



NEWSLETTER OCTOBER/NOVEMBER/DECEMBER 2006

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EDITORIAL

Dear Member,

Even if the XVIIth Congress is still fresh in our memories, the Society's Boards are already planning our XVIIIth Congress, which is to be held in 2009. The upcoming meetings in Stavern next spring should give us a clear view on what the possibilities are. I therefore seize this opportunity to launch a call for proposals both regarding the place where the next Congress could be held as well as regarding the subject matters for study and discussion.

Upon request, the General Secretariat will be pleased to provide you with any more detailed information you might require, for example as to the question what is expected from the host organisation of a Congress.

On a separate issue, we are working on the organisation of the VIIIth Seminar for Legal Advisors of the Armed Forces, which is planned to be held later this year. We will keep you informed as more detailed information will be confirmed.

Ludwig Van Der Veken
Secretary-General

NEWS, ANNOUNCEMENTS OF CONFERENCES, SEMINARS, ETC.

The **Managing Board and the Board of Directors** of the Society will convene in Stavern (Norway) from 24-27 April 2007.

Belgian National Group of the Society: Conference in Brussels on 9 February 2007 on the theme of customary international humanitarian law (more information is available at the Group's website).

The **US National Group** of the Society will hold an international seminar in Washington D.C. on 1 March 2007 on Maritime Security Operations (more information is available at the Society's website).

New Zealand Armed Forces Law Conference at Trentham Military Camp (New Zealand) from 9 to 10 February 2007.

The French Committee of Humanitarian Law and of the Law of War (the French National Group of the Society) has participated in a seminar that was held at the Council of Europe in Strasbourg on 5 October 2006. The theme was 'the tools for European independence - With no independent defence or industrial and technological base, there is no sovereign Europe!' This seminar has been organised jointly by the 'Académie européenne', 'Forum Carolus' and the 'Association Rhin Volga'.

This seminar has been organised under the patronage and in the presence of:

-Jean-Pierre MASSERET, former minister, Chairman of the WEU Parliamentary Assembly, President of the Lorraine Regional Council, Senator of the Moselle department;

-His Excellency Alexandre Orlov, Permanent representative of the Russian Federation at the Council of Europe;

-Philippe Monfils, chairman of the Defence Commission of the Belgian Chamber of Representatives, representative to the WEU Parliamentary Assembly.

There have been discussions about the indispensable construction of an autonomous European defence in the service of a sovereign political Europe, in the presence of representatives of the European defence industry.

The French Committee of Humanitarian Law and of the Law of War has also participated in the conference of the 'Lycées René CASSIN' (the father of the universal declaration of human rights) in Strasbourg on 6 and 7 October 2006.

This conference has been organised under the patronage of:

-the director of education of the 'Académie' of Strasbourg;

-the chairman of the International Institute of Human Rights;

-the Council of Europe secretary general;

-the secretary-general of the French national commission for UNESCO;

-the secretary-general of the 'Organisation internationale de la Francophonie'.

(A. Grosrenaud, Secretary-General of the French National Group)

Human Rights and International Legal Discourse organises an **international conference on accountability for human rights violations by international organizations** in Brussels from 16 to 17 March 2007. For more information see the flyer annexed to this newsletter.

The European Working Group for Non-Lethal Weapons

Several European organisations are currently developing and implementing non-lethal capabilities. This enables to counter many emerging and non-traditional threats which appear in low intensity and asymmetric conflicts, as well as in peace support and anti-terrorism operations.

Non-lethal weapons are of interest to both the military and law enforcement agencies, as in many cases the character of the scenarios is similar, non-lethal weapons can indeed be seen as having dual use application: They provide armed forces, law enforcement agencies, and policy makers with additional options to respond in a tailored and graduated manner.

Therefore the 'European Working Group for Non-Lethal Weapons' was founded in 1998 at the Institute for Chemical Technology of the Fraunhofer Gesellschaft in the city of Pfingsttal/Berghausen (Germany). At present researchers and experts from Austria, the Czech Republic, France, Germany Italy, the Netherlands, Russia, Sweden and the United Kingdom are in the Group. The Group is open to all organisations working in the area of non-lethal weapons. Cooperation with the European Defence Agency in Brussels has been considered.

The objective of the working group is the promotion and development of the knowledge about and research into non-lethal weapons, the coordination of related activities and the initiation of cooperation within the field of non-lethal options. Non-lethal weapons are understood by the working group as new means which minimise the risk of fatalities and harm to humans, the environment or other important assets.

The working group promotes relevant studies and holds seminars, symposia and conferences relating to non-lethal weapons. These activities include the legal aspects of the use of non-lethal weapons as a key element. The next symposium on non-lethal weapons will be held in Ettlingen (Germany) from 21 to 23 May 2007. The legal aspects of this symposium are prepared by a virtual working group. Experienced and committed lawyers are invited to present their views on subjects identified in a document which can be provided on request.

For more information and for contributions (deadline: 28 February 2007) please contact Dr. Friedhelm Krüger Sprengel (E-mail: fried.ks@t-online.de, Tel.: +49 228 257667, Fax: +49 228 257601 and Mail: F. Krüger-Sprengel - Bonn Office - Lilienthalstrasse 9 - D 53 125 Bonn - Germany)

(Dr. F. Krüger Sprengel)

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 and Conferences

UN General Assembly Adopts Treaty against Enforced Disappearances

On 20 December 2006 the UN General Assembly adopted the International Convention for the Protection of All Persons from Enforced Disappearances. This convention had been prepared for some time in the UN: see previous issues of this *Newsletter*, including for a short summary.

(F. Naert)

Pact on Security, Stability and Development in the Great Lakes Region

At the International Conference on the Great Lakes Region held in Nairobi (Kenya) from 14 to 15 December 2006, Angola, Burundi, the Central African Republic, the Republic of Congo, the DRC, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia have signed the Pact on Security, Stability and Development in the Great Lakes Region to prevent conflict and promote economic stability. Article 5 of the Pact contains a Protocol on Non-aggression and Mutual Defence in the Great Lakes Region. Article 8 contains a Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination. The Pact will enter into force thirty days after receipt of the eight instrument of ratification.

(A. Vanheusden)

Towards an Arms Treaty

On 6 December 2006 the First Committee to the UN General Assembly adopted a resolution that could lead to a new international treaty regulating the global trade in conventional arms. The resolution, "Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms," was adopted by a recorded vote, with the United States alone in opposing the text which was supported by 153 countries. An additional two dozen countries abstained. For more information see <http://www.un.org/apps/news/story.asp?NewsID=20876&Cr=disarmament&Cr1=> and <http://www.un.org/News/Press/docs//2006/ga10547.doc.htm>.

(I. Heyndrickx)

UN 6th Review Conference on Biological Weapons

The Sixth Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (BWC) has concluded its three-week session on 8 December 2006. The Conference marked some important steps in the further strengthening of the effectiveness of the Biological Weapons Convention. A series of decisions and recommendations on various issues were taken, including the creation of an Implementation Support Unit, to provide administrative support and confidence-building measures. Moreover, an intersessional

work programme for 2007-2010 was determined, and on the promotion of universalisation it was agreed that a concerted effort by States parties was needed to persuade States not Parties to join the Convention. There are currently 155 States parties to the Biological Weapons Convention, with a further 16 states having signed but not yet ratified. For more information see <http://www.un.org/News/Press/docs//2006/ga10547.doc.htm> and [http://www.unog.ch/80256EE600585943/\(httpPages\)/3496CA1347FBF664C125718600364331?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/3496CA1347FBF664C125718600364331?OpenDocument).

(I. Heyndrickx)

UN 3RD REVIEW CONFERENCE OF THE STATES PARTIES TO THE CONVENTION ON CERTAIN CONVENTIONAL WEAPONS

From 7 to 17 November 2006 the Third Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW) was held, in which a special plenary meeting of the Conference took place to mark the entry into force of CCW Protocol V on Explosive Remnants of War. The Conference ended with a substantial outcome document and the agreement to continue to work on the issue of conventional weapons in the coming years.

With regard to the mandate for further work on Explosive Remnants of War (ERW) and cluster munitions it was agreed "to consider further the application and implementation of existing international humanitarian law to specific munitions that may cause explosive remnants of war, with particular focus on cluster munitions, including the factors affecting their reliability and their technical and design characteristics, with a view to minimizing the humanitarian impact of the use of these munitions." [emphasis added]

NGO's regretted the fact that there was no agreement on the proposal to begin negotiations on cluster munitions in the CCW. Following the decision on the mandate on cluster munitions, and the lack of consensus with a view to negotiate a legally binding instrument, Norway announced on the 16th of November 2006 that Oslo will lead a new process outside the CCW aimed at a cluster munition treaty.

On the issue of Mines Other Than Anti-Personnel Mines the State Parties did not succeed in concluding a legally binding document. However, it was agreed to continue negotiations on this issue the coming year.

Nevertheless, the State Parties did come to a decision to have a compliance mechanism with a pool of experts; there was agreement on a plan of action to universalisation of the CCW, and on a financial sponsorship program to get more states to attend CCW meetings.

For more information see: <http://www.sfdi.org/actualites/a2006/Sentinelle%2086.htm> and [http://www.unog.ch/80256EE600585943/\(httpPages\)/1DB747088014E6D7C12571C0003A0818?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/1DB747088014E6D7C12571C0003A0818?OpenDocument).

(I. Heyndrickx)

International Organisations

UN Security Council Adopts Resolution on Protection of Civilians and Journalists

On 23 December 2006, the UN Security Council adopted resolution 1738 reaffirming the protection of civilians in armed conflicts generally and in particular the civilian status of journalists. The resolution urges warring parties to prevent abuses against journalists and to respect their professional independence and rights on the one hand and condemns all incitements to violence, stressing the need to bring to justice individuals responsible for it on the other hand. The resolution also noted the Council's readiness to consider appropriate action against violations of both these sets of rules and is available online at http://www.un.org/Docs/sc/unsc_resolutions06.htm.

(F. Naert)

Sudan Consents to UN Role in Darfur Peace Force as Violence Continues

After long discussions the Sudanese Government agreed to a mixed UN-AU peace force in Darfur. On 20 November 2006, agreement was reported between the UN, Sudan and the AU on a mixed or hybrid peacekeeping force in various phases and the UN and AU concluded an agreement on such a force later that month. However, further clarification was required and Sudan's consent was only formally given late December 2006 and on 28 December 2006 the first UN personnel deployed in Sudan. The UN Security Council had authorised the transition to a UN force in Darfur on 31 August 2006 in Resolution 1706 subject to Sudanese consent.

Meanwhile, the humanitarian situation in Darfur remains dire and the violence there continues. UN Under-Secretary-General for Humanitarian Affairs Jan Egeland stated in November that it was the worst security situation he had ever seen in the region and noted that deadly attacks, particularly against civilians, internally displaced persons and aid workers, are being reported every day throughout Darfur.

On 28 November 2006 the new UN Human Rights Council expressed alarm at the humanitarian situation in Darfur and called on all parties to immediately end their violations of human rights and other international laws but narrowly rejected proposals that would have underscored the responsibility of the Khartoum Government to protect all Sudanese against violations, and mentioned the need to end impunity. On 13 December 2006, the Human Rights Council did agree to send a 5 member panel to Darfur to assess the situation, apparently duplicating the work on an earlier investigation that led to the Security Council's referral of the Darfur situation to the ICC (see previous issues of this *Newsletter*; in fact, on 14 December 2006 the ICC's Chief Prosecutor informed the Security Council that he is almost ready to submit the first Darfur cases to ICC judges). The Office of the High Commissioner for Human Rights on 4 November 2006 stated that Sudan's Government should immediately investigate recent militia attacks in West Darfur, in particular an attack on October 29 against civilians and displaced persons in the vicinity of Jebel Moon and Seleha areas, that latest reports show killed around 50 civilians and affected up to 7000 others, many of whom fled across the border to Chad (which is harbouring over 200.000 Sudanese refugees).

See UN press releases of 4, 20, 23 and 28 November and 12, 13, 14, 26, 27 and 28 December 2006 and *Sentinelle* No. 88 of 3 December 2006.

(F. Naert)

UN Security Council Resolution as Legal Basis for Use of Force in Iraq

On 28 November 2006, the UN Security Council adopted Resolution 1723 which extended the mandate of the multinational force until December 2007. Specifically the UNSC, acting under Chapter VII of the UN Charter, noted that the presence of the multinational force in Iraq is at the request of the Government of Iraq and reaffirmed the authorization of the force as set forth in its Resolution 1546 (2004). Moreover, the UNSC further decided to review the multinational force's mandate at the request of the Government of Iraq not later than 15 June 2007 and declared that it would terminate the mandate earlier if requested by the Government of Iraq. This resolution effectively extends the international legal mandate for the multinational force to continue operations in Iraq unless the UNSC decides to terminate the mission earlier.

(UK Operational Law Branch, *Land Warfare Centre Newsletter*, December 2006).

UN Security Council Imposes Sanctions on Iran over Uranium Enrichment

After long discussions (starting in 2003 when it was discovered that Iran had concealed nuclear activities for 18 years in breach of its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons), on 23 December 2006, the UN Security Council adopted resolution 1737 imposing (specific nuclear technology and materials related) sanctions on Iran in response to that country's uranium-enrichment activities. The aims of these activities are a matter of debate: Iran says the activities are for peaceful purposes but a number of other countries believe they pursue military ambitions. The resolution came after successive reports by the International Atomic Energy Agency indicating its inability to certify that Iran's

motives are entirely peaceful. Also, Iran has not taken a number of other steps previously required by the UN Security Council in its resolution 1696 (2006). The resolution, which also set up a sanctions committee and threatens "further appropriate measures" in case of non compliance, is available online at http://www.un.org/Docs/sc/unsc_resolutions06.htm. See also UN press release of 23 December 2006 and *Sentinelle* No. 81 of 8 October 2006.

(F. Naert)

UN Security Council Reacts to North Korean Nuclear Test

On 14 October 2006, the UN Security Council in Resolution 1718 condemned the North Korean nuclear test of early October 2006 in violation of Security Council resolution 1695 (2006), demanded various steps from the country and imposed a number of sanctions. See http://www.un.org/Docs/sc/unsc_resolutions06.htm, *ILIB* of 1 November 2006; the *ASIL Insights* by C. Le Mon, 'International Law and North Korean Nuclear Testing', 20 October 2006 and by A.L. Paulus & J. Müller, 'Security Council Resolution 1718 on North Korea's Nuclear Test', 3 November 2006, both available at <http://www.asil.org/insights.htm> and *Sentinelle* Nos. 80 and 81 of 8 and 15 October 2006.

(F. Naert)

UN Bodies Criticise Israeli Actions in Gaza

The Israeli military actions in the Gaza strip which commenced late June 2006 have given rise to concern, including in particular the shelling of a residential in Beit Hanoun on 8 November 2006 in which 18 Palestinian civilians were killed and about 60 others injured. The UN Special Coordinator for the Middle East Peace Process said he was "*deeply shocked and appalled*" by the shelling and called on the Palestinian side to cease attacks against Israeli targets. On 8 November 2006, the Special Rapporteur on the situation of human rights in the occupied Palestinian territories, qualified Israel's military operation in Gaza as a "*brutal collective punishment of a people, not a government*". On 15 November 2006 the UN Human Rights Council condemning the Israeli actions as "*a collective punishment of ... civilians*" and voted to send a fact-finding mission to the region (see <http://www.ohchr.org/english/bodies/hrcouncil/specialesession/3/index.htm>). Israel's representative told the Council that his country was dismayed by the lack of impartiality and objectivity being shown and blamed the Palestinian Authority for not preventing the firing of rockets at Israeli communities from Beit Hanoun. On 20 November 2006 the UN General Assembly urged Israel to withdraw its troops and called for the dispatch of a fact-finding mission to Beit Hanoun, after the US vetoed a similar draft text in the Security Council on 11 November 2006 (see <http://www.un.org/News/Press/docs//2006/ga10534.doc.htm>). On 21 November 2006, the UN High Commissioner for Human Rights, said that massive violations against civilians had taken place in the Gaza Strip and that an independent, credible and thorough inquiry was needed to determine where responsibility lies for the deaths in Beit Hanoun. See UN press releases of 8, 11, 15, 20 and 21 November 2006.

Furthermore, a report (to be) aired on Italian television raised the possibility that Israel has used an experimental weapon in the Gaza Strip, causing especially serious physical injuries, similar to a weapon developed by the US military, known as DIME (Dense Inert Metal Explosive). See M. Rapoport, 'Italian Probe: Israel Used New Weapon Prototype in Gaza Strip', *Haaretz*, 11 October 2006, <http://www.haaretz.com/hasen/spages/772933.html>.

(F. Naert)

UN Struggles to Eradicate Abuse by UN Peacekeepers and Staff

On 4 December 2006, the UN held a high-level meeting aimed at eliminating sexual exploitation and abuse. The event involved the Department of Peacekeeping Operations, UN agencies, funds and programmes, Member States, troop contributing countries and non-governmental organizations. Proposals include negotiations to be held next year to examine a possible treaty in order to assure there is always some jurisdiction covering the actions of a UN peacekeeper. Since the beginning of 2004, the UN has investigated 319 peacekeeping

personnel in all missions, resulting in the summary dismissal of 18 civilians and the repatriation on disciplinary grounds of 17 police and 144 military personnel. The meeting followed new reports of abuse (see <http://news.bbc.co.uk/1/hi/world/americas/6197370.stm>). Meanwhile in Liberia, the Government, together with national and international partners, today launched a campaign to combat sexual exploitation and abuse. Moreover, on 18 December 2006, the UN Special Committee on Peacekeeping Operations called for continued efforts to formulate measures against sexual exploitation and abuse involving countries contributing troops to the UN's missions and *inter alia* requested an expert working group to pursue its consideration of a revised model memorandum of understanding between the UN and troop contributors. See UN press releases of 30 November and 4 and 18 December 2006; *Sentinelle* No. 89 of 10 December 2006 and previous issues of this *Newsletter*.

(F. Naert)

UN Adopts Standards for Disarming, Demobilizing and Reintegrating Ex-Combatants

On 18 December 2006, the UN launched a new set of standards aimed at improving the process of disarming, demobilizing and reintegrating ex-combatants (DDR). The new Integrated DDR Standards acknowledge the difficulties of DDR and call for measures to provide psycho-social counseling, job training, educational opportunities and mechanisms to promote reconciliation in the communities where the ex-combatants return. The Standards were launched together with accompanying tools. See <http://www.unddr.org> (with further links) and UN press release of 18 December 2006.

(F. Naert)

UN Security Council Details (De)Listing Procedures

On 19 and 22 December 2006, the UN Security Council respectively adopted resolutions 1730 and 1735, which detail the listing and delisting procedures for persons in respect of various UN sanctions lists. The resolutions are available online at http://www.un.org/Docs/sc/unsc_resolutions06.htm.

(F. Naert)

IAEA Issues Guidelines for Responding to Nuclear/Radiological Incidents

On 22 December 2006, the International Atomic Energy Agency issues guidelines for 'First responders' to a nuclear or radiological emergency, whether from an attack or another incident. The guidelines consist of new web pages and a series of publications, see <http://www.iaea.org/NewsCenter/News/2006/firstresponders.html> (with further links) and UN press release of 18 December 2006.

(F. Naert)

Eritrea Releases UN Volunteer

On 4 October 2006, Eritrea released an UN volunteer who worked for the UN Mission in Ethiopia and Eritrea (UNMEE) and had been detained for more than five weeks. UNMEE monitors the ceasefire along the disputed border over which Eritrea and Ethiopia fought a war between 1998 and 2000 but its work has been hampered by restrictions imposed on the Mission by Eritrea. See UN press release of 4 October 2006 and previous issues of this *Newsletter*.

(F. Naert)

UN Takes over All Policing in Timor Leste

In a further effort to reduce lawlessness in Timor Leste, the UN will have prime responsibility for police operations throughout the country, after signing an agreement with the Government on 1 December 2006. This is the first ever such arrangement between a sovereign nation and the UN, and it details the operational arrangements and command and control procedures

through which the police component of the UN Integrated Mission in Timor-Leste (UNMIT) will take responsibility as the interim law enforcement agency. The Security Council created UNMIT in August 2006 (see Resolution 1704 of 25 August) to help restore order after deadly violence broke out in the spring of this year. See UN press release of 1 December 2006.

(F. Naert)

UN to Investigate Illegal Armed Groups in Guatemala

On 12 December 2006, the UN signed an agreement with the Guatemalan Government to set up an independent commission to investigate illegal armed groups that have been operating in the country and to help justice officials carry out criminal prosecutions against them (UN press release of 12 December 2006).

(F. Naert)

EP Report Claims Several EU Governments Knew of US Secret Detentions

On 24 of November 2006, the European Parliament's Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners issued an interim report which *inter alia* claims that a number of EU Governments knew of the US detention programme (said to be divulged at EU and NATO foreign Ministers meetings) and contains a number of recommendations, some of which are also relevant to detention in military operations. The report is available at http://www.europarl.europa.eu/compar/tempcom/tdip/draft_final_report_en.pdf. See generally http://www.europarl.europa.eu/compar/tempcom/tdip/default_en.htm. See also previous issues of this Newsletter.

(F. Naert)

International(ised) Courts

Developments at the International Criminal Court¹

On 9 November 2006, the ICC commenced its pre-trial hearings to determine whether Thomas Lubanga Dyilo, a former militia leader in the Democratic Republic of the Congo (DRC) who was arrested in March, will be the first person tried before the ICC. The accused was formally charged by the ICC Prosecutor's office in August with enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities, and in particular with playing "an overall coordinating role" in the policy of the Forces Patriotiques pour la Libération du Congo to recruit and enlist child soldiers. The hearings will determine whether there is enough evidence to establish substantial grounds to believe that Mr. Lubanga Dyilo committed the crimes charged.

Furthermore, Chad and Montenegro became the latest States Parties to the ICC Statute, effective respectively 1 January 2007 and 3 June 2006.

In addition, at its fifth session the Assembly of States Parties adopted four resolutions: on strengthening the International Criminal Court and the Assembly of States Parties, on the programme budget for 2007, on the permanent premises of the Court and on the strategic planning process of the Court.

Finally, reports indicate that US opposition to the ICC is decreasing. In particular, Mid November 2006, the US has withdrawn sanctions against some 25 countries that have refused to guarantee that they would never surrender an American to the ICC. Other signals include the absence of anti-ICC statements, a more positive attitude of the US military towards the ICC (reflected in a study by the Henry L. Stimson Center, see <http://www.stimson.org/pub.cfm?id=278>), in addition to the US' non opposition to the UN Security Council's referral of the Darfur situation to the ICC. See N. Boustany, 'A Shift in the Debate On International Court: Some US Officials Seem to Ease Disfavor', 7 November 2006, *The Washington Post*, <http://www.amicc.org/docs/11-7-06%20Washington%20Post.pdf> and K.

¹ See generally <http://www.icc-cpi.int>.

Van Dusen, 'US Opposition to ICC Said to be Decreasing', translation from a contribution by T.-J. Meeus in the *NRC Handelsblad* of 21 November 2006.

(F. Naert)

Developments at the ICTY²

On 24 November 2006, the ICTY appellate chamber dismissed the prosecutions request for review of its judgement in the *Tihomir Blaškić* case. Blaškić, a former Bosnia Croat general, was charged with, among other things, unlawful attacks against the civilian population, taking civilian hostages and using them as human shields as well as wilful killing between 1 May 1992 and 31 January 1994. Previously, on 3 March 2000, he was found guilty of "committing, ordering, planning, or otherwise aiding and abetting, various crimes against the Bosnia Muslims population." The Appeals Chamber reversed several of the findings of guilty by the Trial Chamber and reduced his sentence to 9 years. The prosecution had argued that its previous decision to reduce the sentence and find the accused not guilty of some of the charges should be reviewed in light of new facts discovered. The appellate court disagreed and determined that what the prosecution offered was not "new facts" rather "additional evidence" relating to facts previous considered.

Furthermore, on 17 November 2006, the Tribunal's Referral Bench referred its first case to the Republic of Serbia. The ICTY has previously transferred nine cases to Bosnia and Herzegovina (BiH) and one case to Croatia. In one of these cases, on 14 November 2006, the Court of BiH found Radovan Stankovic guilty on four counts of crimes against humanity and sentenced him to 16 years imprisonment. See <http://www.un.org/icty/latest-e/index.htm> for more information.

(UK Operational Law Branch, *Land Warfare Centre Newsletter*, December 2006)

Moreover, on 28 November 2006, the ICTY's Appeals Chamber partly upheld the appeal of Blagoje Simic, a Bosnian Serb politician who had been convicted of persecuting non-Serb civilians. The Tribunal reversed the 2003 ruling that Simic participated in a joint criminal enterprise with the aim of persecuting non-Serbs and found that the prosecution acted unfairly in respect of this charge, rendering the trial unfair. It also overturned the conviction for persecution by torture and beating but upheld the conviction for aiding and abetting persecution in the form of unlawful arrests and detention, confinement of prisoners in inhumane conditions, forced labour and forced displacement. The sentence was reduced from 17 to 15 years.

In addition, on 30 November 2006, the ICTY's Appeals Chamber sentenced Stanislav Galic, a former Bosnian Serb general, to life in prison after dismissing an appeal against his convictions for his role in the long siege of the city of Sarajevo during the early 1990s and upholding the prosecutor's appeal against the original December 2003 sentence of 20 years. It is the first time that the ICTY's appeal chamber has imposed the maximum penalty.

Also, on 27 September 2006, the ICTY sentenced Momcilo Krajišnik, a former Bosnian Serb political leader, to 27 years' jail after convicting him of persecutions, extermination, murder, deportation and the forced transfer of non-Serb civilians. He was acquitted of genocide, complicity in genocide and one count of murder as a war crime. The Tribunal established the existence of a joint criminal enterprise and found that Mr. Krajišnik gave the go-ahead for a programme of ethnic cleansing and played a crucial role in the crimes.

(F. Naert)

Developments at the ICTR³

On 7 June 2004, Sylvestre Gacumbitsi, the *Bourgmestre* of Rusumo Commune and the highest ranking local administrative official, was convicted by an ICTY Trial Chamber for genocide and extermination and rape as crimes against humanity and was sentenced to 30 years. On 7 July 2006, the Appeals Chamber dismissed Gacumbitsi's appeal and allowed parts of the Prosecution's appeal, *inter alia* finding the accused also guilty of murder as a

² See generally <http://www.un.org/icty>.

³ See generally <http://www.ictt.org>.

crime against humanity and increasing the sentence to life imprisonment. See also *ILIB* of 26 September 2006

On 13 December 2006, the ICTR sentenced Athanase Seromba, a former Roman Catholic priest who encouraged and directed the demolition of a church where about 2000 Tutsis had tried to take shelter during the 1994 genocide – killing all those inside – to 15 years' jail, finding him guilty of genocide and extermination as a crime against humanity but dismissing the charges of complicity in genocide and conspiracy to commit genocide.

On 14 December 2006, the ICTR accepted the guilty plea of Mr. Nzabirinda, a former businessman and youth organizer, to the charge of murder as a crime against humanity. He will be sentenced in January 2007.

Fourthly, on 6 December 2006, Elizaphan Ntakirutimana, a pastor who had been sentenced to ten years in prison by the ICTR, was released as he had completed his prison term, becoming the first ICTR convict to be released after serving his sentences.

(F. Naert)

Inter-American Court of Human Rights Judgments

The Inter-American Court of Human Rights ruled on 26 September 2006 in the case of *Almonacid-Arellano et al. v. Chile* that a Chilean amnesty law was contrary to the Inter-American Convention of Human Rights. Four days earlier, in the case of *Goiburú et al. v. Paraguay*, the Court held that Paraguay, under the regime of Stroessner, violated various fundamental rights in a campaign of State terror. The judgments are available in Spanish at <http://www.corteidh.or.cr/casos.cfm>. For a summary, see *Sentinelles* No. 83 of 22 October 2006.

(F. Naert)

EUROPEAN COURT OF HUMAN RIGHTS FINDS THAT RUSSIA VIOLATED RIGHT TO LIFE OF CHECHENS

In the case of *Estamirov and Others v. Russia*, the ECtHR ruled on 12 October 2006 that Russia has violated articles 2 (right to life) and 13 (right to an effective remedy) of the European Convention of Human Rights and awarded a significant compensation. The suit was filed by relatives of five family members killed in Grozy, Chechnya, claiming that Russian servicemen killed their relatives in February 2000. The applicants had attempted a number of remedies before the Russian Courts but without success. The ECtHR held that they were not required to exhaust all their domestic remedies because they were lacking or ineffective, noting *inter alia* that a criminal investigation continued for more than six years without results. It ruled that there was a violation of Article 2 of the Convention because the authorities failed to conduct a proper investigation and found that the deaths of the applicant's relatives could be attributed to the State, in light of all the evidence. The Court held that there was a violation of Article 13 of the Convention because there was an ineffective investigation into the killings, which in turn created an inability of the applicants to obtain other civil remedies. The judgment is available at <http://cmiskp.echr.coe.int>. See also *ILIB* of 1 November 2006 and *Sentinelles* No. 89 of 10 December 2006.

(F. Naert)

EUROPEAN COURT OF HUMAN RIGHTS RULES THAT A UK COURTS MARTIAL VIOLATED THE ECHR

In the case of *Martin v. the UK*, the ECtHR ruled on 24 October 2006 that the UK courts martial of the child of an army Corporal in Germany in 1995 violated article 6 (right to a fair trial) of the European Convention of Human Rights because the composition, structure and procedure of the applicant's court-martial were sufficient to raise in him a legitimate fear as to his lack of independence and impartiality. The judgment is available at <http://cmiskp.echr.coe.int>.

(F. Naert)

The Special Court for Sierra Leone

The Special Court for Sierra Leone was established in 2002 to provide justice for the victims of the terrible crimes committed during the destructive conflict that held the country in terror for over a decade. In comparison with the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone is a fairly unique construction. Its establishment was decided by a 2002 negotiated agreement between the Government of Sierra Leone and the United Nations. (For the full text of this document, see <http://www.sc-sl.org/scsl-agreement.html>.) The creation of a unique Court by a *sui generis* treaty may demonstrate a tendency to make more effort to adapt post-conflict criminal proceedings to the local context.

The Special Court holds competence to judge those who "bear the greatest responsibility for serious violations" of crimes against humanity, common article 3 of the Geneva Conventions and of Additional Protocol II, other serious violations of international humanitarian law and certain crimes under Sierra Leonean law, committed after November 30th 1996 (the date of the signing of the Abidjan Peace Agreement). Its jurisdiction *ratione materiae* thus covers international as well as national law. Concerning the Court's jurisdiction *ratione personae* it is interesting to note that child soldiers, who had attained the age of fifteen at the time of the alleged offence, can be brought to trial before the Special Court (they do however receive special benefits and must be punished with measures other than imprisonment). This is thus the first internationalised criminal court that tries minors. The Court also holds a secondary jurisdiction over personnel from UN peacekeeping forces.

Thirteen persons have been indicted. The accusations against them have been brought together in various cases: the case against the CDF (Civil Defense Forces) accused, the RUF (Revolutionary United Front) accused and the AFRC (Armed Forces Revolutionary Council) accused. Last but not least, former Liberian president Charles Taylor has been indicted for his involvement in the conflict and is now awaiting his trial in the facilities of the ICC in The Hague. Two indictments were withdrawn following the death of the accused (Foday Sankoh and Sam Bockarie), while AFRC leader Johnny Paul Koroma is still at large.

Certain elements of the Court's jurisprudence deserve special attention, as they may have an effect on the future development of international humanitarian and criminal law:

- The Appeals Chamber rejected preliminary objections about a lack of jurisdiction from the Defence, who considered the Court to be in violation of the Sierra Leonean Constitution. It stressed the international character of the Court by stating that its creation by an international treaty impedes the connection to national law.
- The Court affirmed the lack of immunity of heads of state before international criminal courts. This decision of the Appeals Chamber restates the international aspect of the Court for Sierra Leone and bases itself on the jurisprudence of the International Court of Justice (the Yerodia case, DR Congo vs. Belgium, judgment of 14 February 2002). This ruling of course enables the prosecution of Charles Taylor.
- The Appeals Chamber ruled that the amnesties initially accorded under the 1999 Lomé Peace Agreement were not valid as amnesties can only apply to national criminal jurisdiction. It was thus confirmed that crimes against humanity and war crimes are universal crimes that states are under international obligation to act against.
- As an unseen precedent in international law, forced marriage was defined by the Court as a crime against humanity and added to the indictments of the accused.
- Child abduction and recruitment was defined as a war crime that was a part of customary international law in 1996 and entails individual criminal responsibility.

Overall, the Special Court has a good record regarding issues of local ownership and the forging of ties with the Sierra Leonean society. The choice of the Sierra Leonean capital Freetown for its seat may hold a large symbolic value for the people of Sierra Leone as it could create a larger feeling of ownership of the justice process. Furthermore, the criminal enquiries are for a large part run by domestic investigators. It is hoped that the workings of the Court may increase the legitimacy and workings of the local legal system, which will benefit from the infrastructure of the Court and the professional development it entails. On the other hand, the relationship with the Sierra Leonean legal system has not been optimal as the

Court has been viewed to be too "international" and not employing sufficient Sierra Leonean officials in high profile posts. However, the institution of the tribunal may in itself reinforce the rule of law in this unstable West-African country.

This article was mainly based on a recent report of the International Center for Transitional Justice: "The Special Court for Sierra Leone under Scrutiny", available at www.ictj.org (last retrieved 15 September 2006). The following publications were also useful resources:

-H. JALLOW, "The legal framework of the Special Court for Sierra Leone" in K. AMBOS and M. OTHMAN (eds.), *New approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia*, [Interdisziplinäre Untersuchungen aus Strafrecht und Kriminologie ; 11, Freiburg, i. Br. : Max-Planck-Institut für ausländisches und internationales Strafrecht](#), 2003, pp. 149-171.

-Several contributions in C.P. ROMANO, A. NOLLKAEMPER and J.K. KLEFFNER, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*, Oxford, Oxford University Press, 2004, 491 p.

-A. KLIP and G. SLUITER, *Annotated leading cases of International Criminal Tribunals: the Special Court for Sierra Leone 2003-2004*, Antwerpen, Intersentia, 2006, 855 p. This volume is a good source for more detailed information on the jurisprudence of the Court.

-The official site of the Special Court contains all the Court's decisions and relevant documents. It also provides weekly summaries of the Court's proceedings. See <http://www.sc-sl.org/> (last retrieved 15 September 2006).

(L. Nijs)

National Developments

Afghan Action Plan on Peace, Reconciliation and Justice

On 11 December 2006, the Afghan authorities launched an Action Plan on Peace, Reconciliation and Justice. The plan was welcomed by the Special Representative of the UN Secretary-General for Afghanistan, who pledged the UN's support in carrying it out. See UN press release of 11 December 2006 and <http://www.unama-afg.org/news/Afghan%20Government/06dec10-government-action-plan-eng.pdf>.

(F. Naert)

Mass Grave Uncovered in Eastern DRC

It has been reported that UN investigators have found a recent mass grave in an army camp in the Democratic Republic of the Congo's eastern Ituri district holding about 30 victims who appeared to have been executed, including women and children. A military prosecutor is investigating the grave and two officers of the DRC Army's First integrated Brigade (made up of members of a range of rebel and government factions), the unit which witnesses say is responsible, have been arrested so far. See e.g. Belgian press reports and Reuters, 'UN Investigators Find Mass Grave in Army Camp in East Congo', 24 November 2006, reported in a *NY Times Online News Report* of 25 November 2006.

(F. Naert)

Former Ethiopian Dictator Convicted for Genocide

On 12 December 2006, Ethiopia's Federal High Court has convicted former dictator Mengistu Haile Miriam *in absentia* of genocide for atrocities committed during his 1974-1991 reign after a 12-year trial. 11 co-defendants were also found guilty of genocide and other crimes. Mengistu lives in exile in Zimbabwe and Zimbabwe's President Mugabe has previously refused repeated Ethiopian requests to extradite Mengistu. Another 60 co-defendants were also found guilty of genocide and other counts. One defendant was acquitted on all charges. Those convicted, including Mengistu, face the death penalty and their lawyers have until December 28 to file motions seeking lesser sentences. See AFP, 'Ethiopian ex-

dictator Mengistu convicted of genocide', 12 December 2006 and *Sentinelle* No. 90 of 17 December 2006.

(F. Naert)

No Compensation for NATO Attack on Varvarin Bridge

With its ruling of 2 November 2006, Germany's Federal Court of Justice upheld the lower courts' rulings dismissing claims for compensation by plaintiffs from the former Yugoslavia against the Federal Republic of Germany because of a NATO mission within the scope of Operation "Allied Force" in 1999.

On 30 May 1999, NATO combat aircraft destroyed a bridge in the small Serbian town of Varvarin, using rockets. In the process, ten people were killed and 30 wounded - all of them civilians. German combat aircraft were not involved in the action, but the plaintiffs pleaded that German agencies provided support for the attack in the form of reconnaissance, air escort and airspace protection, as well as participated in the selection of the target. They claimed compensation for their own injuries suffered and for the killing of relatives and dependents.

The Federal Court of Justice examined first of all whether claims of the plaintiffs might have any basis directly under international law. It found this not to be so because, in case of violations of the law of war, no individual injured persons, but only their native country would be entitled under international law to compensation from the foreign country responsible. This position handed down under international law still applies today, manifesting itself particularly in Art. 91 ("Responsibility") of the first Protocol, dated 8 June 1977, Additional to the Geneva Convention of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts.

The Federal Court of Justice next examined whether claims for compensation might have any basis under German national law. In this regard, only the institution of official liability as defined under § 839 of the German Civil Code, in conjunction with Art. 34 of Germany's Basic Law, could be considered as any basis for such claims. According to Art. 34 of the Basic Law, derelictions of duty committed by somebody exercising an official function are fundamentally the responsibility of the state. The Federal Court of Justice left it open to interpretation whether all military acts of warfare abroad are exempt from claims regarding official liability, also after the Basic Law entered into force. The lower court, in this case the higher regional court in Cologne, had regarded such an interpretation of the law as outdated since the end of the Second World War and dismissed the action for other reasons. The Federal Court of Justice arrives at the same finding, without taking any position on the issue of individual claims of state liability in armed conflicts.

In the opinion of the court the action fails in that it is not possible to accuse German military personnel or agencies of any specific violations of the rules of international humanitarian law and, hence, of any dereliction of their official duties in connection with the destruction of the bridge. There are no indications that the German agencies might have been informed about the actual target or details of the air strike in question.

According to the Federal Court of Justice, it would not even have been a dereliction of duty by German agencies, had they had a part in including the bridge in NATO's list of targets, because military agencies are accorded an extensive, judicially unverifiable margin for making decisions regarding military operations. The threshold is exceeded only if such military decision-making clearly violates international law. Infrastructure such as roads, railway lines and also bridges rank traditionally among the military targets. German agencies, in approving any inclusion in the list of targets, could have expected to rely on any NATO strike taking place in accordance with international law.

The ruling of the Federal Court of Justice is of relevance with respect to the Bundeswehr's operations abroad particularly because of the clarification regarding claims under international law and because of the references to a judicially unverifiable margin for assessing military decisions.

(Dr. D. Weingärtner)

New Lawsuit in Germany against (former) US Officials

In November 2006, a number of persons who claim to be victims of abuse by US officials in Abu Ghraib and Guantanamo Bay, again filed charges in Germany against several top (former) US officials, including former US Secretary of Defence Rumsfeld, seeking criminal prosecution. Germany was chosen for the court filing because German law provides universal jurisdiction. A similar, but narrower, legal action brought in Germany in 2004 was dismissed on the basis that there was no indication that US authorities and courts would not deal with allegations in the complaint. However, the plaintiffs now argue that circumstances have changed in that Rumsfeld no longer enjoys the legal immunity usually accorded high government officials since his resignation and that it has become clear that the US authorities are not dealing with the case and are barred from doing so under the Military Commissions Act. Lawyers for the plaintiffs say that one of the witnesses who will testify on their behalf is former US Army Brigadier General Janis Karpinski, who ran the Abu Ghraib prison in Iraq until early 2004. Karpinski has issued a written statement which says, in part that "*It was clear the knowledge and responsibility [for what happened at Abu Ghraib] goes all the way to the top of the chain of command to the Secretary of Defense Donald Rumsfeld*" and reportedly stated in Spain's *El Pais* newspaper of 25 November 2006 that she had seen documents apparently signed by former US Defence Secretary Rumsfeld which authorized the use of harsh techniques during interrogation. She also claims Rumsfeld authorized threatening and insulting POWs who refused to answer and not registering all detainees. See A. Zagorin, 'Charges Sought Against Rumsfeld Over Prison Abuse', *Time online*, 10 November 2006, <http://www.time.com/time/nation/article/0,8599,1557842,00.html>; http://today.reuters.com/news/articlenews.aspx?type=topNews&storyid=2006-11-25T164527Z_01_L25726413_RTRUKOC_0_US-IRAQ-RUMSFELD.xml&src=rss and S. Lyons, German Criminal Complaint Against Donald Rumsfeld and Others, *ASIL Insight*, Volume 10, Issue 33, 14 December 2006.

In relation to authorized interrogation techniques, in October 2006 the remark by US Vice President Cheney that he saw no problem with "a dunk in water" was seen by some as an endorsement of the use of a controversial interrogation technique called "water-boarding", which is regarded by many as torture. Cheney denied he was talking about water boarding. See e.g. S. Holland, 'Cheney Says Did Not Refer to Water Boarding', *Reuters*, 27 October 2006 and D. Eggen & B. Brubaker, Cheney's Remarks on Dunking Terrorism Suspects Fuels Debate', *The Washington Post*, 27 October 2006.

(F. Naert)

Tehran Court Awards Damages to Victim of US Abduction

Three years ago, a Tehran Court awarded Hossein Alikhani, a Cyprus-based Iranian businessman who was abducted in the Bahamas by US agents in 1992 and spent 105 days in a US jail, more than half a billion dollars in damages to be paid by the US for supporting terrorism. Early December 2006, a writ of enforcement was reported to be (about to be) served, giving the US 10 days to respond by paying or presenting a list of assets in Iran to be seized as compensation. The most valuable of those assets is the defunct US embassy in Teheran. While the US says that under the Vienna Convention on Diplomatic Relations, diplomatic premises are immune from court judgments, Mr. Alikhani counters that the US flouted that convention in 1996 when it adopted the Antiterrorism and Effective Death Penalty Act, which stripped countries on the State Department's list of sponsors of terrorism of their immunity from lawsuits in US courts for terror acts perpetrated against US citizens. See M. Theodoulou, 'Tehran Court Judgment Could Turn over US Embassy to Plaintiff', 4 December 2006, <http://www.csmonitor.com/2006/1204/p04s01-wome.html>; <http://www.opiniojuris.org/posts/1164252518.shtml> and <http://news.findlaw.com/csmonitor/s/20030203/03feb2003085703.html>.

(F. Naert)

Iraq: Saddam Hussein executed

The former Iraqi dictator was hanged on 30 December 2006, after the Iraqi High Criminal Court had sentenced him to death for crimes against humanity at the conclusion of a trial

that had started on 19 October 2005. Saddam Hussein and his co-defendants were prosecuted for the killing of 148 Shia Muslims of the town of Dujail in 1982, as a reprisal for a failed assassination attempt on the former president.

The Iraqi High Criminal Court was set up in December 2003 by the Iraqi governing Council, with the support of the Coalition Provisional Authority. Formerly known as the « Iraqi Special Tribunal », the High Court has been empowered to prosecute the perpetrators of international crimes committed in Iraq between 1968 and 2003 (website: <http://www.iraq-ihc.org/en/orgenal.html>; Statute of the Court: http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf; Rules of procedure and evidence: <http://www.iraq-ihc.org/en/doc/ihrulesofprocedure.pdf>).

The verdict of the first legal proceedings instituted against Saddam Hussein had been handed down on 5 November 2006 (see <http://law.case.edu/saddamtrial/dujail/opinion.asp>). The death sentence could however only be executed after Iraq's Appeals Court had upheld the verdict. The case had been automatically submitted to this authority, which was entrusted with controlling the legitimacy of the judgment delivered without expressing its opinion on the merits. The nine judges of the Appeals Court unanimously upheld the death sentence on 26 December 2006. It was then possible to carry out the sentence within thirty days. The speed with which the Iraqi authorities have carried out the death sentence has been much debated in the Arab world.

Next to Saddam Hussein, his half-brother Barzan Ibrahim al-Tikriti, and former chief judge of the « revolutionary court » of the Baath party Awad Ahmed Al-Bandar, have also been sentenced to death, whereas former Iraqi vice-president Taha Yassine Ramadan has been sentenced to life imprisonment. Three other former Baath party officials have been sentenced to 15 years in prison. One former party official had been acquitted.

US leaders have declared to be satisfied with the verdict and have stated that Saddam Hussein has had a fair trial. Several lawyers and human rights associations have on the other hand denounced serious irregularities during the trial: the dissension among the various Iraqi political parties about the control of the court would have compromised its impartiality and independence; the difficulty to give a detailed notification of the charges against the defendants in an appropriate manner; the failure on several occasions to disclose the exhibits but also exculpatory pieces of evidence would have prevented the lawyers from preparing the defence of their customers under the same conditions as the public prosecutor ; the impossibility for the defendants' lawyers to cross-examine witnesses for the prosecution, ... See e.g.

<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/E428FFBF774FFB26C1257234003D2187?opendocument>; <http://international-lawyers.org/Documents/WGAD%20Final%20Decision.pdf>; <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/0C31EA1E56E5D3FFC125721E005F706C?opendocument> and <http://hrw.org/english/docs/2006/11/06/iraq14518.htm>. Moreover the court would not have taken effective measures to protect the defendants' witnesses and lawyers as well as their relatives. Three defendants' lawyers have indeed been murdered during the trial.

It should also be pointed out that most European countries have systematically opposed death sentence and have deplored the mediatisation of Saddam Hussein's hanging. In compliance with article 27 of the Statute creating the Iraqi High Criminal Court, there is not any authority, not even the president of the Republic, that can pardon a convict or commute the sentence of a person convicted of international crimes.

Saddam Hussein's death terminates the proceedings instituted against him within the framework of a second trial before the Iraqi High Criminal Court. Since 21 August 2006, the former dictator had indeed been tried for genocide together with six other persons. In this separate case, the latter had to answer for the slaughter and the forced disappearance of ten thousands of members belonging to Iraq's Kurdish minority during the Anfal campaign. The Anfal trial will therefore only be continued against the surviving defendants.

See also M. Scharf & M. Newton, 'The Iraqi High Tribunal's Dujail Trial Opinion', *ASIL Insight*, 18 December 2006, <http://www.asil.org/insights/2006/12/insights061218.html>; *Sentinelle* No. 85 of 12 November 2006; http://www.trial-ch.org/fr/trial-watch/profil/db/facts/saddam_hussein-al

[majid-al-tikriti_125.html](#) and J. Burns & K. Semple, 'Hussein Is Sentenced to Death by Hanging', *the New York Times*, 6 November 2006.

(M. Silvestre)

Iraqi Justice System Cannot Cope - British Forces Storm Iraqi Jail

A study by the New York Times reported that the Iraqi system for detaining, charging and trying suspects has become a weak link in the rule of law in Iraq, see M; Moss, 'Iraq's Legal System Staggered Beneath the Weight of War', *the New York Times online*, 17 December 2006. The problem was painfully illustrated late December 2006 when British forces stormed a police station where 127 prisoners were held by a local police unit infiltrated by criminals and militias in extremely bad conditions, some showing signs of torture, see M. Santora, 'British Soldiers Storm Iraqi Jail, Citing Torture', *the New York Times online*, 26 December 2006.

(F. Naert)

Israeli Judgments on Claims by Palestinians and on Targeted Killings

On 13 December 2006, the Israeli Supreme Court handed down a very interesting judgment on targeted killings, *inter alia* touching upon the nature of the armed conflict, the status of combatants and civilians and the issue of direct participation in hostilities. The judgment is available at http://www.court.gov.il/heb/psakdin/sikulim_eng.doc.

On 12 December 2006, the Israeli Supreme Court unanimously annulled part of a law that prevented Palestinians from seeking compensation from Israel for damages from "nonbelligerent" Israeli Army operations in the occupied territories but left standing a bar on compensation to Palestinians harmed in combat operations. The law in question was passed in July 2005 and provided for retroactive immunity from being sued for damages caused since 29 September 2000, i.e. the start of the second Palestinian intifada. See S. Erlanger, 'Israeli Court Rules Army Can Be Held Liable', *New York Times*, 12 December 2006.

(F. Naert)

The Situation in Lebanon

Israel's use of cluster bombs in the latest war in Lebanon has been widely reported and debated, in particular because most cluster munitions are said to have been used during the last days of the war, including in populated areas (see e.g. http://www.hrw.org/campaigns/israel_lebanon/clusters/index.htm). A report by the High-Level Commission of Inquiry set up by the UN's Human Rights Council found that Israel's use of weapons such as cluster bombs during the 2006 war with Hizbollah in Lebanon was a violation of international humanitarian law (see <http://www.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.HRC.3.2.pdf> and UN press release of 4 December 2006). However, some delegations said the report lacked impartiality and was one-sided and the Commission indeed only had a mandate to investigate Israel's actions (see and <http://www.reliefweb.int/rw/RWB.NSF/db900SID/SODA-6W65A6?OpenDocument>). Meanwhile, Israel has released a declassified report in an attempt to provide evidence that Hezbollah was using civilians and civilian installations as shields (see <http://www.aicongress.org/site/PageServer?pagename=secret2>). On 20 November 2006, Israel military's chief of staff even ordered an inquiry to determine whether the military followed his orders when it used large numbers of cluster bombs during this war, though it was not clear what orders may have been violated, and the US is investigating whether Israel used cluster bombs in Lebanon in violation of agreements between the two countries that restrict their use., see G. Myre, 'Did Israeli military follow orders?', *The International Herald Tribune*, 20 November 2006. Furthermore, it has been reported that Hezbollah has used cluster munitions too in some of its attacks against Israeli villages, which would be a clear violation of IHL, see <http://hrw.org/english/docs/2006/10/18/lebanon14412.htm>.

Since the end of the hostilities, the UN Interim Force in Lebanon (UNIFIL) has reported that security in Lebanon has stabilized but that Israeli overflights continue almost every day despite UN protests and also that it has discovered various arms caches that have subsequently

been destroyed or confiscated by the Lebanese army. See UN press releases of 20 November and 8 December 2006 and the report at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/638/98/PDF/N0663898.pdf?OpenElement> (which also notes that Israel has not yet provided UNIFIL with the detailed firing data on its use of cluster munitions, which would help mitigate the threat to innocent civilians).

Furthermore, on 23 November 2006, the UN Security Council has given its support for the establishment of a special tribunal to try those alleged responsible for last year's assassination of then Lebanese prime minister Rafik Hariri and 22 others, saying it was satisfied with the agreement reached by the UN with the Lebanese Government on the tribunal. See the letter to the UN Secretary-General by the Security Council's President of 21 November 2006 (<http://daccessdds.un.org/doc/UNDOC/GEN/N06/625/78/PDF/N0662578.pdf?OpenElement>) and Kofi Annan's report of 15 November 2006, which includes the tribunal's Statute (<http://www.un.org/Docs/journal/asp/ws.asp?m=s/2006/893>). The tribunal will consist of a majority of international judges and will be financed for 49 % by Lebanon and for 51 % by voluntary contributions from other States and should be established when sufficient contributions and pledges are available to finance its formation and 3 years of operations.

(F. Naert)

Mexican Report on Crimes of Former Regimes

Late November 2006, the administration of Mexican President Vicente Fox published a voluminous report which states that past Mexican governments carried out a covert campaign of murder and torture against dissidents and guerrillas from the late 1960s through the early 1980s. See <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB209/index.htm> and J. Forero, 'Details of Mexico's Dirty Wars From 1960s to 1980s Released', *the Washington Post*, 22 November 2006 and J. McKinley, 'Mexican Report Cites Leaders for "Dirty War"', *the New York Times*, 23 November 2003.

(F. Naert)

Controversy over Interrogations by Dutch Forces in Iraq

Mid November 2006 allegations surfaced that Dutch intelligence personnel in Iraq had violated regulations and had abused some detainees in November 2003. The conduct was reported to the public prosecutor, who decided not to press charges after an investigation. However, the matter is now again under investigation. Relevant documents, mostly in Dutch, are available at http://www.tweedekamer.nl/kamerstukken/dossiers/Gedetineerden_in_Irak.jsp.

(F. Naert)

New Zealand Cancels Arrest Warrant for Israeli General

Early December 2006, Moshe Yaalon, the former chief of staff of Israel's army continued a trip to New Zealand after the country's attorney general rescinded a warrant issued for his arrest to face allegations of war crimes, issued by the Auckland district court one week earlier. The case concerns Yaalon's part in the assassination in Gaza of a leading Hamas figure by a one-ton bomb dropped by the Israeli air force on his house in 2002 in a residential area, killing at least 14 civilians. See D. Macintyre, 'New Zealand Cancels Arrest Warrant for Israeli General', *The Independent*, 2 December 2006, http://news.independent.co.uk/world/middle_east/article2032688.ece.

(F. Naert)

Rwanda Breaks Off Diplomatic Relations with France as French Judge Recommends Trying Rwandan President Kagame of Involvement in His Predecessor's Death

On 20 November 2006, the French judge leading a probe into the attack on a plane carrying the then Rwandan President Juvenal Habyarimana recommended that current Rwandan

President Paul Kagame should face trial before the ICTR over his alleged involvement in the attack. French courts also called for international arrest warrants to be served against nine of Kagame's aides in relation to the plane attack. French prosecutors will now consider these recommendations. See e.g. P. Smolar, 'Attentat de Kigali en 1994: Jean-Louis Bruguière accuse Paul Kagamé', 21 November 2006, <http://www.lemonde.fr/web/article/0,1-0@2-3212,36-836769,0.html?xtor=RSS-3208>. In response, Rwanda broke off its diplomatic relations with France and French diplomats left Rwanda, see http://www.diplomatie.gouv.fr/fr/pays-zones-geo_833/rwanda_374/index.html. In contrast, the ICTR on 4 December 2006 accepted the French judge's report in the trial of Théoneste Bagosora and stated that it would be 'useful' in understanding the 'context' of the genocide even though a witness cited in the report denied having made the statements cited in the report, see 'UN Tribunal Accepts French Probe as Evidence in Genocide Trial', AFP, 4 December 2006 and 'Alleged Witness Tells Radio French Judge Doctored Report', *the New York Times online*, 2 December 2006. The contested report is also said to claim that the ICTY conducted an investigation into the shooting down of the plane but suspended this investigation due to an alleged lack of jurisdiction, see 'ICTR/Attack - the ICTR Had Aborted Investigation On the Attack Against Habyarimana's Plane', Hironelle News Agency, 29 November 2006, http://www.publicinternationallaw.org/warcrimeswatch/archives/wcpw_vol02issue08.html#w1. Moreover, Kagame accused France of having supported the genocide in Rwanda, see http://www.rwandagateway.org/article.php?id_article=3785.

(F. Naert)

The Situation in Somalia

In recent months, Somalia saw fighting between the country's Transitional Federal Institutions and the Union of Islamic Courts. In response, on 6 December 2006 in Resolution 1725 the UN Security Council, acting under Chapter VII of the UN Charter, authorised the setting up of an African protection and training mission in Somalia by the African Union and the Intergovernmental Authority on Development (IGASOM) to help support the country's Transitional Federal Institutions with an initial mandate of six months. Moreover, both Ethiopia and the US have intervened militarily in support of the Transitional Federal Institutions in December 2006 and January 2007 and have largely pushed back the forces of the Union of Islamic Courts. See e.g. J. Gettleman, 'Ethiopia Hits Somali Targets, Declaring War', *The New York Times online*, 25 December 2006 and D.S. Cloud, 'US Airstrike Aims at Qaeda Cell in Somalia', *The New York Times online*, 9 January 2007.

(F. Naert)

Swede Convicted for Balkan Crimes

In December 2006, the Stockholm district court convicted Swedish citizen Jackie Arklöv, who served with a Croat militia in Bosnia, of crimes against international law perpetrated in Bosnia in 1993, in particular assaulting and torturing 11 prisoners of war and civilians. Arklöv confessed to six charges and gave partial admissions to two crimes. He was sentenced to eight years in jail in 1995 by the Bosnian Supreme Court but was released and returned to Sweden as part of a prisoner exchange after serving sixteen months. It was accepted in this case that Arklöv could be charged twice for the same crime because he had not served his sentence. See X, 'Swede Convicted of Bosnia Torture', *The Local - Sweden's News in English*, 18 December 2006, <http://www.thelocal.se/5838> and X, 'Schwedischer Söldner für Kriegsverbrechen in Bosnien verurteilt', *Der Standard* (Wien), 18 December 2006, <http://derstandard.at/?url=?id=2700091>.

(F. Naert)

UK Outlines Plans of Its Nuclear Posture

On 4 December 2006, the UK Government signalled its intention to maintain Britain's nuclear deterrent beyond the 2020s by renewing its Trident system, replacing the submarines and extending the life of the Trident missiles and reducing by 20 per cent the number of nuclear warheads (to under 160). The Cabinet has made its decision, a White Paper has been pub-

lished (see <http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/PolicyStrategyandPlanning/DefenceWhitePaper2006Cm6994.htm>) and there will be a debate and a vote in Parliament early 2007. See <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1163677883544>.

(F. Naert)

US Serviceman Convicted in Mahmudiyah Case

On 16 November 2006, SPC James Barker was sentenced to life with eligibility for parole and a dishonorable discharge in a General Court-Martial for his role in the Mahmudiyah incident. He was charged with and pleaded guilty to premeditated murder, rape, conspiracy to commit premeditated murder and rape, conspiracy to obstruct justice, obstruction of justice, violating a lawful general order, arson and housebreaking. This is a companion case to the US District Court case of former Army PFC Steven D Green (see http://www.kywd.uscourts.gov/3-06-00230/Green_Case.php). The remaining three military cases have been referred to trial by the General Court-Martial Convening Authority (GCMCA). Two of the cases, those against SGT Paul Cortez and PFC Jesse Spielman, were referred capital meaning that the death penalty is a possible sentence because they were all charged with premeditated murder. PFC Bryan Howard's case was referred non-capital, meaning that the maximum confinement that could be adjudged is life without possibility of parole. See also <http://news.bbc.co.uk/1/hi/world/americas/6156656.stm>.

(UK Operational Law Branch, Land Warfare Centre Newsletter, December 2006)

Other US Developments

In response to the US Supreme Court's *Hamdan v. Rumsfeld* judgment of 29 June 2006 (see the previous issue of this Newsletter), the US Congress adopted and the US President signed the *Military Commissions Act of 2006* (Pub. L. No. 109-366, 120 Stat. 2600, 17 October 2006, available online at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ366.109.pdf; see also *ILIB* of 13 October 2006 and <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>). The Act was criticised for breaching US international obligations by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN press release of 27 October 2006, see also <http://www.unhchr.ch/huricane/hurricane.nsf/view01/13A2242628618D12C12572140030A8D9?opendocument>) and by others (see e.g. http://www.humanrightsfirst.org/us_law/etn/index.asp). It has also prompted concern by the ICRC (see <http://www.icrc.org/web/eng/siteeng0.nsf/html/kellenberger-interview-191006?opendocument>). Moreover, several Senate Democrats have announced that they will try to amend the Act (see e.g. <http://thehill.com/thehill/export/TheHill/News/Frontpage/111606/tribunal.html>). For a brief discussion of the Act, see J. Cerone, 'The Military Commissions Act of 2006: Examining the Relationship between the International Law of Armed Conflict and US Law', *ASIL Insight*, 13 November 2006, Volume 10, Issue 30, <http://www.asil.org/insights/2006/11/insights061114.html>.

On the basis of the new Act, on 13 December 2006, the District Court of the District of Columbia dismissed the petition of Hamdan for a writ of habeas corpus, despite its finding that "Congress's removal of jurisdiction from the federal courts was not a suspension of habeas corpus within the meaning of the Suspension Clause (or, to the extent that it was, it was plainly unconstitutional ...)". See http://www.pegc.us/archive/Hamdan_v_Rumsfeld/opinion_20061213.pdf and <http://www.dcd.uscourts.gov/opinions/2006/2004CV1519-143711-12132006a.pdf> and the commentary at <http://jurist.law.pitt.edu/hotline/2006/12/mca-habeas-suspension-and-hamdan.php>.

Meanwhile, in the case of the *Humanitarian Law Project v. US Treasury*, the District Court of the Central District of California ruled on 29 November 2006 that the President's authority to

designate "specially designated global terrorists" under Executive Order 13224 was unconstitutionally vague on its face, see <http://tinyurl.com/yzvutr>.

Still on the judicial front, late December 2006, four marines were charged with murder in the killings of two dozen Iraqi civilians, including at least 10 women and children, in the village of Haditha last year. Military prosecutors also charged four officers, including a lieutenant colonel in charge of the Marine Battalion concerned, with dereliction of duty and failure to ensure that accurate information about the killings was delivered up the Marine Corps' chain of command. The case concerns the marine's actions after a roadside bomb killed a comrade on 19 November 2005, in Haditha, Iraq. The officers charged include a military lawyer for Battalion concerned, who was charged with dereliction of duty for failing to investigate suspected violations. None of the eight marines charged entered a plea yesterday. Formal reviews, known as Article 32 hearings, to determine whether the charges warrant court-martial, will be the next step in the case. See [P. von Zielbauer](#) & [C. Marshall](#), 'Marines Charge 4 With Murder of Iraq Civilians', *the New York Times*, 22 December 2006

Furthermore, mid November 2006, PFC Jodka, a US marine, was sentenced to 18 months in the brig for his role in the kidnapping and murder in April of an unarmed Iraqi in Hamandiyah (Iraq). He pleaded guilty to aggravated assault and conspiracy to obstruct justice and in exchange, authorities dropped graver charges, and the penalty was set at a maximum of 18 months in the brig and a general discharge, as part of a plea bargain. Navy corpsman Melson Bacos also pleaded guilty in this case and was sentenced to a year in the brig. Lance Cpls. Tyler Jackson and Jerry Shumate pleaded guilty too in the case and were both sentenced to 21 months in the brig. See T. Perry, 'Marine Gets Brig Time for Role in Iraqi Death' and 'Marine Gets 21 Months in Slaying of Iraqi Man', *L.A. Times online*, respectively 15 and 17 November 2006, <http://www.latimes.com/news/nationworld/nation/la-na-marine16nov16,0,6893161.story?coll=la-home-headlines> and <http://www.latimes.com/news/printedition/front/la-fg-marine17nov17,1,5276536.story?coll=la-headlines-frontpage&ctrack=1&cset=true> and also http://www.heraldnet.com/stories/06/11/22/100wir_b5marine001.cfm.

In contrast, it has been reported that inquiries into alleged crimes by civilians have not led to a single indictment so far, though some cases are said to still be open. See D. Johnston, 'Inquiry into Abuses Ends with No US Civilian Indictments', *the International Herald Tribune*, 19 December 2006.

On a different issue, on 31 August 2006, the US adopted and published a *US National Space Policy*, which contains substantial sections concerning security and defence and addresses some legal issues. See <http://www.ostp.gov/html/US%20National%20Space%20Policy.pdf>.

(F. Naert)

INTERESTING PUBLICATIONS

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

W.J. Aceves, *The Anatomy of Torture: A Documentary History of Flartiga V. Pena-Irala*, Brill, 2007, ISBN 978 15 7105352 7;

K. Arts & V. Popovski, *International Criminal Accountability and the Rights of Children*, Cambridge UP, 2006, ISBN 9789067042277 (hb);

Y. Beigbeder, *Judging War Crimes and Torture. French Justice and International Criminal Tribunals and Commissions (1940-2005)*, Brill, 2006, ISBN 978 9004153 29 5;

C.L. Blakesley, *Terrorism and Anti-Terrorism: A Normative and Practical Assessment*, Brill, 2006, ISBN 1 5710 5332 8;

N. Blokker, R. Lefeber, L. Lijnzaad & I. van Bladel (eds.), *The Netherlands in Court. Essays in Honour of Johan G. Lammers*, Brill, 2006, ISBN-13 978 9004157 05 7;

Brynjar Lia, *Building Arafat's Police. The Politics of International Police Assistance in the Palestinian Territories after the Oslo Agreement*, Ithaca Press, 2007, ISBN 978-0-86372-305-6;

Brynjar Lia, *A Police Force without a State. A History of the Palestinian Security Forces in the West Bank and Gaza*, Ithaca Press, 2006, ISBN 0-86372-304-7;

R. Crawshaw, S. Cullen & T. Williamson, *Human Rights and Policing*, Brill, 2006 (2nd ed.), ISBN 90 04 15437 X;

S. Darcy, *Accountability in International Law: The Use of Collective Responsibility*, Brill, 2007, ISBN 978 15 7105376 3;

T. de Wilde & M. Liégeois, *Deux poids, deux mesures? L'ONU et le conflit israélo-arabe: une approche quantitative*, Presses universitaires de Louvain, 2006, ISBN 2874630268;

D. Dyzenhaus, *The Constitution of Law. Legality in a Time of Emergency*, Cambridge UP, 2006, ISBN 9780521677950 (pb) / 9780521860758 (hb);

M. Freeman, *Truth Commissions and Procedural Fairness*, Cambridge UP, 2006, ISBN 9780521615648 (pb) / 9780521850674 (hb);

A. Gat, *War in Human Civilization*, Oxford UP, 2006, ISBN 978-0-19-926213-7;

F. Grünfeld & A. Huijboom, *The Failure to Prevent Genocide in Rwanda. The Role of Bystanders*, Brill, 2007, ISBN 978 9004157 81 1;

V.K. Holt & T.C. Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, Henry L. Stimson Center, <http://www.stimson.org/pub.cfm?id=346>;

H. Langholtz, B. Kondoch & A. Wells (eds.), *International Peacekeeping*, Volume 11 (2005), ISBN 90 04 15678 X;

H.R. Reginbogin & C.J.M. Safferling, in collaboration with W.R. Hippel (eds.), *Die Nürnberger Prozesse: Völkerstrafrecht seit 1945 / The Nuremberg Trials: International Criminal Law Since 1945*, K.G. Saur Verlag, 2006, ISBN 978-3-598-11756-5;

T.A. van Baarda & D.E.M. Verweij (eds.), *Military Ethics. The Dutch Approach - A Practical Guide*, Brill, 2006, ISBN 90 04 15440 X;

Chatham House Principles of International Law on the Use of Force in Self Defence, available online at <http://www.chathamhouse.org.uk/pdf/research/il/ILPForce.doc> and published by E. Willmshurst in *55 International and Comparative Law Quarterly* 2006;

Internationaal Humanitair Recht in de Kijker 2006, Flemish Red Cross, 2007;

The third issue of the ESDP (*European Security and Defence Policy*) newsletter can be consulted online at http://www.consilium.europa.eu/uedocs/cmsUpload/ESDP_3_final.pdf;

Oxford University Press, *International Law in Domestic Courts (ILDC)*, <http://www.oxfordlawreports.com> (a regularly updated repository of domestic cases in international law from over 65 jurisdictions, featuring expert commentary, full texts of judgments in their original language, and translations of key passages of judgments into English; an archive of cases dating back to 2000 is being gradually added; searchable both by full text and a large number of more specific parameters; for a 30 day free trial of ILDC, see <http://www.oup.com/online/freetrials/restofworld/>);

The US Iraqi Study Group Report is available at http://wid.ap.org/documents/iraq/2006isg_report.pdf;

On 2 November 2006, the Human Security Centre published an 'In Focus' issue on 'Conflict-related Mortality' following the debate prompted by an article in *the Lancet* attempting to quantify the death toll since the 2003 invasion of Iraq. The issue features a series of recently-published reports and articles on conflict-related mortality and is designed to shed some light on the topic. See <http://www.humansecuritycentre.org/index2.php?option=content&task=view&id=224&pop=1&page=0>;

The ISN published a Special Issue of the Month in October 2006 on 'Landmines, explosive remnants of war (ERW) and small arms and light weapons (SALW)', see <http://www.isn.ethz.ch/index.cfm>;

FROM THE GENERAL SECRETARIAT

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