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,

From 16 to 21 May 2006 legal experts from over 40 Countries will convene in the Kurhaus hotel in Scheveningen, The Hague, to attend our XVIIth Congress. This Congress, carefully organized with our Dutch National Group, will without any doubt give rise to lively discussions, amongst others on the extraterritorial application of human rights in peace operations. It will also be the perfect opportunity to celebrate the Society's 50th anniversary.

At this moment there is still a possibility to register for the Congress. Therefore I would like to invite those who have not already considered participation, to join the already high number of participants, by registering via our General Secretariat. After all, the most valuable assets of the Society are its members and sympathizers, so the maximum number of participants will certainly contribute to the excellence we aim for with this Congress.

I am looking forward to meeting many of you in Scheveningen.

Ludwig Van Der Veken

Secretary-General

NEWS, ANNOUNCEMENTS OF CONFERENCES, SEMINARS, ETC.

The ***Third European Meeting of National Committees and other national bodies on International Humanitarian Law (IHL)*** was held in Athens from 25 to 28 January 06. The meeting was organized by the Hellenic Committee for the Implementation and Dissemination of IHL, in cooperation with the ICRC. The participation included representatives of the twenty five Committees which exist in Europe and Central Asia, representatives of Governments of other European States, where the process for the establishment of a committee or other national body on IHL is under consideration or it is actively promoted and representatives of the EU, Council of Europe and OSCE. The meeting had the following objectives:

a. To increase the capacity, commitment and activities of Governments in Europe and Central Asia for the promotion and national implementation of International Humanitarian Law (IHL) and to follow-up on the conclusions and recommendations of the Second European Meeting, held in Budapest in 2001;

b. To provide a forum for the exchange of ideas and discussion of the activities and good practices of national committees and other bodies on International Humanitarian Law in Europe;

c. To encourage and support European States, which have not yet done so, to consider the establishment of a national IHL Committee;

d. To update participants on current developments on IHL and its national implementation, and to encourage further action in this field, in particular with regard to the repression of war crimes and other serious violations of IHL and the implementation of the Rome Statute of the International Criminal Court;

e. To promote dialogue and cooperation among national IHL Committees and among participants on a regional, sub-regional or pan-European level.

With great satisfaction the Society has learned of the creation of the ***French Committee for Humanitarian Law and the Law of War*** ('Comité Français de Droit Humanitaire et de Droit de la Guerre' (CFDHFG)). This committee has applied for the status of French National Group of the Society.

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". Announcements have also been published 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:

-27 April 2006: Organised crime during peace operations

-1 June 2006: The law of maritime operations

-12 and 13 October 2006: Contractors on the battlefield

For more information, please contact the General Secretariat.

The ***British Institute of International and Comparative Law*** invites you to its conference entitled "Testing the Boundaries of International Humanitarian Law", taking place in London on 1 & 2 June 2006. Jointly hosted by the McCoubrey Centre for International Law, this conference will not only provide a response to events of the last decade and the growing academic interest in international humanitarian law, but will complement the launch of the first BIICL publication to address IHL in over a dozen years. The publication explores the topical subject of 21st century conflict and the implications for international humanitarian law, exploring issues such as terrorism, complex security situations, legal fault-lines, contemporary warfare, and post-conflict management. In particular this book examines problems relative to occupation, interrelations between humanitarian law and human rights and the Security Council use of international humanitarian law. There is a special section devoted to the creation and role of the Iraqi Special Tribunal. Full details are provided on the flyer.

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 Organisations

Hariri Killing Inquiry May Lead to International Tribunal

Nicolas Michel, the UN Under-Secretary-General for Legal Affairs, visited Beirut on 26 and 27 January 2006 to help the Lebanese authorities identify the nature and scope of the international assistance needed to create a tribunal to try those charged with the killing of former Prime Minister Hariri and others. This follows the adoption of Security Council Resolution 1644 (see previous *ISMLLW Newsletter*), in which the Security Council acknowledged "*the Lebanese Government's request that those eventually charged with involvement in this terrorist attack be tried by a tribunal of an international character*" and requested "*the Secretary-General to help the Lebanese Government identify the nature and scope of the international assistance needed in this regard*". The Security Council was briefed on the results of this visit on 31 January 2006 and heard that Mr. Michel believed that there was a broad basis of support for the establishment of a tribunal of an international character. See UN press releases of 25 and 31 January 2006 and *Sentinelle* No 52 of 5 February 2006. In the mean time, Serge Brammertz, Deputy Prosecutor at the International Criminal Court, succeeded Detlev Mehlis as head of the UN International Independent Investigation Commission charged with looking into the assassination of Mr. Hariri and into other terrorist attacks perpetrated in the country since 1 October 2004. Talks continued at the UN late February 2006 (UN press release of 1 march 2006). For the latest developments, see the *Third report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005) and 1644 (2005)*, included in UN Doc. S/2006/161 of 14 March 2006, available at http://daccessdds.un.org/doc/UNDOC/GEN/N06/270/40/PDF/N0627040.pdf?OpenElement and *Report of the Secretary-General pursuant to paragraph 6 of resolution 1644 (2005)*, 21 March 2006, UN Doc. S/2006/176, available at http://daccessdds.un.org/doc/UNDOC/GEN/N06/277/44/PDF/N0627744.pdf?OpenElement.

(F. Naert)

UN Plans UN Peacekeeping Mission in Darfur

As the African Union (AU) Mission in Sudan (AMIS, see generally http://www.africa-union.org/DARFUR/homedar.htm#) was struggling to obtain funds to continue its operations and is currently only mandated until 31 March 2006, despite support from the EU, NATO and the UN, the AU Peace and Security Council on 12 January 2006 issued a communiqué supporting a transition to a UN operation in Darfur (see http://www.africa-union.org/root/au/AUC/Departments/PSC/45th/Communique.htm), despite opposition from the Sudanese Government (see *Sentinelle* No 50 of 22 January 2006). While the UN currently has a peacekeeping operation in Sudan (UNMIS, see http://www.un.org/Depts/dpko/missions/unmis/), this mission is overseeing an agreement between the Government of Sudan and the southern Sudan People's Liberation Movement/Army (SPLM/A) and was only supporting AMIS in Darfur. In response to this communiqué, the UN Security Council has mandated the UN Secretary-General to start contingency planning for a UN mission in Darfur, in close cooperation with the AU and the parties concerned (see UN Doc. S/PRST/2006/5 of 3 February 2006, available at http://daccessdds.un.org/doc/UNDOC/GEN/N06/232/69/PDF/N0623269.pdf?OpenElement). See also *Sentinelle* No 53 of 12 February 2006. Subsequently, on 10 March 2006, the AU Peace and Security Council decided to "*support in principle the transition from AMIS to a UN Operation*" and to extend the mandate of AMIS until 30 September 2005 (see http://www.africa-union.org/root/au/News/Communique/2006/PSC/46th/Communiqué_46th.pdf). See also *Sentinelle* No 58 of 19 March 2006.

(F. Naert)

UN Mission in Haiti Arrest People Looting

On 30 January 2006, the UN Stabilization Mission in Haiti (MINUSTAH, see http://www.un.org/Depts/dpko/missions/minustah/) announced that its rapid reaction forces

recently repelled members of an armed gang who were attacking certain facilities in Port-au-Prince and arrested nearly two dozen people who were looting (UN press release).

It may be recalled that, under § 7, I, of UN Security Council Resolution 1542 (30 April 2004, available at http://www.un.org/Docs/sc/unsc_resolutions04.html), MINISTAH has the mandate to, *inter alia*, to "*(a) in support of the Transitional Government, to ensure a secure and stable environment within which the constitutional and political process in Haiti can take place*"; "*(d) to assist with the restoration and maintenance of the rule of law, public safety and public order in Haiti through the provision inter alia of operational support to the Haitian National Police and the Haitian Coast Guard […]*" and " *(f) to protect civilians under imminent threat of physical violence, within its capabilities and areas of deployment, without prejudice to the responsibilities of the Transitional Government and of police authorities*".

(F. Naert)

UN Police Advisor Stresses Capacity Building and Staff Quality

On 30 January 2006, the UN Police Adviser noted that the role of UN police on peacekeeping missions has been evolving towards capacity building for local forces and away from strictly monitoring and observing, bringing with it the need to recruit better quality officers (UN press release).

(F. Naert)

UN General Assembly Establishes Human Rights Council

On 17 March 2006, the UN General Assembly adopted a Resolution setting up a new Human Rights Council to replace the much-criticized Human Rights Commission. The new body will be a subsidiary organ of the General Assembly and the resolution was adopted by a vote of 170 in favour with 4 against (the US, Israel, the Marshall Islands and Palau), with Venezuela, Iran and Belarus abstaining. The 47 members of the Council will be individually elected by a majority of 96 votes in the General Assembly and if a Council member fails to uphold high human rights standards, it can be suspended by a two-thirds majority vote in the General Assembly. See http://www.un.org/News/Press/docs/2006/ga10449.doc.htm and http://www.un.org/Docs/journal/asp/ws.asp?m=A/60/L.48. See also *Sentinelle* No 58 of 19 March 2006.

(F. Naert)

African Union Studies How to Prosecute former Chad President Habre

At its sixth Summit on 23-24 January 2006, the African Union adopted a decision setting up a Committee of Eminent African Jurists "*to consider all aspects and implications of the Hissène Habré case as well as the options available for his trial*", taking into account various benchmarks, including the "*total rejection of impunity*", international fair trial standards and priority for an African mechanism. The Committee is mandated to make concrete recommendations on ways and means of dealing with issues of a similar nature in the future and is to finalize its work and submit a report by July 2006. The decision is available at http://www.africa-union.org/root/au/Documents/Decisions/hog/AU6th_ord_KHARTOUM_Jan2006.pdf). See also *Sentinelle* No. 51 of 29 January 2006, and on earlier developments in the Habré case the previous *ISMLLW Newsletter*.

(F. Naert)

Council of Europe Inquiry into Secret Detention Continues

The rapporteur of the Council of Europe inquiry into alleged secret detentions in Council of Europe member states issued a second report on 22 January 2006. The report inter alia states that "*At this stage of the investigations, there is no formal, irrefutable evidence of the existence of secret CIA detention centres in Romania, Poland or any other country. Nevertheless, there are many indications from various sources which must be considered reliable, justifying the continuation of the analytical and investigative work*" (§ 90) and is available at http://www.globalsecurity.org/intell/library/reports/2006/secret-detentions_ce-pa_060122.htm. See also the Venice Commission's opinion on the international legal obligations of Council of Europe Member States in respect of secret detention facilities and inter-State transport of prisoners, adopted on 17-1 March 2006 and available at http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp, *Sentinelle* No 51 of 29 January 2006 and the websitehttp://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ArtId=362 .

(F. Naert)

European Parliament Sets Up Commission to Look into Secret Detention

The European parliament established a 'Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners'. The Committee has met several times since. See http://www.europarl.eu.int/comparl/tempcom/tdip/default_en.htm and *Sentinelle* Nos 49, 54, 55 and 57 of 15 January, 19 and 26 February and 12 March 2006.

(F. Naert)

International(ised) Tribunals

International Court of Justice Finds It Has no Jurisdiction in DRC-Rwanda Case

On 3 February 2006, the International Court of Justice rendered its judgment on jurisdiction and admissibility in the *case concerning Armed Activities on the Territory of the Congo (New Application: 2002)*, brought by the Democratic Republic of the Congo against Rwanda. The Court found, by fifteen votes to two, that it has no jurisdiction to entertain the DRC's Application. The Court rejected all bases for jurisdiction put forward by the DRC and was therefore not required to rule on the admissibility of the Application. It was consequently also precluded from taking any position on the merits of the case.

A summary of the Judgment is available at http://www.icj-cij.org/icjwww/ipresscom/ipress2006/ipresscom_2006-04_crw_20060203.htm and the full text at http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw_ijudgment_toc.htm. See also *ILIB* of 4 February 2006 and *Sentinelle* No 52 of 5 February 2006.

(F. Naert)

Developments concerning the International Criminal Court

On 26 January 2006, the Assembly of States Parties to the ICC Statute elected 6 judges who will serve nine-year terms starting in March. The judges are Hans- Peter Kaul of Germany, Erkki Kourula of Finland, Sang-hyun Song of the Republic of Korea, Anita Ušacka of Latvia (all four re-elected) and Akua Kuenyehia of Ghana and Ekaterina Trendafilova of Bulgaria.

Furthermore, on 17 March 2006, the first accused was transferred to the ICC. Thomas Lubanga Dyilo, the alleged leader of the Union des Patriotes Congolais, was transferred to the Court by the

authorities of the Democratic Republic of Congo (DRC) and appeared before the Court on 20 March. The ICC Prosecutor initiated investigations in the DRC in 2004 after the DRC Government referred the situation in the DRC to the Court, which issued a warrant of arrest against Mr. Lubanga on 10 February, finding that there were reasonable grounds to believe he had conscripted children under the age of 15 for active participation in hostilities, a war crime. See also *Sentinelle* No 58 of 19 March 2006.

Moreover, on 9 February 2006, M. Luis Moreno-Ocampo, the ICC ¨Prosecutor, gave an update on communications received by his Office. The update mentions 1732 communications from 103 different countries, 3 referrals from States Parties and 1 referral from the UN Security Council. In total, 80 % of communications were found to be manifestly outside jurisdiction after initial review. 10 situations have been subjected to intensive analysis and of these, 3 proceeded to investigation, 2 were dismissed, and 5 analyses are ongoing. The update is available at http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf.

See http://www.icc-cpi.int for more details.

(F. Naert)

ICTY Cases[1]

On the ICTY front, two deaths made the news headlines. First, on 6 March 2006, Milan Babic committed suicide in his cell. Babic had been sentenced to 13 years imprisonment and was testifying in the case against Milan Martic, another former high-level official of the Croatian Serb political entity (see http://www.un.org/icty/pressreal/2006/p1046-e.htm and *Sentinelle* No 57 of 12 March 2006). Second, on 11 March 2006, former Yugoslav President Slobodan Milosevic died of a heart attack in his The Hague cell. He had been in ICTY custody since 2001 and was standing trial for genocide, crimes against humanity and war crimes. Inquiries have been opened into his death by both the Dutch authorities and the ICTY. On 17 March 2006, the interim toxicological report of Dutch experts released by the ICTY found that no indications of poisoning have been found following an autopsy and that a number of medicines prescribed for Mr. Milosevic were found in the body material, but not in toxic concentration (UN press release and http://www.un.org/icty/pressreal/2006/p1056-e.htm; see also *Sentinelle* No 58 of 19 March 2006).

Furthermore, on 28 February 2006, the UN Security Council adopted Resolution 1660 (available at http://www.un.org/Docs/sc/unsc_resolutions06.htm [FR: http://www.un.org/french/docs/sc/2006/cs2006.htm]), which introduced some changes to the ICTY Statute, in particular by allowing the designation of reserve judges from among the *ad litem* judges. See *Sentinelle* No 58 of 19 March 2006.

On the judicial frond, on 15 March 2006, the Trial Chamber convicted Enver Hadzihasanovic and Amir Kubura, both high level commanders in the Army of Bosnia and Herzegovina (ABiH), for failing to take necessary and reasonable measures to prevent or punish several crimes that forces under their command committed in central Bosnia and Herzegovina in 1993 and the beginning of 1994. Enver Hadzihasanovic was sentenced to five years imprisonment and Amir Kubura to two and a half years. The accused were acquitted of a number of other crimes. This was the first Tribunal judgement to deal with the presence of foreign Muslim or Mujahedin combatants in central Bosnia and Herzegovina. The full summary of the judgement as read out can be found at www.un.org/icty/hadzihas/trialc/judgement/060315/hadz-sum060315.htm and the entire judgment at http://www.un.org/icty/hadzihas/trialc/jugement/060315/had-tj060315f.pdf.

Moreover, on 8 March, the Appeals Chamber of the ICTY reduced the sentence of Momir Nikolic from 27 years to 20 years of imprisonment. Nikolic was Assistant Commander for Security and Intelligence of the Bosnian Serb Army and had pleaded guilty to persecuting Bosnian Muslim

[1] See generally http://www.un.org/icty.

civilians in Srebrenica in 1995. The Appeals Chamber *inter alia* ruled that "*the Trial Chamber committed a discernible error in taking into account twice in sentencing the role the Appellant played in the commission of the crimes*" and upheld the Appellant's grounds of appeal relating to an error in translation which adversely affected his sentence and, in part, relating to whether the Trial Chamber had sufficiently taken into account his co-operation with the Prosecution. See http://www.un.org/icty/mnikolic/appeal/judgement/index.htm; *ILIB* of 21 March 2006 and *Sentinelle* No 57 of 12 March 2006.

Third, on 22 March 2006, the Appeals Chamber upheld the conviction of Milomir Stakic, the former mayor of Prijedor in northern Bosnia who was involved in the Omarska, Keraterm and Trnopolje detention camps, but reduced his sentence from life imprisonment to 40 years' imprisonment. It upheld Stakic's conviction extermination, persecution and murder, but also upheld his acquittal of genocide. For the ext of the judgment, see http://www.un.org/icty/stakic/appeal/judgement/sta-aj060322e.pdf and for the summary read out in court, see http://www.un.org/icty/stakic/appeal/judgement/sta-summ060322e.htm.

Finally, in January 2006 Argentina surrendered Milan Lukic to the ICTY. See *Sentinelle* No 53 of 27 February 2006.

(F. Naert)

ICTR Cases[2]

On 24 January 2006, Italy notified the ICTR that it had completed its internal procedures for the entry into force of the agreement with the ICTY on the execution of sentences signed on 17 March 2004. See *Sentinelle* No 51 of 29 January 2006 and http://www.unictr.org/FRENCH/PRESSREL/2006/464.htm.

On 8 February 2006, the Appeals Chamber confirmed the acquittal of André Ntagerura and Emmanuel Bagambiki, while it did not pronounce itself on the appeal of Samuel Imanishimwe against his conviction (see the summary decision in French at http://www.unictr.org/FRENCH/cases/Ntagerura/decisions/080205.pdf). The motivation of the decision will be published later. See also *Sentinelle* No 53 of 12 February 2006.

(F. Naert)

Roma Claiming Poisoning in Kosovo Sue UNMIK before ECHR

On 20 February 2006, the European Roma Rights Centre filed today an application with the European Court of Human Rights on behalf of 184 Romani residents of camps for Internally Displaced Persons (IDPs) in northern Kosovo. The camps were built on lands that are poisonous: the World Health Organization reportedly declared the area in and around the IDP camps uninhabitable in October 2004 and *inter alia* recommended the immediate removal from the camps of children and pregnant women, which did not occur. The application alleges various violations, including of the right to life, the prohibition of torture and inhuman or degrading treatment and discrimination, and asks for interim measures. The application is filed against UNMIK as the acting government or "state" in Kosovo. Residents of Kosovo are citizens of Serbia and Montenegro, a party to the European Convention on Human Rights, but at present the authorities of Serbia and Montenegro have virtually no authority over the territory of Kosovo. For more details, see http://www.errc.org/cikk.php?cikk=2382.

(F. Naert)

European Court of Human Rights Rejects Saddam's Application

[2] See generally http://www.ictr.org.

On 14 March 2006, the ECtHR declared inadmissible the application brought by Saddam Hussein against 21 European countries whose troops joined the U.S.-led military campaign in Iraq, saying the case fell outside its jurisdiction. The Court *inter alia* stated that (see http://www.echr.coe.int/Eng/Press/2006/March/HUSSEIN%20ADMISSIBILITY%20DECISION.htm):

"[the] jurisdiction arguments [are] based on submissions which are not substantiated. […] The applicant did not address each respondent State's role and responsibilities or the division of labour/power between them and the US. He did not refer to the fact or extent of the military responsibility of each Division for the zones assigned to them. He did not detail the relevant command structures […] except to refer to the overall Commander of coalition forces who was at all relevant times a US General. Finally, and importantly, he did not indicate which respondent State (other than the US) had any (and, if so, what) influence or involvement in his impugned arrest, detention and handover. […] In such circumstances, the Court considers that the applicant has not established that he fell within the jurisdiction of the respondent States on any of the bases alleged. The Court considers that he has not demonstrated that those States had jurisdiction on the basis of their control of the territory where the alleged violations took place ([…]). Even if he could have fallen within a State's jurisdiction because of his detention by it, he has not shown that any one of the respondent States had any responsibility for, or any involvement or role in, his arrest and subsequent detention ([…]). This failure to substantiate any such involvement also constitutes a response to his final submission to the effect that the respondent States were responsible for the acts of their military agents abroad. […] Accordingly, the Court does not consider it to be established that there was or is any jurisdictional link between the applicant and the respondent States or therefore that the applicant was capable of falling within the jurisdiction of those States, within the meaning of Article 1 of the Convention." See also *ILIB* of 21 March 2006 and *Sentinelle* No 58 of 19 March 2006.

(F. Naert)

Chief Judge in Saddam Trial Resigns

In January 2006, judge Amin, the chief judge in the trial of Saddam Hussein before the Iraqi Special Tribunal (http://www.iraq-ist.org), resigned. Judge Abel-Rahman succeeded him as the trial resumed late January. The new chief judge ordered the four lead defendants out of court and two sessions were held without their presence. However, in mid February the defendants were forced back in the courtroom.

(F. Naert)

Cambodian Tribunal on Track

On 10 February 2006, the UN announced that, together with the Cambodian Government, it had set up an administrative office for the special Cambodian tribunal (see http://www.un.org/law/khmerrougetrials/) that is to try former Khmer Rouge leaders (UN press release). Furthermore, on 8 March 2006, UN Secretary-General Kofi Annan recommended a list of 12 legal experts, including seven nominees for international judges, to Cambodia's Prime Minister to serve in the trials before this tribunal (UN press release, see also the previous issue of this *Newsletter*). Finally, on 14 March 2006, the UN and Cambodia signed two agreements concerning the facilities, utilities and services the Cambodian Government would provide for the premises of the tribunal and on safety and security arrangements (UN press release). See also *Sentinelle* No 58 of 19 March 2006.

(F. Naert)

Nigeria Extradites Taylor to Sierra Leone and Liberia Truth and Reconciliation Commission inaugurated

On 17 March 2006, Ellen Johnson Sirleaf, the President of Liberia, told the UN Security Council that she had formally asked Nigeria to extradite Charles Taylor, the former Liberian president, to face war crimes charges in Sierra Leone. Mr. Taylor claimed asylum in Nigeria in August 2003 as part of a peace settlement ending civil war in Liberia. He was later indicted on 17 counts of war crimes and crimes against humanity by a Special court in Sierra Leone. After Taylor seemed to have fled on 27 March 2006, prompting UN Security Council concern the next day, he was arrested and surrendered to the Special Court for Sierra Leone on 29 March 2006. See e.g. http://www.sc-sl.org; W. Hoge, 'Liberian Seeks Extradition of Predecessor for Atrocities Trial', *the New York Times*, 18 March 2006 and UN press releases of 28 and 29 March 2006.

Furthermore, also in Liberia, on 20 February 2006 the Truth and Reconciliation Commission was inaugurated, see *Sentinelle* No 57 of 12 March 2006.

(F. Naert)

Timor-Leste Commission for Reception, Truth and Reconciliation Report Made Public

The final report of the Commission for Reception, Truth and Reconciliation in East Timor (see previous *ISMLLW Newsletter*) was presented to the UN Secretary-General on 20 January 2006. It was later published on the website of the International Center for Transitional Justice at http://www.ictj.org/cavr.report.asp#english (the website also contains various other reports on Timor-Leste: see http://www.ictj.org). The report details the systematic human rights violations committed during the 24-year Indonesian occupation of Timor, both by the Indonesian security forces, including their East Timorese auxiliaries, and by the resistance (see especially Part 8.2). See also *Sentinelle* No 51 of 29 January 2006.

The Commission *inter alia* finds that "*the Government of Indonesia and the Indonesian security forces are primarily responsible and accountable for the death from hunger and illness of between 100,000 and 180,000 East Timorese civilians who died as a direct result of the Indonesian military invasion and occupation*" and finds evidence of, amongst others, crimes against humanity and war crimes, including summary executions, arbitrary detention and torture ("*systematic and […] condoned and encouraged at the highest levels of the security apparatus and the civil administration*"), rape, sexual slavery, attacks on civilians and the use of prohibited weapons.

It also finds that members of the Resistance "*commit[ed] serious human rights violations […] which are inexcusable under any circumstances*", including "*arbitrary detention, beating, torture, ill-treatment and execution of civilians*".

The report also states: "*there have been no adequate justice measures for the crimes against humanity committed in Timor-Leste throughout the 25-year mandate period. […] justice for past crimes must encompass the violations committed throughout the 25-year period of its mandate. […] For both Timor-Leste and Indonesia the result is that impunity has become entrenched. Those who planned, ordered, committed and are responsible for the most serious human rights violations have not been brought to account, and in many cases have seen their military and civil careers flourish as a result of their activities*".

The report contains various recommendations, including:

"*1.7. The Permanent Members of the Security Council, particularly the US but also Britain and France, who gave military backing to the Indonesian Government between 1974 and 1999 and who are duty bound to uphold the highest principles of world order and peace and to protect the weak and vulnerable, assist the Government of Timor-Leste in the provision of reparations to victims of human rights violations suffered during the Indonesian occupation.*

[…]

1.9. All UN member states refuse a visa to any Indonesian military officer who is named in this Report for either violations or command responsibility for troops accused of violations and take other measures such as freezing bank accounts until that individual's innocence has been independently and credibly established.

[…]

3.2.3. A public register of the disappeared be established and, in collaboration with the Government of Indonesia, a systematic inquiry is undertaken to establish the whereabouts and fate of those on the list.

[…]

7.1.1. The Serious Crimes Unit and Special Panels in Timor-Leste have their respective mandates renewed by the United Nations and their resources increased in order to be able to continue to investigate and try cases from throughout the period 1975-1999.

[…]

7.1.5. Those institutions of the Indonesian Armed Forces and those in positions of command responsibility named in the Part 8: Responsibility and Accountability of this Report, for crimes other than those in the above list, should be the subject of focused investigation and prosecution by Indonesian authorities.

[…]

7.1.11. Indonesia, in an authentic spirit of reconciliation and with the aim of strengthening its own nascent democracy, be encouraged to contribute to the achievement of justice by (a) transferring those indicted who reside in Indonesia to the renewed Panels, and (b) strengthening the independence and efficiency of its judicial system in order to be able to genuinely pursue justice and revert the record of impunity that regrettably has been the norm regarding the crimes committed in Timor-Leste.

[…]

7.2.1. The United Nations and its relevant organs, in particular the Security Council, remains seized of the matter of justice for crimes against humanity in Timor-Leste for as long as necessary, and be prepared to institute an International Tribunal pursuant to Chapter VII of the UN Charter should other measures be deemed to have failed to deliver a sufficient measure of justice and Indonesia persists in the obstruction of justice."

However, East Timor is not actively pursuing prosecution of those responsible (e.g., on 21 January 2006, East Timor's Foreign Minister told reporters that "*In today's Indonesia or in the foreseeable future, there will be no leader strong enough who can bring to court and prison senior military officers who were involved in violence in the past. ... They are still too powerful*", see C. Lynch & E. Nakashima, 'E. Timor Atrocities Detailed', *The Washington Post*, 21 January 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/01/20/AR2006012001811.html) and the UN is reportedly reluctant to step in as long as East Timor does not wish it do so (*ibid.*).

(F. Naert)

National Developments

Australia Arrests War Crimes Suspect Sought by Croatia

On 20 February 2006, Australian authorities arrested Dragan Vasiljkovic, on the basis of an international arrest warrant issued by Croatian authorities, who have 60 days to formally request his extradition. See *Sentinelle* No 52 of 5 February 2006 and

http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_First_Quarter_20_January_2006_-_Dragan_Vasiljkovic_arrested_in_extradition_case_-_0042006.

(F. Naert)

Belgian law bans cluster munitions

On 16 February 2006, the Belgian parliament approved an Act, banning cluster munitions by forbidding their possession, production, stockpiling, sale, transfer, importation and exportation. Thereby, Belgium is the first Country in the world to legally ban cluster munitions. However, the Act is yet to be published in the Belgian Official Gazette, and will only enter into force on the day of such publication. Moreover, Belgian parliamentarians have announced a supplementary Act, to be voted upon in the near future, to soften the ban so that certain munitions which do not pose a humanitarian problem after use, smoke or illuminating systems and electronic and electric countermeasures will in principle become explicitly excluded from the ban. The aim seems to be to publish this supplementary Act in the Belgian Official Gazette on the same day as the Act of 16 February 2006.

(I. Heyndrickx and A. Vanheusden)

Bosnian War Crimes Suspect Freed by Bosnian Court

On 5 of January 2006, forces from the European Union led peacekeeping force in Bosnia and Herzegovina (EUFOR) were involved in a shooting incident in the course of an "*operation conducted in connection to the possible future apprehension of indicted war criminal Dragomir Abazovic*", in the course of which the suspect shot (but did not kill) himself and which also lead to the death of his wife and the wounding of his son, who are said to have shot at the EUFOR forces (EUFOR press statement of 5 January 2006, available at http://www.euforbih.org/press/p060105a.htm). However, a Bosnian Court ruled on 2 February 2006 that the arrest warrant on the basis of which the suspect was arrested, was no longer valid, because the new Bosnian Court established in 2005 (see *ISMLLW Newsletter* 2005-1) did not confirm the old arrest warrant based on an indictment approved by the International Criminal Tribunal for the former Yugoslavia, under the new Bosnian legislation. Abazovic was indicted in 2002 for war crimes against Muslims in the area of Rogatica in eastern Bosnia during the 1992-1995 war. See Reuters, 'War crimes suspect freed in Bosnia on legal point', 3 February 2006, available at http://www.alertnet.org/thenews/newsdesk/L03549671.htm.

(F. Naert)

Chief of Colombian Army Resigns over Hazing Scandal

The chief of the Colombian army has resigned following reports of the brutal hazing of young recruits at a military base in Piedras. A Colombian weekly reported that the soldiers were branded like cattle, sexually abused and forced to eat animal waste. Four military instructors have been arrested and several officers have been implicated in the scandal. See http://www.isn.ethz.ch/news/sw/details.cfm?id=14874.

(F. Naert)

UN Human Rights Office Condemns Colombian Rebels' Crimes

On 14 March 2006, the Colombia office of the UH High Commissioner for Human Rights for the fourth time in two weeks condemned the leftist Revolutionary Armed Forces of Colombia – Popular Army (FARC-EP) for attacks on civilians. It notably stated that "*by their number and their frequency the murders perpetrated by members of FARC-EP constitute a crime against humanity*

on which the International Criminal Court will be able to exercise its jurisdiction" (see UN press release and http://www.hchr.org.co/).

(F. Naert)

French Prosecution of Pinochet and Other Former Chilean Officials Advances

Mid December 2005, the Public Prosecutor of Paris requested the referral of former Chilean dictator Augusto Pinichet and some 15 retired military personnel to a Paris jury Court (*Cour d'assises*) for arbitrary detention and disappearances of French nationals between 1973 and 1975. The investigating judge (*juge d'instrcution*) will now decide on whether to allow the referral. See *Sentinelle* No 50 of 22 January 2006. The case was initiated in 1998 after Pinochet's arrest in the UK at the request of the Spanish judiciary. General Pinochet is also being prosecuted in Chile, see http://www.trial-ch.org/trialwatch/profiles/en/legalprocedures/p90.html.

(F. Naert)

France Struggling to Find Resting Place for Decommissioned French Carrier

On 13 February 2006, the Supreme Court of India ruled that the decommissioned French carrier Le Clemenceau was not to enter Indian Waters and requested an assessment of the amount of toxic material on board the ship. Two days later, the French Supreme Administrative Court (Conseil d'Etat) ordered the suspension of the ship's transfer and referred the case to a lower court for review. The issue is discussed in M.A. Orellana, 'Shipbreaking and Le Clemenceau Row', 10 *ASIL Insight* 4, 24 February 2006, http://www.asil.org/insights/2006/02/insights060224.html.

(F. Naert)

German Federal Constitutional Court Rules that Authorisation to Shoot Down Aircraft is Unconstitutional

In its judgment of 15 February 2006, the Federal Constitutional Court declared Section 14 (3) of the Aviation Security Act (*Luftsicherheitsgesetz - LuftSiG*) unconstitutional and, hence, void. This regulation, which took effect on 15 January 2005, declared the use of armed force against a "renegade" aircraft permissible if "*under the circumstances it can be assumed that the aircraft is to be employed to threaten human lives and this is the only way to counter that clear and present danger*". Authority to issue an order for the use of weapons was to be reserved to the Federal Minister of Defence or, should he be unavailable, his deputy in the Federal Cabinet. The Aviation Security Act had been passed in response to the attacks of September 11, 2001 in the United States on the one hand and, on the other, the case of an amateur pilot who, in January 2003, circled the skies above the Frankfurt banking district in a stolen power glider, threatening to crash into a high-rise building.

According to the ruling of the Federal Constitutional Court, Section 14 (3) of the Aviation Security Act goes against the letter of the constitution for the mere fact that the Federation lacks legislative competence. Domestic employment of the Bundeswehr was only allowed in cases expressly provided by the constitution. While the provisions of Article 35(2) and (3) of the Basic Law regulating support rendered by the Bundeswehr to the *Länder* (federal states) in the event of a disaster might be applicable to the defence against an impending terrorist attack, they allowed no deployment of the armed forces in a combat role involving the use of "specifically military means" but only assistance provided with means as authorised for use by the police under the law of the *Land* concerned. Also, contrary to what the Air Security Act provides, Air Force assets could not be deployed on the order of the Federal Minister of Defence but - as clearly stated in Article 35(3) of the Basic Law - only on the basis of a decision taken by the Federal Government as a whole.

The court held that Section 14(3) of the Air Security Act was unconstitutional in substance as well in as far as innocent persons on board the aircraft – be they crew members or passengers – were affected. It violated the constitutionally guaranteed right to life and human dignity. From that perspective, it was inconceivable for the state, based on statutory authorisation, to deliberately kill innocent people caught in a desperate situation by shooting down the aircraft.

The legal position would, however, be different, the court ruled, if armed force was targeted at an unmanned aerial vehicle or solely at persons intending to use the aircraft as a weapon to kill people on the ground. In that case, saving the lives of those threatened on the ground could take precedence over the lives of the perpetrators. Nevertheless, Section 14(3) of the Aviation Security Act was void in this case as well since the Federation – as pointed out above – currently lacked legislative competence.

The ultimate consequences of the ruling cannot yet be foreseen. Initial considerations in Government and Parliament point towards an amendment of the constitution that would allow the use of weapons by the Air Force against aircraft carrying only criminals (terrorists). However, according to the judgment of the Federal Constitutional Court, the Basic Law cannot set a norm for averting an attack with an aircraft that has but one innocent person on board. In the reasons given for the ruling, the statement that this was not a decision on whether or not a shoot-down carried out all the same was to be considered a criminal act is no great help here either because an order to that effect issued by the Defence Minister – should he take the risk in an extreme situation to commit a criminal offence – would not be binding on the soldier concerned under service law.

This means, in the final analysis, that to the extent the ruling of the Federal Constitutional Court allows amendments to be made at the level of constitutional and non-constitutional law, it can be expected that legislators will soon take action to plug gaps in legislation. Where the Court's ruling prohibits this – when uninvolved persons are on board –, every effort must be made to prevent the hijacking of aircraft. Should this ever fail, fate will take its course.

(Dr. D. Weingärtner)

Former El Salvador Generals Found Guilty of Torture by US Court

On 6 January 2006, the 11th Circuit Court of Appeals upheld a 2002 West Palm Beach jury verdict condemning Generals Jose Guillermo Garcia and Carlos Eugenio Vides Casanova, two former Ministers of Defence of El Salvador, to pay 54,6 million US $ to torture victims. The case was brought under the Alien Tort Claims Act and the Torture Victim Protection Act and in August 2005, the Court had vacated an earlier 2005 opinion that the case was not filed within the 10 year statute of limitations period permitted by both Acts. The ruling states that the doctrine of “equitable tolling” applies to this case, meaning the plaintiffs’ delay in filing their claims was justified due to ‘extraordinary circumstances’ in the interests of justice and that the statute of limitations can be suspended not only until the time that the defendants came to the US but also until the time that widespread violence in El Salvador subsided since only then were the plaintiffs free from fear of reprisal. See http://www.cja.org/cases/romagoza.shtml for more details on the case.

(F. Naert)

Guatemala Starts Compensating Victims of Atrocities

Surviving family members of a 1982 massacre committed by the army in a Guatemalan village have started receiving compensation from the Guatemalan Government, which is thereby implementing a judgment of the Inter-American Court of Human Rights of 19 November 2004 (***Case of Plan de Sánchez Massacre v. Guatemala***. *Reparations*, Series C, No. 116, available at http://www.corteidh.or.cr/seriec_ing/index.html).

(F. Naert)

Iranians File Claims against Saddam for Chemical Warfare

Some 2000 Iranian victims of chemical warfare in the Iran-Iraq war have lodged complaints against Saddam Hossein. Iran's Humanitarian Rights National Committee has urged the victims to present their claims to the Iranian Foreign Ministry or Iran's embassy in Baghdad. See http://www.irna.ir/en/news/view/line-17/0601167661151959.htm.

(F. Naert)

Israel Compensates Palestinian Torture Victims in Settlement

On 1 February 2006, the Israeli newspaper Haaretz reported that a few days earlier, the Israeli Defence Ministry awarded compensation to the amount of 2.4 million NIS (about 430.000 Euros or 512.000 US $) to 28 Palestinians who were tortured by the Israel Defence and security Forces, following a settlement which also included the termination of law suits in the cases concerned but which did not include admitting to the torture. Plaintiffs without permanent disabilities received between 15.000 and 38.000 NIS each and those with permanent disabilities received between 50.000 and 435.000 NIS, depending on the nature of the disability. See http://www.haaretz.com/hasen/spages/677160.html for more details.

(F. Naert)

Italy to Prosecute US Serviceman Accused of Killing Secret Agent in Iraq

On 22 December 2005, the public prosecutor in Rome opened a case against American soldier Mario Lozano, who is accused of killing Nicola Calipari, the Italian secret agent who was killed in Iraq on 4 March 2005 while driving towards safety an Italian journalist the release of whom he had been able to secure. US authorities did not release the names of the soldiers who were on the patrol that fired at the car, but the Italians recovered it electronically from a report published by the US. The US and Italy conducted a joint inquiry into the case, but could not agree on the conclusions. See *Sentinelle* No 48 of 8 January 2006 and http://www.ansa.it/mae/notizie/topnews/2005-12-22_2187846.html.

(F. Naert)

Jordan Exempts US Nationals from International Criminal Court

Early January 2006, the Jordanian parliament ratified an agreement with the US that prevents Jordan from handing over Americans and non-US nationals working for the US Government to the International Criminal Court. Instead, if such persons are accused of war crimes, crimes against humanity or genocide, Jordan is required to surrender them to US authorities.

The agreement is one of the many 'article 98 bilateral immunity agreements' the US has concluded (see http://www.state.gov/t/pm/art98/). It was criticised by a number of dissenting deputies and human rights NGOs, who see it as incompatible with Jordan's obligations under the Statute of the International Criminal Court.

See IRIN, 'JORDAN: Amid protests, parliament exempts US nationals from International Criminal Court', 9 January 2006, http://www.alertnet.org/thenews/newsdesk/IRIN/8cbe8d0ec754ec66b19809cd6b9cca27.htm.

On such agreements generally, see also the Guidelines adopted by the Council of the European Union (available at http://ue.eu.int/uedocs/cmsUpload/ICC34EN.pdf) and:

- http://www.iccnow.org/documents/otherissuesimpunityagreem.html;

- http://www.amicc.org/usinfo/administration_policy_BIAs.html;

- http://hrw.org/campaigns/icc/us.htm;

- http://web.amnesty.org/pages/icc-US_threats-eng;

(F. Naert)

Dutchman Convicted for War Crimes by Supplying Chemicals to Saddam

Shortly after having convicted two former Afghan intelligence officials for war crimes (see the previous issue of this *Newsletter*), the The Hague Court on 23 December 2005 condemned Dutch national Frans van Anraat for having committed war crimes (case number LJN AU8685, available at http://www.rechtspraak.nl). Van Anraat was acquitted of genocide, with which he had also been charged.

Under Saddam Hussein's leadership, Iraq developed a chemical weapons arsenal, which included mustard and nerve gas, in the 1980s, with the help of foreign traders supplying the required chemicals. Iraq also used these chemical weapons, including against the civilian population, most notably in 1988 in the village Halabja in Northern Iraq.

In the case against van Anraat, the judge had to decide whether the suspect's supplying of thiodiglycol (TDG), a precursor for mustard gas, amounted to complicity in war crimes and genocide. As the facts occurred before the entry into force of the Statute of the International Criminal Court and the Dutch implementing legislation thereof, the prosecution was based on the War Crimes Act then in force (*Wet oorlogsstrafrecht*, hereinafter 'WOS') and the implementing legislation of the Genocide Convention.

Concerning war crimes, the judges ruled that by contributing to the supply of large quantities of TDG, van Anraat knowingly accepted a significant risk that the chemical would be used as a precursor for poisonous gas used in attacks with chemical weapons. The judges also concluded that this had in effect been the case under Saddam. In the periode during which the attacks were carried out, there was both an international armed conflict (between Iraq and Iran) and a non international armed conflict (between Government forces and Kurdish resistance groups). Saddam thereby violated the laws and customs of war, which is a criminal offence under article 8 WOS. Because of van Anraat's supply of the means to commit these crimes, the court found him guilty of complicity to war crimes.

In respect of genocide, the judges concluded that Saddam did commit crimes of genocide by attacking the Kurdish population. However, on the basis of international jurisprudence, the court ruled that it was required that the accused knew the genocidal intent of the perpetrator. As van Anraat's supplies predated the (international media attention for the) chemical weapons attacks on the Kurds, the judges found that it had not been proven that van Anraat knew he was contributing to acts intending to destroy the Kurds. He was therefore acquitted of this charge

Despite the latter finding, the court sentenced the accused to the maximum penalty of 15 years imprisonment, stating that he acted consciously and solely out of pursuit of profit and that even this penalty did not do justice to the gravity of the offence and its consequences. Both van Anraat and the Prosecutor have appealed the decision.

For other short annotations, see *Sentinelle* No 48 of 8 January 2006 and *ILIB* of 27 January 2006.

(Lt Col Joop Voetelink, Netherlands Defence Academy)

Dutch Conclude MOU with Afghanistan on the Transfer of Detainees

Late 2005, The Memorandum of Understanding between the Ministry of Defense of the Islamic Republic of Afghanistan And The Minister of Defense of the Kingdom of the Netherlands concerning the transfer of persons by Netherlands military forces in Afghanistan to Afghan

authorities was concluded. Denmark concluded a similar MOU and NATO is considering the conclusion of such an MOU. See the replies by the Dutch Ministers of Defence and Foreign Affairs to Parliamentary questions, dated 27 January 2006 (questions 137-142), available at http://www.minbuza.nl/default.asp?CMS_TCP=tcpAsset&id=ED4B709E18C7409CB796A5D1C7AA10EFX1X69455X64, and the Letter of said Ministers to the Dutch Parliament dated 22 December 2005, available at http://www.minbuza.nl/default.asp?CMS_TCP=tcpAsset&id=93044FCCBA6F4F639DAB548599E264FCX1X56773X59. The English text of the MOU is available at http://www.minbuza.nl/default.asp?CMS_TCP=tcpAsset&id=FAC0BEAB679D475FA4A5B40C8334FE69X1X73604X97.

(F. Naert)

Dutchman Arrested over War Crimes and Sanctions Violations

Dutch national Guus Kouwenhoven was arrested in Rotterdam and was provisionally charged with war crimes and violations of UN sanctions. Kouwenhoven was named in UN reports as a trafficker of "blood timber" in Liberia and Sierra Leone and was subject to a UN imposed travel ban (see http://www.un.org/Docs/sc/committees/Liberia3/1521_list.htm). See S. van den Berg, 'Dutchman faces war crimes trial over "blood timber"', Agence France-Presse, 17 February 2006 (summary at http://www.unmil.org/read.asp?newsID=1049&cat=pclip).

(F. Naert)

Missile Attack in Pakistan Causes Uproar

Early on 13 January 2006, a missile attack was carried out on houses allegedly hosting terrorists, including Al Qaeda's second in command, in a village in Northwest Pakistan. While it does not appear to have been officially acknowledged by the US, the attack is believed to have been carried out by the US, possibly by missiles fired from a CIA operated Predator drone aircraft launched in Afghanistan. Pakistan, which has not granted US forces in Afghanistan the right to pursue militants into Pakistan, has condemned the air strike and lodged an official protest. At least some 18 people appear to have been killed in the attack, but it is unclear how many were terrorists and how many civilians. See various articles in the New York Times of 14, 15, 16 and 19 March. Press reports indicate the attack is part of a broader US programme to eliminate terrorists in this manner and mention at least 19 successful strikes so far. See J. Meyer, 'CIA Expands use of Drones in Terror War', *LA Times*, 29 January 2006, available at http://www.globalpolicy.org/empire/un/2006/0129predator.htm, and C. Dickey, 'Target Practice', *Newsweek, MSNBC.com*, 19 January 2006, http://www.msnbc.msn.com/id/10910410/site/newsweek.

(F. Naert)

Mexican Report on Dirty War Published

A draft report by the office of Mexico's Special Prosecutor for Social and Political Movements of the Past on a dirty war in Mexico from 1964 until 1982 was published late February, even though the official report has not yet been made public. See http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB180/index.htm.

(F. Naert)

Slovene NGO Member Prosecuted for Defamation for War Crimes Allegations

It was reported that the Slovene state prosecutor and the Slovene state have charged the president of the Slovene Helsinki Committee with defamation for saying she had reasons to suspect that Slovene soldiers had committed a war crime during hostilities with the Yugoslav People's Army in the Summer of 1991 and requesting an inquiry into these allegations (BBC Worldwide Monitoring, 14 February 2006, referring to a news report on HRT1 TV, Zagreb, 1830 gmt 14 February 2006).

(F. Naert)

Spanish Court to Hear Case against former Chinese Leaders

Madrid's National Court has agreed to consider a lawsuit charging seven former Chinese officials, including former President Jiang Zemin and former Chinese Prime Minister Li Peng, with genocide, crimes against humanity, state terrorism and torture. by a pro-Tibetan human rights group. See G. Tremlett, 'Court to hear genocide case against China', *The Guardian*, 11 January 2006, http://www.guardian.co.uk/international/story/0,3604,1683477,00.html and *Sentinelle* No 53 of 12 February 2006.

(F. Naert)

Spanish Court Accepts Competence to Judge Guatemala Case

On 22 February 2006, the *Audiencia Nacional* ruled that it was competent to examine allegations of genocide, terrorism and torture claimed to have been committed against the Maya population in Guatemala between 1978 and 1986. This decision follows the Constitutional Court's October 2005 decision endorsing universal jurisdiction (see the previous issue of this *Newsletter*). See *Sentinelle* No 57 of 12 March 2006.

(F. Naert)

Peace Activists Appeal Rejected by House of Lords

The UK House of Lords heard appeals against the convictions of several peace activists who tried to obstruct the deployment of UK and US forces to Iraq, including by breaking into military facilities. See http://politics.guardian.co.uk/commons/story/0,,1713624,00.html and http://www.peacenews.info/issues/2458/2458023.html. On 29 March 2006, the House of Lords rejected the defence that the alleged illegality of the war justified their crimes. The judgments, *R v. Jones (Appellant) (On Appeal from the Court of Appeal (Criminal Division)) (formerly R v. J (Appellant)), Etc.*, [2006] UKHL 16, are available at http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060329/jones-1.htm.

(F. Naert)

Addendum on House of Lords Torture Ruling

The Commentary in the previous Newsletter on the case of *A v Secretary of State for the Home Department* correctly stated that the House of Lords unanimously held that evidence obtained through torture was inadmissible. However, the House of Lords went further in that they went on to look at the practical effects of their ruling and in particular where the burden of proof lay. There, the Court was split 4 to 3. All seven Law Lords were agreed that if the issue was raised in a reasonable form, there was a duty on the Special Immigration Appeals Commission to investigate further. However, they could not agree on where the subsequent onus lay. The minority considered that the evidence should be refused if the court were unable to conclude that there was not a real risk that the evidence had been obtained by torture. Reading through all those double

negatives, the burden was left on the Government to prove that the evidence had not been obtained by torture.

The majority on the other hand took a more pragmatic approach. On their approach, the evidence was only inadmissible if it was established on the balance of probabilities that the evidence was in fact obtained under torture. This reverses the burden and, in the view of many NGOs, places a burden on the victim that he will find near impossible to satisfy. It will be interesting to see how the judgment works out in practice.

(Ch. Garraway, UK)

UK Considers Limiting War Crimes Suits

The UK government is considering weakening the legislation concerning the prosecution of alleged war criminals and torturers in the UK, in particular by limiting private individuals from initiating prosecution. This follows the last minute avoidance of arrest by a retired Israeli general last year (see previous *ISMLLW Newsletter*), which has led to Israeli requests to address this issue, to a discussion between the UK and Israeli Prime Ministers, to an apology by Foreign Secretary Jack Straw and to a withdrawal of the arrest warrant against the general. In the mean time, the police was criticised for rejecting to investigate who tipped off the general. The government says any change would be referred back to parliament. See V. Dodd, 'UK considers curbing citizens' right to arrest alleged war criminals', *The Guardian*, 3 February 2006, for more details.

It may be noted that in a similar development in 2003, Belgium restricted the scope of its legislation on grave breaches of international humanitarian law under intense international pressure, including from the US.

(F. Naert)

UK Serviceman Contesting Legality of Iraq War Referred to Court Martial

A Royal Air Force Serviceman charged in the UK with insubordination for refusing to serve in Iraq will face court martial on 11 April 2006. The Judge Advocate rejected his claim that he would be participating in an illegal war because at the time of his refusal to serve in Iraq, the UK presence there was justified on the basis of UN Security Council resolutions 1511 and 1546 (the legality of the war prior to this was deemed irrelevant). The Court also held that his position was not high enough to possibly be involved in a crime of aggression and that he had not been ordered to do anything illegal. See BBC, 'Court martial for Iraq refusenik', 22 March 2006, http://news.bbc.co.uk/2/hi/uk_news/scotland/4832282.stm, and the previous *ISMLLW Newsletter*.

(F. Naert)

UK Investigating Iraq Abuse on Video and SAS Soldier Quits over US Tactics

UK authorities are investigating allegations of abuse by UK forces in Iraq following the publication of a video (available at http://www.newsoftheworld.co.uk/armyvideo.shtml and at http://www.aljazeera.com/cgi-bin/review/article_full_story.asp?service_ID=10580) showing such abuse. See S. Lyall, 'Britain Investigates Video Said to Show Abuse of Iraqi Youths by Troops', *The New York Times*, 13 February 2006. Several soldiers have been arrested in the course of the investigation, see http://news.bbc.co.uk/1/hi/uk/4788210.stm. In another development concerning Iraq, an SAS soldiers quit the UK armed forces because he refused to serve any longer alongside US troops, of whom he perceived several tactics as being illegal. See S. Rayment, 'SAS soldier quits Army in disgust at "illegal" American tactics in Iraq', *The Telegraph*, 12 March 2006, http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/03/12/nsas12.xml.

(F. Naert)

UK Judge Condemns US Torture and Allows Request for Order to Seek Release

A High Court judge who granted three Britons held at Guantanamo Bay permission to seek a court order requiring the home secretary to petition for their release was quoted as having stated that "*America's idea of what is torture is not the same as ours and does not appear to coincide with that of most civilised nations*" See R. Norton-Taylor & S. Goldenberg, 'Judge's Anger at US Torture', *The Guardian*, 17 February 2006, http://www.guardian.co.uk/guantanamo/story/0,,1711833,00.html. The case was being heard late March (see e.g. http://news.independent.co.uk/uk/legal/article353012.ece).

(F. Naert)

Selected Developments in the US

Congress temporarily extended the provisions of the PATRIOT ACT until 10 March 2006 (the act would otherwise have expired on 3 February 2006, see previous *ISMLLW Newsletter*). See http://www.whitehouse.gov/news/releases/2006/02/20060203-16.html. It subsequently extended 14 of the 16 temporary provisions permanently and extended the other 2 until 2009 and also included some additional civil rights safeguards. The text was signed into law on 9 March 2006, see http://www.whitehouse.gov/infocus/patriotact/.

Meanwhile, the legislation on the treatment of detainees (discussed in the previous issue of this *Newsletter*), appears to be interpreted differently by various parties, including concerning its applicability to pending cases (see e.g. http://jurist.law.pitt.edu/forumy/2006/03/no-habeas-at-guantanamo-executive-and.php).

Furthermore, five independent UN human rights experts issued a report on 16 February 2006 calling on the US to close the Guantánamo Bay detention centre and either bring all detainees to trial or release them without further delay. The report inter alia states states that "*the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law*" (§ 21, with a reference to an ICRC publication) and that **"***The interrogation techniques authorized by the Department of Defense, particularly if used simultaneously, amount to degrading treatment […]. If in individual cases […] the victim experienced severe pain or suffering, these acts amounted to torture […]. Furthermore, the general conditions of detention, in particular the uncertainty about the length of detention and prolonged solitary confinement, amount to inhuman treatment and to a violation of the right to health as well as a violation of the right of detainees […] to be treated with humanity and with respect for the inherent dignity of the human person*" (§ 87, see also §§ 49-52). UN Secretary-General Kofi Annan stated that while he did not necessarily agree with everything in the lengthy report "*the basic point that one cannot detain individuals in perpetuity and that charges have to be brought against them and be given a chance to explain themselves and prosecute a charge or release them I think is common under any legal system*" (see http://www.un.org/apps/sg/offthecuff.asp?nid=834). The US dismissed the report (see http://www.asil.org/pdfs/ilib0603212.pdf and http://www.whitehouse.gov/news/releases/2006/02/20060216-1.html#e). The report (UN Doc. E/CN.4/2006/120, 15 February 2006) is available at http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120_.pdf. It will now be considered by the UN Human Rights Commission. See also *Sentinelle* No 54 of 19 February 2006 and *ILIB* of 21 March 2006.

Moreover, further photographs of abuse by US forces in Iraq were published (see e.g. http://www.salon.com/news/feature/2006/02/16/abu_ghraib/index.html). Moreover, press reports indicate that the US stopped transferring detainees to Guantanamo after a court ruling late 2004

opening the possibility of legal scrutiny and instead has been using a prison in Bagram (Afghanistan) as a key detention facility (see T. Golden & E. Schmitt, 'A Growing Afghan Prison Rivals Bleak Guantanamo', the *New York Times*, 26 February 2006).

Still concerning Guantanamo Bay, on 3 March the Pentagon released the names of many of the detainees held there in transcripts of hearings, after being forced to do so by a court decision earlier this year in a law suit brought by Associated Press under the Freedom of Information Act. The transcripts are available at http://www.defenselink.mil/pubs/foi/detainees/csrt/index.html. See also *Sentinelle* No 56 of 6 March 2006. Analysis of the documents released so far raise questions as to whether all detainees are really dangerous terrorists, see e.g. C. Hegland, 'Empty Evidence', *The National Journal*, 3 February 2006, http://law.shu.edu/news/empty_evidence.htm, and the Report entitled *A Profile of 517 Detainees through Analysis of Department of Defense Data* and available at http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

In the mean time, some more cases of abuse have been tried in court. In one case, Chief Warrant Officer Lewis Welshofer Jr., an Army interrogator, was convicted for negligent homicide and negligent dereliction of duty by a military jury for putting a sleeping bag over an Iraqi general's head and sitting on his chest as the man suffocated (J. Sarche, 'Army Officer Found Guilty in Iraqi's Death', AP, 22 January 2006, http://apnews.myway.com/article/20060122/D8F9MUMG0.html). He was sentenced to restriction to his place of work, worship, and barracks for 60 days, forfeiture of US $6000 salary, and a formal reprimand (see http://jurist.law.pitt.edu/forumy/2006/02/reprimand-for-iraqi-detainee-homicide.php for details and comments).

In another case, the Army dropped its case against Captain Christopher M. Beiring, the only officer to face criminal charges in connection with the beating deaths of two prisoners held by the US in Bagram, Afghanistan, in December 2002. He had been charged with lying to investigators and being derelict in his duties. The decision follows the recommendation of an investigating judge that his case not proceed to a court-martial. The judge overseeing the pretrial inquiry, Lt. Col. Berg, rejected the claims that the captain had failed to properly train his soldiers (he had sought but was denied more training) and to order them to stop chaining prisoners overhead after the first one died (he did, in fact, instruct his subordinates to stop doing so). Captain Beiring was, however, issued a letter of reprimand. See T. Golden, 'Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates', *The New York Times*, 8 January 2006.

In yet another case, on 21 March 2006, an Army dog handler was found guilty of tormenting detainees at the Abu Ghraib prison in Iraq with his dog. Sgt. Michael J. Smith was found guilty on 6 of 13 counts, including maltreatment, dereliction of duty and conspiring with another Army dog handler to frighten detainees into urinating and defecating on themselves. He faced up to more than eight years in prison but was only sentenced to 179 days in prison, in addition to a demotion, bad-conduct discharge and a 2250 US $ fine. The jury of four officers and three enlisted soldiers rejected Sergeant Smith's defense that he was simply following orders and using a barking dog to keep prisoners in line. Col. Thomas M. Pappas, the former military intelligence chief at Abu Ghraib, testifying under a grant of immunity, said the Army lacked clear rules for using dogs in interrogations at Abu Ghraib. See E. Schmitt, 'Army Dog Handler Is Convicted in Detainee Abuse at Abu Ghraib', the New York Times, 22 March 2006 and http://www.humanrightsfirst.org/blog/index.htm. Earlier on in this case, General Miller invoked his right not to give testimony that might incriminate him and refused to answer questions in the court-martial proceedings. On 19 March 2006, Time reported that a report by the Army Inspector General cleared Miller of various charges, going against an earlier report (see A. Zagorin & S.B. Donnelly,'Gitmo Goat or Hero?', http://www.time.com/time/magazine/article/0,9171,1174697,00.html).

Meanwhile, early January army investigators recommended that Lt Col Jordan, who supervised the interrogation Task Force at Abu Ghraib, be charged with criminal offences. It is up to his

commanding officer to decide whether or not to do so. See R.A. Serrano & M. Mazzetti, 'Charges Sought Against Officer at Abu Ghraib', *LA Times*, 13 January 2006.

In another case, the US has reached a settlement with Ehab Elmaghraby, an Egyptian who was among the many Muslims and Arabs arrested after 9/11 and held for months in a federal detention centre in Brooklyn but who was later cleared of links to terrorism. Ehab Elmaghraby will discontinue his law suit against various Government officials, including former Attorney-General John Ashcroft and the FBI Director Robert S. Mueller, and will receive 300.000 $ in compensation. For more details, see N. Bernstein, 'US Is Settling Detainee's Suit in 9/11 Sweep', *the New York Times*, 28 February 2006.

Meanwhile, on 4 January 2006, the US Supreme Court granted the US Government's request to transfer Jose Padilla from military custody to civilian custody but will consider the pending petition for certiorari in due course (the judgment is available at http://news.findlaw.com/hdocs/docs/padilla/scotus10406opn.html; see also the previous issue of this *Newsletter*).

Furthermore, a group of Chinese Uighurs who continue to be held at Guantanamo despite being determined not to be 'enemy combatants' are appealing their case to the US Supreme Court after a District Court judge ruled on 22 December 2005 (*Abu Bakker Quassim, et al. v. George W. Bush, et al*, order and memorandum available at http://www.dcd.uscourts.gov/opinions/district-court-2005.html) that their continued detention was illegal but that he lacked the power to order them to be freed (see C.D. Leonnig, 'Chinese Detainees' Lawyers Will Take Case to High Court', *The Washington Post*, 17 January 2006).

In still another case, US District Judge David G. Trager of the Eastern District of New York has granted the US Justice Department's request for dismissal of a lawsuit filed by Maher Arar concerning his 'extraordinary rendition'. For more details, see http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=zPvu7s2XVJ&Content=377 and http://jurist.law.pitt.edu/paperchase/2006/02/federal-judge-dismisses-canadian.php. For the text of the judgment, see http://www.justicescholars.org/pegc/archive/Arar_v_Ashcroft/opinion_DGT_20060217.pdf.

Meanwhile, on 22 February 2006, Human Rights First issued a report analyzing the US' handling of investigations into deaths in US custody, entitled *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan* and available at http://www.humanrightsfirst.org/us_law/etn/dic/index.asp. The report *inter alia* finds "*accountability for wrongdoing has been limited at best, and almost non-existent for command*", that "*commanders have played a key role in undermining chances for full accountability*", that "*command responsibility itself […] has been all but forgotten*" and that "*The failure to deal adequately with these cases has opened a serious accountability gap for the U.S. military and intelligence community, and has produced a credibility gap for the United States*".

In addition, one day later, the American Civil Liberties Union released documents which it claims show the refusal to abandon interrogation techniques deemed to have probably been illegal and ineffective by the FBI, as well as documents indicating high level approval of such interrogation techniques, see http://www.aclu.org/intlhumanrights/gen/24249prs20060223.html.

Furthermore, several top military lawyers top lawyers for the Army, Navy and Marine Corps have told Congress that a number of aggressive techniques used by military interrogators on a detainee at the Guantanamo Bay prison were not consistent with the guidelines in the Army field manual on interrogations because they were humiliating or degrading. See e.g. J. White, 'Military Lawyers Say Tactics Broke Rules', *The Washington Post*, 16 March 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/03/15/AR2006031502299_pf.html. Also, details of resistance against certain interrogation techniques from lawyers within the administration have become public, see e.g. J. Mayer, 'How an internal effort to ban the abuse and torture of detainees was thwarted', The New Yorker, 20 February 2006,

http://www.newyorker.com/printables/fact/060227fa_fact and http://www.newyorker.com/images/pdfs/moramemo.pdf.

In contrast, the White House is said to have decided that statements made under torture will not be admissible in military commission trials, a decision which still has to be formally announced, see the *Wall Street Journal online*, 22 March 2006.

On a different matter, the Army is looking again into the death of an American soldier shot by his fellow Rangers on 22 April 2004. See M. Davey & E. Schmitt, '2 Years After Soldier's Death, Family's Battle Is With Army', *The New York Times*, 21 March 2006.

(F. Naert)

US Judge Allows Filing of Lawsuit against US Company for Indonesian Rights Abuses

A US judge allowed Indonesian villagers to file a lawsuit (filed on their behalf by the International Labor Rights Fund) against Exxon, an American oil giant, for allegedly allowing its facilities to be used by Indonesian soldiers to torture locals and to commit other human rights abuses abuses in the Aceh province. The company has not yet decided whether it will appeal the ruling. The case was brought in 2001 but the hearings were postponed in 2002 after the State Department said the lawsuit could harm American interests. However, on 2 March US District Judge Louis Oberdorfer ruled the case could proceed. See http://www.laborrights.org/projects/corporate/exxon/, and, for the judgment, http://www.laborrights.org/projects/corporate/exxon/DenyingDismissal030206.pdf.

(F. Naert)

INTERESTING PUBLICATIONS

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

T. BECKER, *Rethinking State Responsibility for Terrorism*, Hart, 2006, ISBN 1-84113-606-9 (hb) / 1-84113-627-1 (pb);

THE CHALLENGES PROJECT, *Meeting the Challenges of Peace Operations: Cooperation and Coordination*, Elanders Gotab, Stockholm, 2005, available at http://www.challengesproject.net/roach/Challenges_Concluding_Report_2006.do?pageId=55 (the Executive Summary and Conclusions are also available in Arabic, Chinese, French, Russian and Spanish);

A.-M. DE BROUWER, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, Intersentia, 2005, ISBN 90-5095-533-9 (pb);

M. GLASIUS, *The International Criminal Court: A Global Civil Society Achievement*, Routledge, 2006, ISBN 0415333954;

M. NOONE, 'Unprivileged Belligerency: The IRA', LXXXV *the Military Review* (September-October 2005), pp. 58-63;

P. ROWE, *The Impact of Human Rights Law on Armed Forces*, Cambridge UP, 2006, ISBN-13: 9780521851701 / ISBN-10: 052185170X (hb) / ISBN-13: 9780521617321 / ISBN-10: 0521617324 (pb);

A. SCHNABEL & H.-G. EHRHART (eds.), *Security Sector Reform and Post-Conflict Peacebuilding*, 2006, UN University Press, ISBN 92-808-1109-6;

Studia Diplomatica, *the Brussels Journal of International Relations*, published by the Belgian Royal Institute for International Relations has issued a call for papers, see http://www.irri-kiib.be/news/SD-Call-for-Pap.doc.

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