his plea and convicted him of murder and extermination as crimes against humanity, dismissing the other counts in conformity with the plea agreement (Case No. ICTR-00-60). See also *Sentinelle* No. 45.

Third, on 13 December 2005, in the case of *The Prosecutor v. Aloys Simba* (Case No. ICTR-01-76), the ICTR found the accused guilty of genocide and crimes against humanity (extermination) and sentenced him to 25 years' imprisonment.

(F. Naert)

60th Anniversary of International Military Tribunal

60 years ago, on 20 November 1945, the International Military Tribunal (the 'Nuremberg Tribunal'), the predecessor of the present international criminal tribunals, held its opening session. Online documentation on the IMT can *inter alia* be found at <http://nuremberg.law.harvard.edu> and at <http://www.mazal.org/NMT-HOME.htm>.

(F. Naert)

UN Selects Judges for Cambodian Tribunal

On 23 November 2005, the UN announced it was in the process of selecting the international magistrates who will sit in the special Cambodian tribunal that is to try former Khmer Rouge

² See generally <http://www.ictt.org>.

leaders. Selected candidates were to be interviewed in the course of December 2005. For more details, see <http://www.un.org/law/khmerrougetrials/>.

(F. Naert)

Timor-Leste Commission for Reception, Truth and Reconciliation Issues Final Report

The Commission for Reception, Truth and Reconciliation (<http://www.easttimor-reconciliation.org/>) submitted its final report to President Xanana Gusmao on 31 October 2005 and to the Timor-Leste Parliament on 28 November 2005. However, there are concerns that the report may not be made public (in the near future) (see <http://web.amnesty.org/library/Index/ENGASA570052005>).

(F. Naert)

National Developments

Algerians Vote for Peace and Reconciliation Charter

In a referendum held on 29 September 2005, Algerians voted in favour of a proposed Charter for Peace and Reconciliation (French text available at <http://www.el-mouradia.dz/francais/infos/actualite/archives/chartereconciliation.htm> and http://www.algeria-watch.org/fr/article/pol/amnistie/projet_charte.htm), despite the fact that (some parts of) the Charter had been criticized by various NGOs for promoting impunity, see e.g. the International Federation for Human Rights (see http://www.fidh.org/article.php3?id_article=2367) and Human Rights Watch (see <http://hrw.org/english/docs/2005/09/01/algeri11679.htm>). The Charter would *inter alia* grant amnesty to perpetrators of a number of crimes, while excluding some serious crimes. It also addressed to some extent the problem of disappeared persons.

For a brief analysis, see *Sentinelle* No. 36. See also http://www.algeria-watch.org/fr/article/pol/amnistie/addi_charte.htm.

(F. Naert)

New Australian Anti-Terrorism Legislation

On 3 November 2005, Australia adopted a 'mini' anti-terrorism act, the Anti-Terrorism Act 2005 (text available at <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/53D2DEBD3AFB7825CA2570B2000B29D5?OpenDocument>). Moreover, on 6 December 2005, the Australian Commonwealth Parliament passed the renamed Anti-Terrorism Bill (No. 2) 2005. For a criticism on the bill before it was enacted by the Australian Law Council, see <http://www.safecom.org.au/terrorlaws-lawcouncil.htm> and <http://www.lawcouncil.asn.au>. For a short commentary, see also http://en.wikipedia.org/wiki/Australian_Anti-Terrorism_Act_2005.

(F. Naert)

First War Crimes Convictions in Bosnian Serb Republic

On 17 November 2005, a court in Banja Luka sentenced three former members of the Bosnian Serb police, to prison time ranging from 15 to 20 years for war crimes, namely the murder of six Bosnian Muslim civilians in Prijedor in March 1994. This is the first verdict for war crimes at a court in Republika Srpska since the war in Bosnia and Herzegovina ended ten years ago. See <http://www.humanrightshouse.org/dllvis5.asp?id=3859>.

(F. Naert)

Danish Prime Minister Sued over Iraq War

On 22 November 2005, the parents of a Danish soldier killed in Iraq filed a lawsuit against the Danish Prime Minister claiming that the Danish participation in the war against Iraq violates the Danish constitution. They join a similar suit filed on 11 October 2005 by 24 others. The plaintiffs contend that sections 19 and 20 of the constitution (English text available at <http://www.folketinget.dk/pdf/constitution.pdf>) were violated due to the absence of a UN Security Council resolution and the transfer of authority over Danish troops to another country without the required 5/6th parliamentary majority. See e.g. <http://news.bbc.co.uk/1/hi/world/europe/4330578.stm> and <http://www.abc.net.au/news/newsitems/200510/s1480037.htm>.

(F. Naert)

Investigation in Case against French Armed Forces for Rwandan Genocide

The investigating magistrate ('juge d'instruction') of the Paris Armed Forces Tribunal ('tribunal aux armées de Paris', see http://www.defense.gouv.fr/sites/sga/enjeux_defense/droit_et_defense/justice_militaire/tribunal_aux_armees_de_paris/), the sole French court competent to judge criminal offences involving French armed forces abroad, visited Rwanda at the end of November 2005 to hear the applicants in the case of a complaint filed on 16 February 2005 against unknown members of the French armed forces for complicity to genocide and/or complicity to crimes against humanity during the French operation Turquoise in Rwanda in 1994. For more details, see *Sentinelle* No. 45.

(F. Naert)

German Court Affirms Prosecutor's Decision Not to Prosecute US Officials

On 13 September 2005, the Stuttgart Court dismissed the appeal against the decision of the Prosecutor earlier this year not to pursue the complaint filed against US Secretary of Defence Rumsfeld and other US officials for prisoner abuse in Iraq (see *ISMLLW Newsletter* 2005/1). For more details, see http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=1xiADJOOQx&Content=472, *Sentinelle* No. 40 and *ILIB* of 31 October 2005.

(F. Naert)

Constitutionality of German Aviation Security Act Challenged

The constitutional complaints against the Aviation Security Act (see *ISMLLW Newsletter* 2005/1), are proceeding. See <http://www.bundesverfassungsgericht.de/cgi-bin/link.pl?aktuell> for more details.

(F. Naert)

Controversy over US Use of White Phosphorus in Iraq

An Italian documentary, available in English at http://www.rainews24.rai.it/ran24/inchiesta/video/fallujah_ING.wmv, alleged that US forces in Iraq illegally used White Phosphorus as a weapon in Fallujah in November 2004. After initial denials, the US admitted the use of White Phosphorus as a weapon but claimed it was legal. For a brief analysis of the legal issues involved, see David P. Fidler, 'The Use of White Phosphorus

Munitions by U.S. Military Forces in Iraq', *ASIL Insight*, 6 December 2005, <http://www.asil.org/insights/2005/12/insights051206.html> and A. Dworkin, 'The Use of White Phosphorus in Fallujah: Was it Against the Law?', <http://www.crimesofwar.org/onnews/news-fallujah3.html>.

(F. Naert)

Reports of Abuse by Iraqi Authorities

Various press articles reported that US and Iraqi forces raided Iraqi Government detention facilities on 15 November and 8 December 2005 and appear to have uncovered mistreatment in both cases, although there is some discussion over the scope of mistreatment (see e.g. E. Wong, 'Iraq Prison Raid Finds a New Case of Mistreatment', *The New York Times online*, 12 December 2005). Moreover, the human rights report of the UN Assistance Mission in Iraq (<http://www.uniraq.org>) for the period of September-October 2005 noted various human rights problems, including a high number of detainees, as well as extra-judicial executions and illegal searches and detention (see <http://www.uniraq.org/documents/HR%20Report.new.%20Eng.doc>). In response to these developments, on 18 November 2005, Louise Arbour, the UN High Commissioner for Human Rights called for an international probe into detention conditions in Iraq, US Secretary of Defence Rumsfeld ordered the US military to establish clear rules on how to address abuse by foreign troops, the US ambassador to Iraq pledged that the US will inspect Iraqi prisons and the US military is planning to increase the number of its advisors to Iraqi police commando units. The US also decided not to turn any detainees over to the Iraqi authorities until US officials are satisfied the Iraqis meet US standards for detention (E. Schmitt & T. Shanker, 'US, Citing Abuse in Iraqi Prisons, Holds Detainees', *The New York Times online*, 25 December 2005).

(F. Naert)

US Army Drops Charges against Officer

On 5 December 2005, the US Army dropped charges against an officer accused of allowing soldiers of his unit to kill Iraqi civilians, including one alleged 'mercy killing'. See <http://www.guardian.co.uk/world/latest/story/0,1280,-5458868,00.html> and http://www.usatoday.com/news/nation/2005-12-05-charges-dropped_x.htm.

(F. Naert)

Prosecution of Saddam Hussein Advances (Slowly)

The prosecution of former Iraqi President Saddam Hussein before the Iraqi Special Tribunal (<http://www.iraq-ist.org>) is proceeding, albeit slowly. The trial concerning the Al Dujayl case started on 19 October 2005 but was immediately adjourned until 28 November 2005, at which date it resumed but was again adjourned until 5 December 2005 to allow for the replacement of two defence lawyers who had been killed and a third who had fled. On 22 December, the chief judge called a recess until 24 January 2006.

Developments in the case are *inter alia* discussed in *Sentinelle* No. 38 and at http://en.wikipedia.org/wiki/Trials_of_Saddam_Hussein. See also *ISMLLW Newsletter* 2005/3.

(F. Naert)

Israeli Supreme Court Decisions

On 15 September 2005, the Israeli Supreme Court issued a decision concerning part of the controversial security/separation barrier in the case of *Mara'abe v. The Prime Minister of Israel*. The judgment is available in English at <http://elyon1.court.gov.il/eng/verdict/framesetSrch.html> and is discussed in *ILIB* of 29 September 2005 and *Sentinel* No. 34.

Secondly, in the case of *Adalah - The Legal Center for Arab Minority Rights in Israel and others v. GOC Central Command, IDF and others*, the Supreme Court decided on 6 October 2005 that the so called "Early Warning" procedure, under which Israeli soldiers wishing to arrest a Palestinian suspected of terrorist activity may be aided by a local Palestinian resident, who gives the suspect prior warning of possible injury to the suspect or to those with him during the arrest (in fact using the local as a human shield), is illegal. The judgment is available in English at <http://elyon1.court.gov.il/eng/verdict/framesetSrch.html> and is discussed in *ILIB* of 16 December 2005.

(F. Naert)

Complaints against Israeli Officials in UK and US

The Guardian reported on 12 September 2005 that Scotland Yard almost arrested Israeli retired Major General Doron Almog at Heathrow airport on 11 September 2005 for alleged war crimes in occupied Palestinian lands after a British judge had issued a warrant for his arrest. It is believed the accused was tipped off about his impending arrest while in the air and stayed on the plane to avoid capture until it flew back to Israel. See <http://www.guardian.co.uk/israel/Story/0,2763,1568001,00.html>.

Furthermore, the Center for Constitutional Rights announced that it is involved in two cases against other Israeli officials. First, on 8 December 2005, it brought, together with the Palestinian Center for Human Right a class action lawsuit against Avi Dichter, the former Director of Israel's General Security Service, on behalf of the Palestinians who were killed or injured in an air strike in Gaza on 22 July 2002, when the Israeli Defense Forces dropped a one-ton bomb on a residential neighborhood in Gaza City. For more details on the case, *Matar v. Dichter*, see http://www.ccr-ny.org/v2/legal/human_rights/rightsArticle.asp?ObjID=ccDzL2NjXs&Content=678. Second, on 15 December 2005, it served process papers on retired Lt. General Moshe Ya'alon, former Head of the Intelligence Branch and former Chief of Staff of the Israel Defense Forces, for war crimes, extrajudicial killing, crimes against humanity, and cruel, inhuman or degrading treatment or punishment and other human rights violations in connection with the hundreds of civilian deaths and injuries in the 1996 shelling of a UN compound in Qana, in the south of Lebanon. For more details on the case, *Belhas v. Ya'alon*, see http://www.ccr-ny.org/v2/legal/human_rights/rightsArticle.asp?ObjID=eqVBNxvlcx&Content=682.

(F. Naert)

Italy Prosecutes CIA Agents Accused of Abduction

In the investigation by the Italian judiciary into the alleged kidnapping of Egyptian national in Italy by CIA agents, an Italian judge reportedly ruled on 29 November that a former CIA station chief in Milan does not enjoy diplomatic immunity in this case and upheld the arrest warrant issued against him (see http://jurist.law.pitt.edu/paperchase/2005_11_29_indexarch.php#113331073247317244 and <http://www.guardian.co.uk/worldlatest/story/0,1280,-5446042,00.html>). See also F.L. Kirgis, 'Alleged CIA Kidnapping of Muslim Cleric in Italy', *ASIL Insight*, 7 July 2005, <http://www.asil.org/insights/2005/07/insights050707.html>.

(F. Naert)

Prosecution of Afghan war criminals in the Netherlands.

On 14 October 2005 the District Court of The Hague found two former high-ranking officials of the KhAD-e Nezami (the KhAD), the military branch of the Afghan Ministry of State Security, guilty of committing international crimes in Afghanistan in the seventies and eighties of the past century.³⁾ Heshamuddin Hesam, the former head of the KhAD, was sentenced to 12 years imprisonment for ‘*complicity in torture, repeatedly committed*’ and ‘*...intentionally permitting a subordinate to violate the laws and customs of war while the violation includes the use of violence, together with others, against one or more persons, repeatedly committed and intentionally permitting a subordinate to violate the laws and customs of war, while the violation caused grave bodily harm of another*’. Habibullah Jalalzoy, the former head of the interrogation department of the KhAD, was sentenced to 9 years imprisonment for ‘*...complicity in violation of the laws and customs of war while the violation includes the use of violence, together with others, against another, repeatedly committed and complicity in violation of the laws and customs of war while, the violation results in grave bodily harm of another*’.

Hesam en Jalalzoy both applied for political asylum in the Netherlands in the early nineties. The immigrations authorities denied Hesam’s application in 1994 based on the information he submitted together with his application. Jalalzoy initially received refugee status in 1996. However, the immigrations authorities revoked this status in 2000 after further examination of his file. In both cases there were serious grounds to assume that the men concerned had committed war crimes and crimes against humanity. In accordance with procedures established by the Justice department in 1997, Hesam’s and Jalalzoy’s files were transferred to the Public Prosecutor’s Office for possible criminal prosecution. In the Netherlands these cases are referred to as ‘*IF-cases*’. The title is a direct reference to article 1F of the UN Convention relation to the status of Refugees.⁴⁾ This article reads: ‘*The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crime.....*’.

Most of the cases investigated by the Netherlands concerning international crimes like war crimes and torture, are 1F-cases. The Central Prosecutorial Service that is responsible for the criminal investigation of these cases has received approximately 700 files from the immigrations authorities over the last couple of years. Still, the criminal proceedings against both former Afghan officers form only the second 1F-case to have led to a conviction in the past few years. In April 2004 the Rotterdam District Court convicted the former Congolese colonel of the Garde Civile, Sebastien Nzapali, nicknamed ‘King of the beasts’ for torture.⁵⁾

In practice it turns out to be extremely complicated to prove war crimes cases. A 2002 research into the working methods of the Netherlands National Investigation Team for War Crimes (Dutch acronym: NOVO) arrived at the same conclusion.⁶⁾ Most war crimes were committed decades ago in countries far from the Netherlands. Reliable witnesses are hard to find and these people are often traumatised by their experiences. Furthermore, it is difficult to obtain legal assistance in countries that are still recovering from the conflicts. The investigations into the Hesam en Jalalzoy cases ran into similar problems and took considerable time and effort. It was not until 2004 that during a criminal investigation into another Afghan, incriminating evidence was produced against Hesam. Similarly, the Jalalzoy case arose from a criminal investigation against another person. Ultimately, the investigations led to the arrest of both men in November and December 2004.

³ A translation of the judgement will be available in the English language at a later date at: <http://www.rechtspraak.nl>.

⁴ The full text of the convention is available at: <http://www.unhchr.ch>.

⁵ A case report by Ward Ferdinandusse can be found in the American Journal of International law, Vol. 99, 2005, p. 686ff.

⁶ The summary of the report is available in the English language at the Research and Documentation Centre of the Dutch Ministry of Justice (Dutch acronym WODC): <http://www.wodc.nl/onderzoeken>.

Hesam en Jalalzoy committed their crimes in Afghanistan in the period between 27 April 1978, when the communist party came to power through a military coup, and 16 April 1992 when president Najibullah was overthrown.⁷⁾ The International Criminal Court (ICC) has no jurisdiction over these crimes as article 11 of the ICC Statute⁸⁾ limits the jurisdiction of the tribunal to crimes committed after the entry into force of the Statute on 1 July 2002. Having implemented the ICC Statute in the International crimes act (Dutch acronym: WIM), the Netherlands had to base the prosecution on the provisions of the Act on criminal law in time of war (Dutch acronym: WOS) and the Act to implement the Torture Convention, as both were applicable prior to the entry into force of the WIM on 1 July 2003.

The application of the provisions of the Act to implement the Torture Convention was only restricted by the time-factor. In the case of the Surinam politician Bouterse, who was suspected of involvement in the murder of a number of his political opponents, the Supreme Court of the Netherlands decided, that only crimes committed after the entry into force of the Act to implement the Torture Convention on 20 January 1989 could be prosecuted based on this Act of Parliament.⁹⁾ Application of this act does not require that the crime was committed during an armed conflict: it is applicable in times of peace and armed conflict.

The restriction in time was not an issue for the application of the WOS, as that act had already entered into force in the early fifties of the past century. However, application of the articles 8 and 9 (violation of the laws and customs of war) demands that the crimes have to be committed during an armed conflict. With respect to that, the judge held that the conflict in Afghanistan between government forces and opposing armed groups, fell within this term. Although a further qualification of the conflict was not necessary in order to apply the WOS, the judge indicated that the Russian armed support to the government could not be considered as a war between states. Therefore, the fighting in Afghanistan was not of an international character, to which common article 3 of the four Geneva Conventions of 1949 is applicable. Violation of this provision is a violation of the laws and customs of war within the meaning of articles 8 en 9 WOS, as the Supreme Court had previously decided in the case against Darko Knezevic in 1997.¹⁰⁾

Eventually, the judge decided it legally and convincingly proven that Hesam and Jalalzoy had kicked and beaten their victims and had administered electroshocks to them while Hesam in addition to these facts, had permitted subordinates to commit the same crimes. These and other facts, which formed a fixed pattern within the Afghan military intelligence service, are recognized as international crimes that justify long term prison sentences. The judge also took in consideration that the crimes have an impact on Dutch society as many Afghan refugees who in their homeland experienced the atrocities of war, have now found refuge in the Netherlands.

Both Heshamuddin Hesam and Habibullah Jalalzoy appealed against the judgement to the Court of Appeal in the Hague. It is expected that the proceedings in appeal will be heard early 2006.

(LTC J. Voetelink, Netherlands Defence Academy)

Dutch Prosecute Suspect for Complicity to Genocide and War Crimes in Iraq

⁷ This information is based on a memorandum of the Netherlands Ministry of Foreign Affairs, entitled: Afghanistan – security service / 29-02-00 (text in Dutch language at: <http://www.minbuza.nl>).

⁸ Full text of the Statute is available at: <http://www.un.org/law/icc/>.

⁹ Supreme Court of the Netherlands, 18 September 2001.

¹⁰ Supreme Court of the Netherlands, 11 November 1997; an unofficial translation can be found at: <http://www.u-j.info/index/Cases>.

As noted in ISMLLW Newsletter 2005/2, earlier this year, Frans Van Anraat was indicted in the Netherlands for complicity in genocide and war crimes by delivering chemical agents to the Iraqi regime in the late 1980s knowing that they would be used for chemical weapons. His trial started on 21 November 2005. For a brief comment in French, see *Sentinelle* No. 43. He was condemned and sentenced to 15 years on 23 December 2005 by the Hague Criminal Court for participation in and complicity to war crimes, in particular inhuman treatment causing death or serious bodily injury pursuant to a policy of terrorising an entire population or a part thereof (parketnr. 09/751003-04, available in Dutch at www.rechtspraak.nl).

(F. Naert)

Divergent Dutch Court Rulings on Extradition of Terrorists to US

On the one hand, on 12 October 2005, the Hague court reportedly decided that Mohammed A., sought by the US for telephone card fraud, could not be extradited to the US because he could be charged by US authorities with offences related to terrorism and the US had not provided adequate assurances, which had been demanded by the court at an earlier date, that he would not be prosecuted for such offences (see <http://www.nrc.nl/binnenland/artikel/print/1129093249454.html> and <http://www.volkskrant.nl/binnenland/1129093175290.html>). The judgment follows an initial decision of the Amsterdam court of 20 February 2004 prohibiting extradition, which had been annulled by the Dutch Supreme Court ('Hoge Raad') on 7 September 2004 (nr. 00764/04 U, available in Dutch at <http://www.rechtspraak.nl>) and 19 April 2005 (Case No. 00762/04 U, available in Dutch at <http://www.rechtspraak.nl>), arguing *inter alia* that it must be presumed that the US respects the right to a fair trial unless it appears that the suspect risks a flagrant violation of the right to a fair trial, which the lower court had not stated to be the case, and that he/she will have no judicial remedy to address this.

On the other hand, on 12 December 2005, the Rotterdam court held that Wesam al Delaema, an Iraqi-born Dutch citizen, could be extradited to the US to be tried there for participation in illegal attacks on US forces in Iraq. The judgment in this case, Parketnr. 10/000304-04, is available in Dutch at <http://www.rechtspraak.nl>.

(F. Naert)

Senegal Ponders Belgian Arrest Warrant for former Chad President Habre

On 19 September 2005, a Belgian investigating magistrate ('juge d'instruction') issued an international arrest warrant for Hissène Habre, the former President of Chad who had sought refuge in Senegal, charging him with grave breaches of international humanitarian law. Belgian authorities also requested his extradition to Belgium. It may be noted that early 2001, the Senegalese courts held that they were not competent to try Habre themselves. Moreover, it is important that in November 2002, the Chad authorities wrote to the same magistrate that they waived any immunity to which Habre might be entitled (see <http://www.hrw.org/french/press/2002/tchad1205a.htm>). Subsequently, on 15 November 2005, Habre was arrested by the Senegalese authorities. However, on 26 November 2005, the 'chambre d'accusation' of the Dakar Court of Appeals declared itself incompetent to decide on the extradition request. In a remarkable development, the Senegalese Government put Habre at the disposal of the President of the African Union, which will hold its next summit, at which a decision on Habre's fate is expected, in January 2006. See *Sentinelle* Nos. 36, 42 and 44 for more details.

(F. Naert)

War Crimes Trials in Serbia

First, on 12 December 2005, a special Belgrade court convicted 14 former Serb militia members of the massacre of nearly 200 Croatian prisoners of war during the battle of Vukovar in November 1991. The sentences imposed range from five to 20 years. See B. Bilandzic, 'Serbian Court Convicts 14 in Massacre of POWs in '91', *The Washington Post*, 13 December 2005, p. A28, <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/12/AR2005121201342.html>.

Second, this summer, video footage (excerpts available at <http://jurist.law.pitt.edu/srebrenica.ram>) of executions near Srebrenica in the summer of 1995 was broadcast widely on television (see e.g. <http://www.guardian.co.uk/yugo/article/0,2763,1498291,00.html>). This subsequently led to several arrests and, on 20 December 2005, the start of the trial of five accused in Serbia. See <http://edition.cnn.com/2005/WORLD/europe/12/20/serbia.execution.ap/index.html>.

(F. Naert)

Spanish Constitutional Court Upholds Universal Jurisdiction

According to press reports, on 5 October 2005 the Spanish Constitutional Court overruled the Spanish Supreme Court and decided that Spanish Courts were competent to investigate crimes of genocide and human rights violations in Guatemala even if there were no Spanish victims involved. See *Sentinelle* No. 36 and *ILIB* of 17 October 2005).

(F. Naert)

Spanish Court Issues Arrest Warrants for US Soldiers over Shooting of Journalist in Iraq

ILIB of 15 November 2005 reports that on 20 October 2005, a Spanish judge issued an international arrest warrant for three US soldiers (a sergeant, a captain and a Lt. Colonel) concerning the killing of a Spanish Journalist and an Ukrainian cameraman in a Baghdad hotel in April 2003 by US tank shelling.

(F. Naert)

Report on Swiss Neutrality in Iraq War

On 2 December 2005, the Swiss Ministry of Foreign Affairs has published a report on the Swiss neutrality in the recent war in Iraq. The text is available at <http://www.eda.admin.ch/eda/f/home/recent/rep/neutral/irak.html> in French, at <http://www.eda.admin.ch/eda/g/home/recent/rep/neutral/irak.html> in German and at <http://www.eda.admin.ch/eda/i/home/recent/rep/neutral/irak.html> in Italian. See also *Sentinelle* No. 45.

(F. Naert)

House of Lords Declares Evidence Obtained through Torture Inadmissible

On 8 December 2005, the House of Lords rules that evidence obtained through torture, regardless by whom or where, is inadmissible in British courts.

Lord Bingham put it as follows: "*The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer*" (§ 51 *in fine*). He added that "*The principles of the common law, standing alone, in my opinion compel the exclusion*

of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice” (§ 52).

Referring to the US, Lord Hoffmann wrote “honour ... is what underlies the legal technicalities of this appeal. The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it. ... In our own century, many people in the United States, heirs to that common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction and its practice of extra-legal “rendition” of suspects to countries where they would be tortured (...)” (§ 82), adding “Just as the writ of habeas corpus is not only a special (...) remedy for challenging unlawful detention but also carries a symbolic significance as a touchstone of English liberty which influences the rest of our law, so the rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system. ... the abolition of torture, ..., was achieved as part of the great constitutional struggle and civil war which made the government subject to the law. Its rejection has a constitutional resonance for the English people which cannot be overestimated” (§ 83).

Lord Hope expressed it this way: “The use of [evidence obtained by torture] is excluded ... on grounds of its barbarism, its illegality and its inhumanity. The law will not lend its support to the use of torture for any purpose whatever. It has no place in the defence of freedom and democracy, whose very existence depends on the denial of the use of such methods to the executive”.

One may also note Lord Brown’s view that “Torture is an unqualified evil. It can never be justified. Rather it must always be punished. So much is not in doubt” (§ 160).

The judgment, *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) (2004)A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals)*, [2005] UKHL 71 (on appeal from: [2004] EWCA Civ 1123), is available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm> and at <http://www.statewatch.org/news/2005/dec/hol-torture-judgment-05.pdf>. For a brief discussion, see *ILIB* of 16 December 2005.

(F. Naert)

Legality of Iraq War Raised in UK Case against RAF Serviceman

A Royal Air Force Serviceman charged in the UK with insubordination for refusing to serve in Iraq will probably raise the alleged illegality of the war against Iraq in his defense. Flight-Lieutenant Malcolm Kendall-Smith will be prosecuted for “refusing to obey a lawful command” after refusing to serve in Iraq. He had previously served in Iraq but after studying the legality of the war, including the advice of the UK attorney-general (see *ISMLLW Newsletter* 2005/2), he was of the opinion that the war was unlawful. See <http://www.timesonline.co.uk/article/0,,2087-1828054,00.html>.

(F. Naert)

UK Signs Memoranda of Understanding on Deportations

On 18 October 2005, the UK and Libya signed a Memorandum of Understanding (MOU) regarding deportation of suspected terrorists. The MOU is very similar to the one with Jordan discussed in the previous issue of this Newsletter. See <http://www.britishembassy.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1064572030254&a=KArticle&aid=1129040148696>; http://news.bbc.co.uk/1/hi/uk_politics/4353632.stm and <http://hrw.org/english/docs/2005/10/18/libya11890.htm> for more details (copies of the text should

be available in the libraries of the House of Commons and of the House of Lords). On 23 December the UK signed another similar MOU with Lebanon (see <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1134650095963>).

(F. Naert)

UK Anti-Terrorism Bill Challenged

The UK Parliament rejected an amendment to the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), as amended (see *ISMLLW Newsletter* 2005/1), which would *inter alia* have extended the period of detention without charge of suspected terrorist to 90 days (for the version of the Bill before the defeat, see <http://www.statewatch.org/news/2005/oct/uk-terrorism-bill-12-oct-05.pdf> and for a previous draft, see <http://www.statewatch.org/news/2005/sep/terror-bill.pdf>). The Government responded by submitting an amended Bill (see <http://www.statewatch.org/news/2005/nov/terrorism-Bill-9-11-05.pdf>). However, even so Parliaments' Joint Human Rights Committee issued a very critical report on the amended Bill: see <http://www.statewatch.org/news/2005/dec/JCreport.pdf>.

(F. Naert)

US Court Finds Former El Salvador Official Guilty of Crimes against Humanity

On 18 November 2005, a jury in Memphis found Colonel Carranza, the former Vice-Minister of Defence of El Salvador, who now lives there, responsible for overseeing crimes against humanity and awarded substantial damages to the plaintiffs. See <http://www.cja.org/cases/carranza.shtml>.

(F. Naert)

Nazi Suspect Faces Deportation from US to Ukraine

On 28 December 2005, in the latest development in a long legal affair, the chief immigration judge ruled that John Demjanjuk, who is suspected of having been a nazi concentration camp guard before coming to the US in 1952 and who was stripped of his US citizenship in 2002, could be deported to Ukraine. See <http://public.findlaw.com/pnews/news/ap/o/51/12-29-2005/c6a4001423415d0f.html>.

(F. Naert)

US President Bush Denies Allegations that He Wanted to Bomb Aljazeera

On 22 November 2005, the *Daily Mirror* alleged that US President Bush wanted to bomb the Aljazeera news channel's headquarters in Qatar but was persuaded not to do so by UK Prime Minister Blair. The paper also states that the allegations raise fresh doubts over US claims that previous attacks against al-Jazeera (in 2001, its Kabul office was bombed and in 2003 one of its reporters was killed in a US missile strike on its Baghdad centre) were errors. See http://www.mirror.co.uk/news/tm_objectid=16397937&method=full&siteid=94762&headline=exclusive--bush-plot-to-bomb-his-arab-ally-name_page.html. While two officials face charges for leaking a memo on this issue in the UK, the allegations were denied by Blair (see <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/11/27/njaz27.xml&sSheet=/portal/2>

005/11/27/ixportal.html) and Bush (see <http://edition.cnn.com/2005/WORLD/europe/11/22/us.al.jazeera/>). See also A. Dworkin, 'When Is It Lawful to Attack Television and Radio Stations', <http://www.crimesofwar.org/onnews/news-aljazeera.html>.

(F. Naert)

Selected Developments in the United States

On 7 November 2005, the US Supreme Court (<http://www.supremecourtus.gov/>) has decided to hear the appeal brought by Hamdam against the Court of Appeals decision discussed in the previous newsletter. It is therefore expected to rule on the legality of the Military Commission established to try 'enemy combatants'. The case is *Hamdan v. Rumsfeld*, docket 05-184. For a brief discussion, see *Sentinelle* No. 41.

On the same day, the Pentagon announced that the charges against 5 'enemy combatants' had been approved. See <http://www.defenselink.mil/releases/2005/nr20051107-5078.html> and *Sentinelle* No. 41. It later also announced that hearings in the case of one of these suspects (Canadian citizen Omar Ahmed Khadr) and in that of one other suspect would begin on 10 January 2006 as there had been no stay in these cases.

Furthermore, late November 2005, the US administration decided to charge Jose Padilla, an American citizen, with less serious crimes than those for which he was originally detained. This decision may result from a desire to avoid Padilla being able to further challenge the legality of his detention and from a concern to avoid testimony from other detainees who might raise their own detention and treatment. However, on 21 December 2005 the US Court of Appeals for the 4th Circuit denied the Government's request to transfer Padilla from military custody in the state of South Carolina to civilian law enforcement custody in the state of Florida (the judgment is available at <http://pacer.ca4.uscourts.gov/opinion.pdf/056396R1.P.pdf>).

On the parliamentary front, several developments are worth mentioning. First, the US Congress, after serious debate, voted in favour of extending until 3 February 2006 some provisions of the USA Patriot Act (Public Law 107-56, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001) that would otherwise have expired on 31 December 2005 (see http://en.wikipedia.org/wiki/USA_Patriot_Act). Second, the National Defense Authorization Act for Fiscal Year 2006 as approved by Congress (H.R. 1815, available at <http://thomas.loc.gov>) *inter alia* contains a prohibition of torture by US officials anywhere (s. 1402-1403; see on this provision also *Sentinelle* No. 37) a defence for US agents engaging in specific operational practices that involve detention and interrogation of designated terrorists that were officially authorized and determined to be lawful at the time that they were conducted where the agents did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful (s. 1404) and a provision on review of detentions outside the US (s. 1405).

In addition, it was reported that the US Army has submitted a new, classified set of interrogation methods for final approval to the Under-Secretary of Defence for intelligence policy. It is contained in an addendum to a new Army field manual.

Meanwhile, on 18 November 2005, five UN human rights experts rejected a US invitation to visit the US detention facility at Guantanamo Bay because the US would not accept the principles the experts always apply.

Moreover, reports alleging the existence of secret US detention facilities, including in Europe (see e.g. <http://www.hrw.org/backgrounder/usa/us1004/us1004.pdf>), caused serious concerns in Europe, including a request for explanations from the EU Council Presidency (held by the UK at the time) and a Council of Europe investigation (see *Sentinelle* No. 45 and A. Dworkin, 'Torture, Rendition

and the CIA's Secret War on Terror', <http://www.crimesofwar.org/onnews/news-cia4.html>). In this context, on 8 December 2005, a US State Department legal advisor admitted that the ICRC did not have access to all detainees held by the US but stated that the ICRC did have access to all detainees held at Guantanamo Bay. One day earlier, US Secretary of State Rice declared that "*as a matter of US policy, The United States obligations under the [Convention against Torture], which prohibits, of course, cruel and inhumane and degrading treatment, those obligations extend to US personnel wherever they are, whether they are in the United states or outside of the United states*" (R.W. Stevenson & J. Brinkley, 'More Questions as Rice Asserts Detainee Policy', *The New York Times online*, 8 December 2005. The rapporteur in the Council of Europe inquiry stated on 13 December 2005 that the information gathered to date reinforced the credibility of the allegations concerning the transfer and temporary detention of individuals, without any judicial involvement, in European countries (see [http://press.coe.int/cp/2005/690a\(2005\).htm](http://press.coe.int/cp/2005/690a(2005).htm)). For an initiative by some members of the UK Parliament, see http://www.statewatch.org/news/2005/dec/CHRGJ_rendition.pdf.

The practice of 'extraordinary renditions' is also being challenged in court: the American Civil Liberties Union (ACLU) brought a claim on behalf of Khaled El-Masri, a victim of this practice, against former CIA Director George Tenet for abduction, mistreatment and secret detention in Afghanistan. For more details on the case, *El-Masri v. Tenet*, see <http://www.aclu.org/safefree/extraordinaryrendition/index.html>.

Finally, on 28 October 2005, the Inter-American Commission on Human Rights reiterated and extended its Precautionary Measures (N. 259) regarding Detainees in Guantanamo Bay. See *ILIB* of 15 November 2005 and <http://www.asil.org/pdfs/ilibmeasures051115.pdf>.

(F. Naert)

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 Netherlands) from 16 to 21 May 2006, entitled "The Rule of Law in Peace Operations". Registration will only be possible after sending out the invitations. Further announcements will be also published soon on the Society's website (<http://www.soc-mil-law.org>).

The *Belgian National Group* of the Society has scheduled the following conferences in Brussels:

- 9 February 2006: Weapons of mass destruction
- 27 April 2006: Organised crime during peace operations
- 12 and 13 October 2006: Contractors on the battlefield

For more information, please contact the General Secretariat.

INTERESTING PUBLICATIONS

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

H. ABTAHI & G. BOAS (eds.), *The Dynamics of International Criminal Justice. Essays in Honour of Sir Richard May*, Martinus Nijhoff, 2005, ISBN 90 04 14587 7;

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