



**NEWSLETTER APRIL/MAY/JUNE 2007**

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EDITORIAL

Dear Member,

The topic of extraterritorial application of human rights obligations to external operations was chosen for the keynote discussion of our last Congress. The May 2007 decision of the European Court of Human Rights in the cases *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, constitutes a new and important element in the ongoing discussions, especially in the context of operations under Chapter VII of the UN Charter. Both cases concern conduct of personnel of States Parties in the international civil and security presence in Kosovo. The Court held that it was not competent to review the acts of the States in question carried out on behalf of the UN. We are therefore very pleased to offer you in this newsletter *inter alia* a preliminary analysis of this decision.

Ludwig Van Der Veken  
Secretary-General

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

The President hosted the meetings of the **Managing Board and the Board of Directors** of the Society in Stavem (Norway) from 24 to 27 of April 2007. On that occasion, the Board of Directors appointed Dr. Alexander Poretschkin (Germany) as the new President of the Committee for General Affairs and Professor Michael Noone (United States) as the new President of the Committee for Military Criminology and Criminal Law. The Board expressed its gratitude to Dr. Dieter Fleck (Germany) and Professor Pierre Thys (Belgium), for their work as previous presidents of these two committees. The Board of Directors also decided that the 2009 Congress will deal with 'Practice and Customary Law in Military Operations, including Peace Support Operations'. Senior Vice-President Rolet Loretan will coordinate the drafting of the questionnaire to prepare the plenary session of this Congress.

The **Belgian National Group** of the Society has held a **conference** in Brussels (Belgium) on 22 May 2007 on '**the application of international humanitarian law in recent and current conflicts**'.

The **Belgian National Group** of the Society will organise an **international conference** in Brussels on '**the Militarisation of Outer Space**', in cooperation with various other partners, including the Interdisciplinary Centre for Space Studies and the Belgian Royal Military Academy. Members of the Society will receive an invitation by e-mail including a registration form. Registration of participants will only be possible after the distribution of the registration forms.

(A. Vanheusden)

The **German National Group** of the Society is organizing a **conference** to be held on 11 and 12 October 2007 in Berlin (Germany), focusing on **human rights and the armed forces**. It will

be in German but all members of the International Society are very welcome. More details will be communicated later on the Society's website but the following short description is already available: "For the Bundeswehr as armed forces in the democratic constitutional state, the fundamental rights and human rights are a natural guideline. This applies to the internal order of the armed forces as well as towards third parties. However, fundamental rights and human rights are subjected to legal limits. In this context the highest German courts have recently issued some basic decisions as for example the judgment of the Federal Administrative Court concerning freedom of conscience of soldiers, or the judgment of the Federal Constitutional Court concerning air defense against terrorist attacks. With operations abroad in particular, the armed forces must be aware of how far they are bound by fundamental rights and human rights and how operations can be successfully fulfilled within the given legal limits. From human dignity down to freedom of information, from the freedom of movement down to discrimination bans - we will discuss these subjects with the participation of well known experts of military law and international law. The German National Group of the International Society for Military Law and the Law of War and the "Freie Universität Berlin" invite you to join us in these discussions".

*(Dr. D. Weingärtner and Ms. U. Froissart)*

The '**Maritime Security Operations: Law and Practice at the Beginning of the 21<sup>st</sup> Century**' symposium was co-sponsored by the **U.S. National Group of the Society and Catholic University of America Columbus School of Law**, where it was held on 1 March 2007, with the generous support of the United States Naval Institute.

Major General Thomas L. Wilkerson, USMC (Retired), the CEO of the U.S. Naval Institute and the Naval Institute Foundation began the symposium by introducing the topic and welcoming the participants.

Introductory remarks were given by Col. Ron Reed, USAF, Legal Counsel to the Chairman of the Joint Chiefs of Staff, who set the stage for the event by highlighting that maritime law is at an important crossroads in this time of tension between traditional law of the sea principles, such as freedom of navigation, on one hand, and the increasing need for stronger and more effective maritime security on the other.

The topic of the first panel was "The Law and Practice/ NATO Experience." The panelists included:

- Rear Admiral Jane Dalton (retired), formerly Legal Counsel to the Chairman of the Joint Chiefs of Staff for three years, who now works for the U.S. Department of State supporting the Political-Military Bureau.
- Col. Gary Sharp, USMC (retired), Associate Deputy General Counsel, Office of the General Counsel of the Department of Defense
- Rear Admiral Fabio Caffio of the Office of Legal Affairs, Italian Navy, who was unable to attend, but whose paper was presented by Col. (U.S. Army Retired) James Burger of the Office of the General Counsel, U.S. Department of Defense
- Col. Tia Johnson, U.S. Army, Legal Advisor at NATO HQ in Naples

A common theme in panel concerned international cooperation and the need for a coherent transnational effort to address the gaps in the law relevant to maritime security. Rear Admiral Caffio's paper highlighted the importance of arriving at set of definitions of terms such as "maritime security operation." Panelists described several relevant international initiatives and international legal regimes including the Proliferation Security Initiative, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) and its protocols, the U.N. Security Council Resolutions relating to Iran and North Korea, as well as the U.N. Convention on the Law of the Sea (LOS Convention). Col. Johnson described several NATO operations, such as Operation Active Endeavor.

The second panel entitled "Maritime Interdiction/ Other MIO Experience" dealt specifically with the topic of maritime interdiction operations.

Panelists included:

- Rear Admiral William Baumgartner, USCG, Judge Advocate General

- Cmdr. Steven Barney, USN, Judge Advocate for the Commander, 7<sup>th</sup> Fleet
- Cmdr. Thomas Herold, USN, Judge Advocate serving with NAVCENT, now at U.S. State Department
- Lt. Cmdr. Andrew Murdoch, British Royal Navy, Fleet Legal Operations

This panel focused on the capabilities, strategic objectives, and specific operations in which the U.S. Navy, U.S. Coast Guard, British Royal Navy, and the naval forces of other allies are engaged. Issues discussed included the legal basis for operations, including boarding, aimed at preventing piracy and weapons of mass destruction proliferation, deterring conflict, or protecting assets such as Iraqi off-shore oil platforms. Lt. Cmdr. Murdoch highlighted the issue of differences between European and U.S. legal regimes and interpretations of international law, and the effect of these differences on joint or separate maritime security operations.

Lunch followed this second panel, and following lunch, the luncheon address by Professor John Norton Moore, the Walter Brown Professor of Law, University of Virginia Law School and Director of both the Center for National Security Law and the Center for Oceans Law and Policy. Professor Moore's address focused on the necessity for the United States to ratify the U.N. Convention on the Law of the Sea and the reasons why ratification and adherence would contribute to U.S. maritime security goals.

The third panel, "Air Interdiction/ Air Operations Connected with Maritime Security," treated topics of inter-service cooperation, as its title suggests. Panelists included:

- Col. Larry Youngner, USAF, Chief, Air Force Operational Law Division, Office of the Judge Advocate General
- Maj. Phillip Drew, Canadian Forces, Office of the Judge Advocate General, Pacific Region
- Sqd. Ldr. Patrick Keane, an exchange officer of the Royal Australian Air Force working with the Air Force Operational Law Division of the U.S. Air Force
- Mr. Douglas Mullen, Attorney, Office of the General Counsel, Federal Aviation Administration

A common theme among the panelists was the importance of cooperation and coordination between different military branches as well as civilian officials in the area of maritime security law and the execution of maritime security operations themselves. Specifically, panelists described various ways in which air support, including aerial surveillance, have been used successfully in concert with naval interdiction operations internationally. Mr. Mullen provided insight into the important part played by the Federal Aviation Administration, civilian aviation rules, and other civilian agencies.

The fourth panel, entitled "Commentary on the State of the Law and Practice" included:

- Professor Moore
- Rear Admiral Dalton
- Col. Gary Sharp
- Cmdr. Christopher French, JAGC USN, Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff
- Rear Admiral Sidney A. Wallace, (retired) USCG, now in private practice at Blank Rome LLP in Washington, DC

The fourth and last panel summed up many of the points made throughout the symposium, set forth a broader picture of the current state of the law and practice, and shaped conclusions and recommendations for future actions to address the questions and problems raised during the symposium.

The symposium was followed by a reception during which lively discussions continued. The total number of attendees at the Seminar were 75 to 80. They included teachers, students, active duty military, practicing attorneys, and representatives from local Washington embassies. The group was international. Aside from the United States, speakers and attendees came from Australia, Canada, Chile, Denmark, the Netherlands, and the United Kingdom.

The President of the Society, Mr. Arne Willy Dahl, has represented the Society at the Society's **Hungarian National Group's** 8<sup>th</sup> International Military Criminal Law Conference, which took place in Budapest from 6 to 10 June 2007. The theme was 'Traditions and Future of the Military Justice'. The President of the Society delivered a presentation on international trends in military justice. This presentation will be published on the Society's website. The conference attracted participants from a wide range of countries, including China and Russia.

The **50<sup>th</sup> anniversary conference** of the **Russian Association of International Law** took place in Moscow (Russia) from 3 to 6 July 2007 and was dedicated to the **centenary of the Second Hague Peace Conference**. The Assistant Secretary-General, Mr. Alfons Vanheusden, represented the Society at this conference and presented his views on the current relevance of the 1907 Convention and Regulations Respecting the Laws and Customs of War on Land.

The **UK National Group** of the Society participated in a small **seminar** at the University of Hull on 23<sup>rd</sup> May 2007, where there were presentations on the UK Army's Operational law Branch, from Col Stuart Lythgoe, and on "Soldiers as Citizens in Uniform" from Prof Peter Rowe of Lancaster University. The UK Group is also holding a **further event** at the National Army Museum in Chelsea on 19<sup>th</sup> July 2007, which will address **current legal issues for the British Armed Forces**, "from the blunt end to the sharp end". The "blunt end" is the UK Armed Forces Act (2006), which will actually come fully into effect on 1<sup>st</sup> January 2009, and which will introduce a common disciplinary system for all three of our armed services for the first time. The "sharp end" will deal with legal issues arising frequently on our current operations in Iraq and Afghanistan. Both subjects will be presented on by Army Legal Service officers who are presently serving in relevant appointments. Members of the Society wishing to attend this event should contact the Secretary of the UK National Group, Col Stythe ([James.Stythe100@mod.uk](mailto:James.Stythe100@mod.uk)).

On the occasion of its 140<sup>th</sup> anniversary, and marking 30 years since the adoption of Additional Protocols I and II, **The Netherlands Red Cross** is proud to announce a **conference on 'Protecting Human Dignity in Armed Conflict'**, to be held in Peace Palace in The Hague (The Netherlands) on 19 October 2007. A detailed conference program and a registration form will be available in late summer. For enquiries on the conference please contact Ms. S. Boswijk at [sboswijk@redcross.nl](mailto:sboswijk@redcross.nl) or +31 (0)70 4455869.

The **4<sup>th</sup> European Symposium on Non-Lethal Weapons** took place in Ettlingen (Germany) from 21 to 23 May 2007. The title of the symposium was 'Non-Lethal Weapons: Fulfilling the Promise?'. The symposium dealt with *inter alia* deal with the legal and public acceptability of non-lethal weapons. For a detailed **report** on the legal aspects analyzed at the symposium, please contact Dr. Friedhelm Krüger-Sprengel ( [fried.ks@f-online.de](mailto:fried.ks@f-online.de) ).

#### **RECENT DEVELOPMENTS, LEGISLATION & JURISPRUDENCE**

**Note:** *ILIB* stands for *International Law in Brief*, available at <http://www.asil.org/resources/e-newsletters.html#lawinbrief> and *Sentinelles* (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**

##### **Lima Conference on cluster munitions**

From 23 until 25 May, 67 states participated in Lima in the follow-up of the so-called Oslo Process. This process, initiated by Norway in February this year, aims at securing an international ban on cluster munitions that cause unacceptable harm to civilians, by the end of 2008. Nearly 30 additional countries joined this process, among them various African nations and several affected countries, such as Laos and Cambodia. In addition some 40 NGO's and international organizations contributed to the discussions.

The main goal of the conference was to give participants a forum for discussion and reflection on various issues such as victim assistance, clearance, storage and stockpile destruction,

international cooperation and assistance, transparency and definitions. At the Lima conference, following the example of Norway and Austria, Hungary and Switzerland announced that they would introduce national moratoriums on the use of cluster munitions. Additionally, Peru initiated the idea to make Latin America the world's first cluster-munitions-free region.

Regional meetings on cluster munitions will be held in the following months in Brussels, Costa Rica and Serbia; and the next global step will be taken in Vienna in December.

For more information see *Sentinelle* No. 114 of 24 June 2007 and Press Release Norway at <http://www.regjeringen.no/en/dep/ud/Whats-new/News/2007/Nearly-30-additional-countries-join-init.html?id=468593>.

(I. Heyndrickx)

### **Anti-Nuclear Terrorism Convention to Enter into Force**

After Bangladesh became the 22nd country to ratify or accede to the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (see <http://untreaty.un.org/English/Terrorism.asp> and the 2005/2 issue of this *Newsletter*), this convention, which has been signed by 115 countries, will enter into force on 7 July 2007. See <http://www.un.org/News/Press/docs/2007/sgsm11040.doc.htm>.

(F. Naert)

### **Russia Considers Suspending CFE Treaty**

Late April 2007, Russian President Vladimir Putin said that Russia might apply a moratorium in respect of the Treaty on Conventional Armed Forces in Europe and even warned that it might withdraw from this treaty. See <http://en.rian.ru/russia/20070426/64462473.html>; C.J. Chivers & M. Landler, 'Putin to Suspend Pact With NATO', *New York Times*, 27 April 2007 and <http://en.rian.ru/analysis/20070508/65123886.html>. Later, Russia asked for talks on the matter mid June and said it would not withdraw from the Treaty, see <http://www.globalsecurity.org/military/library/news/2007/06/mil-070606-rianovosti01.htm>.

(F. Naert)

## **International Organisations**

### **Developments at the UN Security Council<sup>1</sup>**

On 24 March 2007 in resolution 1747, the Security tightened sanctions on Iran in response to the country's continued uranium-enrichment activities. See also *Sentinelle* No. 102 of 25 March 2007.

On 28 March 2007, the Security Council adopted a Presidential Statement on the relationship between the UN and regional organizations, in particular the African Union, in the maintenance of international peace and security (S/PRST/2007/7).

On 23 March 2007, the Security Council in resolution 1746 extended the mandate of the UN Assistance Mission in Afghanistan by another year, while voicing concern over narcotics production and urging the Afghan Government and members of the international community to do more to implement the Afghanistan Compact. Furthermore, on 30 March 2007, in Resolution 1750, it extended the mandate of the UN Mission in Liberia until 30 September 2007. In addition, it extended the mandate of the UN Mission in the DRC until 15 May 2007 by Resolution 1751 of 13 April 2007 and until 31 December 2007 by resolution 1756 of 15 May 2007 (with an amended mandate, see *ILIB* of 5 June 2007). Also, it extended the mandate of the UN Observer Mission in Georgia until 15 October 2007 in Resolution 1752 of 13 April 2007. Moreover, in Resolutions 1754 and 1755, both of 30 April 2007, it extended the mandate of the mandate of the UN Mission for the Referendum in Western Sahara until 31 October 2007 and that of the UN Mission in Sudan until 31 October 2007.

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<sup>1</sup> For documents, see <http://www.un.org/documents>.

Finally, on 17 April the Security Council debated the impact of climate change on security, although the body's competence in this domain was challenged by some States. See e.g. <http://www.reuters.com/article/environmentNews/idUSN1736824820070418> and *Sentinelle* No. 106 of 22 April 2007.

(F. Naert)

### **UN Expert Group Offers Recommendations on Ensuring Response to Abuse by Peacekeepers**

In December 2006, the UN published the *Report of the Group of Legal Experts on making the standards contained in the Secretary-General's bulletin [on special measures for protection from sexual exploitation and sexual abuse (ST/SGB/2003/13)] binding on contingent members and standardizing the norms of conduct so that they are applicable to all categories of peacekeeping personnel*: see UN Doc. A/61/645. This follows an earlier *Report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations* (UN Doc. A/60/980), which is now being discussed within the UN. Both documents are available online at <http://documents.un.org>. See also <http://www.peacewomen.org/un/pkwatch/pkwatch.html> and previous issues of this *News-letter*.

(F. Naert)

### **UN Investigation Finds Peacekeepers Used Excessive Force in DRC**

According to a UN press release of 11 June 2007, a UN investigation has found that Bangladeshi peacekeepers operating in the northeast of the Democratic Republic of the Congo (DRC) used excessive force in 2005 against detainees trying to escape from their control. There have been other inquiries and the MONUC chief William Lacy Swing has announced that he has asked the UN's Office for Internal Oversight Services to conduct a full probe into all detainees held by the Mission's Ituri Brigade in 2005. Furthermore, the UN is pressing the Bangladeshi Government to take the appropriate action to hold accountable those responsible.

(F. Naert)

### **UNGA Endorses Creation of a Peacekeeping Support Unit**

In UN General Assembly Resolution 61/256 of 15 March 2007 (available online at <http://www.un.org/Depts/dhl/resguide/r61.htm>), the UNGA supported the reform of the UN Department of Peacekeeping Operations, including the creation of an operations support department outside the UN's seat. See also *Sentinelle* No. 102 of 25 March 2007.

(F. Naert)

### **Investigation into Shootings in Kosovo Riot**

In clashes that occurred in Pristina, Kosovo, on 10 February 2007, two protestors died and two others were wounded following the use of rubber bullets. An interim report by an international prosecutor to UNMIK (<http://www.unmikonline.org/>) has found "substantial basis" on which to conclude that Romanian gunners linked to a Romanian Formed UN Police Unit were responsible and that the Mission, the UN and Romania's Government may want to consider compensation for the victims and their families. However, while there is a reasonable suspicion that three of the shootings constitute crimes under Kosovo law, there is not enough evidence pointing to which specific Romanian gunners were responsible and the evidence does not show that the entire group acted unlawfully. UNMIK has regretted that Romania has withdrawn the police officers involved despite a UN request not to do so and has asked Romania to make them available should they be needed in the probe, stating that it expects the Romanian authorities to continue to cooperate and assist fully with ongoing investigation. See UN press releases of 23 March 2007 and 17 April 2007.

(F. Naert)

### **UN Expert Group Offers Recommendations on Illicit Brokering in Arms**

UN Group of (25) Governmental Experts to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons (established by UN General Assembly Resolution 60/81 of 8 December 2005, see <http://www.un.org/Depts/dhl/resguide/r60.htm>) has produced a series of recommendations for combating the trade through legislation during an 8 June meeting. Their consensus report includes a description of what constitutes illicit brokering in small arms. See <http://disarmament.un.org/cab/GGE%20brokering.htm> and <http://www.un.org/News/Press/docs//2007/dc3071.doc.htm> (the report is not yet available).

(F. Naert)

### **New Council of Europe Report on Secret Detention**

On 7 June 2007, the rapporteur for the Council of Europe's Parliamentary Assembly inquiry into 'Secret detentions and illegal transfers of detainees involving Council of Europe member states' issued an explanatory memorandum to his second report, see [http://assembly.coe.int/CommitteeDocs/2007/EMarty\\_20070608\\_NoEmbargo.pdf](http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf) and <http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=362>. See on this inquiry also previous issues of this *Newsletter*.

(F. Naert)

## **International(ised) Courts**

### **Rwanda Sues France before International Court of Justice**

On 18 April 2007, the Republic of Rwanda applied to the International Court of Justice in a dispute with France concerning international arrest warrants issued by the latter's judicial authorities against three Rwandan officials on 20 November 2006 and a request sent to the UN Secretary-General that President Paul Kagame of Rwanda should stand trial at the ICTR. Rwanda asks the Court to declare that, by issuing the above-mentioned three arrest warrants, France has violated international law with regard to international immunities, as well as the sovereignty of Rwanda, and that it is under an obligation to annul such international arrest warrants forthwith. With respect to the request that President Kagame should stand trial at the ICTR, Rwanda asks the Court to find that France has acted in breach of the obligation of each and every State to refrain from intervention in the affairs of other States and is under a duty to respect the sovereignty of Rwanda. Rwanda seeks to found the jurisdiction of the Court on Article 38, paragraph 5, of the Rules of Court, hoping that France will accept the jurisdiction of the Court even though it has no obligation to do so. See <http://www.icj-cij.org/presscom/index.php?pr=1909&pt=1&p1=6&p2=1> and *Sentinelles* No. 106 of 22 April 2007.

(F. Naert)

## DEVELOPMENTS AT THE ICC<sup>2</sup>

First, on 7 June 2007, President Kirsch of the International Criminal Court and Minister of Foreign Affairs H.E Maxime Verhagen signed the Headquarters Agreement between the International Criminal Court and the Kingdom of the Netherlands. The Headquarters Agreement regulates the relationship between the Court and the Netherlands and in particular the privileges and immunities of staff and other categories of persons participating in proceedings before the Court. The Agreement was approved by the Assembly of States Parties in December 2006 and by the Dutch Council of Ministers in May 2007. It will enter into force after Dutch Parliamentary approval, as required by Dutch law.

Second, on 7 June 2007, the ICC Prosecutor Luis Moreno-Ocampo told the United Nations Security Council that alleged Darfur war criminals Ahmad Harun and Ali Kushayb must be arrested. Evidence collected by the Office of the Prosecutor and presented to the ICC judges on February 27th shows Ahmad Harun and Ali Kushayb joining together to systematically pursue and attack innocent civilians. The Prosecutor told the Security Council that the situation in Darfur "remains alarming," and that his Office is gathering information about current crimes committed in Darfur and also in Chad and the Central African Republic, which are both States Parties to the Rome Statute. He further mentioned allegations of "indiscriminate and disproportionate" air strikes by the Government of the Sudan between January and April of this year, with some villages being bombarded for as long as 10 days. He also noted continuing reports of women being raped if they venture outside the IDP camps and emphasized allegations of crimes committed by rebel forces, including well-documented attacks against international peacekeepers and aid workers. See also *Sentinelle* No. 108 of 6 May 2007.

Third, the ICC Prosecutor Luis Moreno-Ocampo announced the decision to open an investigation in the Central African Republic. The alleged crimes occurred in the context of an armed conflict between the government and rebel forces. This is the first time the Prosecutor is opening an investigation in which allegations of sexual crimes far outnumber alleged killings. The government of the Central African Republic referred the situation to the Prosecutor. See <http://www.icc-cpi.int/cases/RCA.html>. See also *Sentinelle* No. 111 of 27 May 2007.

(C. De Cock)

## DEVELOPMENTS AT THE ICTY AND ICTR<sup>3</sup>

First, Zdravko Tolimir, a high ranking Bosnian Serb Army officer indicted for genocide and other crimes committed in Srebrenica in 1995, was transferred into the custody of the ICTY. He was yesterday detained by authorities in Bosnia and Herzegovina after having been on the run for more than two years. The Tribunal's indictment charges Tolimir, Assistant Commander for Intelligence and Security of the Main Staff of the Bosnian Serb Army (VRS), with responsibility for murdering more than 7,000 Bosnian Muslim men and boys from Srebrenica in July 1995. In executing this plan, VRS and Interior Ministry personnel, amongst other crimes, shelled civilian targets in the enclaves and restricted humanitarian aid, such as food, medicine and medical assistance. According to the indictment, these and other crimes were part of a joint criminal enterprise and operation in which Tolimir participated. Its purpose was to force the Muslim population out of the Srebrenica and Žepa enclaves to areas outside the control of the Republika Srpska (RS).

Second, on 2 April 2007, the ICTY Appeals Chamber dismissed all grounds of Miroslav Bralo's appeal against his sentence, issued in December 2005. Bralo was a former member of a notorious anti-terrorist platoon of the Croatian Defence Council known as the "Jokers" and who was charged with a broad range of war crimes carried out in the Lašva Valley region of central Bosnian and Herzegovina between April and July 1993. Those charges comprise one count of persecution on political, racial and religious grounds; four counts of grave breaches of the Geneva Conventions, including acts of torture or inhuman treatment and unlawful

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<sup>2</sup> See generally <http://www.icc-cpi.int>.

<sup>3</sup> See generally respectively <http://www.un.org/icty> and <http://69.94.11.53>.

confinement; and three counts of violating the laws or customs of war, including murder, torture and rape.

Third, on 3 April 2007, the ICTY Appeals Chamber reduced the sentence of former leading Bosnian Serb politician Brdanic, who was jailed over his role in the ethnic cleansing that took place during the Balkan wars of the 1990s, to 30 years but upheld most of his original convictions. Mr. Brdanin held various prominent positions within the region at that time, including serving as President of the ARK Crisis Staff and was also later a minister and acting vice-president in the Republika Srpska government. In September 2004 the ICTY Trial Chamber found there had been a systematic and strategic plan by the Bosnian Serb state organizers to permanently remove Muslims and Croats from the ARK, and that Mr. Brdanin was well aware of such a plan and had contributed to it.

Fourth, on 4 April 2007, the ICTY sentenced a former Bosnian Serb soldier and de facto military policeman to 15 years in prison for raping and torturing Muslim women and girls in eastern Bosnia and Herzegovina between July and October 1992. He was arrested by Russian authorities in August 2005 after leaving his home and fleeing to Russia under a false name to avoid detection and arrest. He was transferred to the ICTY last year.

Fifth, on 11 April 2007, the ICTY transferred Nicolic, who was a senior security and intelligence officer in the Bosnian Serb army and sentenced to 20 years' jail for his role in the 1995 massacre of more than 7,000 Muslim men and boys at Srebrenica, to Finland where he will serve the rest of his sentence.

Sixth, on 13 April 2007, the ICTY transferred Rajic, who was a former Bosnian Croat militia commander sentenced to 12 years' jail for a notorious attack on a village where more than three dozen Muslims were killed, to Spain where he will serve the rest of his sentence.

Seventh, on 5 April 2007, the ICTY announced that it is referring the case of a Bosnian Serb paramilitary leader and his cousin who are accused of burning to death scores of Muslim women, children and elderly men in 1992. Mr. Lukic and his cousin face multiple charges relating to the activities of their paramilitary unit, which prosecutors say worked with local police and military units to exact a reign of terror over Muslims in the area around Višegrad in south-eastern Bosnia and Herzegovina during the Balkan wars of the early 1990s.

Eighth, on 9 May 2007, the ICTY Appeals Chamber overturned a former Bosnian Serb army commander's conviction for complicity to commit genocide against Muslims at Srebrenica in July 1995, but upheld other convictions for his role in the mass killings there. The ICTY Appeals Chamber said that the Trial Chamber had erred in convicting Mr. Blagojevic of complicity in genocide in 2005 because it was not clear beyond a reasonable doubt that he knew of the main perpetrators' genocidal intent.

Ninth, on 21 May 2007, the ICTR Appeals Chamber confirmed the convictions of Mikaeli Muhimana for genocide, rape and murder as crimes against humanity, as well as his life sentence. He was convicted for instigating, committing, and abetting numerous crimes between April and June 1994 at various locations in Kibuye Prefecture.

Tenth, on the 11 June 2007, the ICTY announced that it is transferring the case of Milorad Trbic, a Bosnian Serb ex-soldier facing genocide charges over his role in the notorious massacre of Muslim men and boys at Srebrenica in 1995. His trial will now take place within the war crimes section of Bosnia and Herzegovina's court system

Mr. Trbic has been charged with genocide, conspiracy to commit genocide, extermination, murder, persecutions and forcible transfer committed against the civilians of the Srebrenica area between July and November 1995. The transfers of cases involving low or intermediate-level accused to courts in the countries of the former Yugoslavia are part of the Tribunal's completion strategy, which is designed to allow it to concentrate its resources upon the most serious cases and under which the Tribunal is scheduled to finish its work by the end of 2010.

Eleventh, on 12 June 2007, the ICTY Trial Chamber sentenced Milan Martić, a former political leader of rebel Serbs in Croatia to 35 years' prison after convicting him for his role in a campaign of ethnic cleansing on 16 counts, including persecutions, murder, torture, deportation, attacks on civilians, the wanton destruction of civilian areas and other crimes against humanity and violations of laws and customs of war. He was acquitted on one count of extermination. He was also convicted of ordering rocket attacks on downtown Zagreb in May 1995 that killed seven people and wounded more than 200 others.

### **Taylor Trial Starts**

On 4 June 2007, the trial of Charles Taylor started before the Special Court for Sierra Leone. See <http://www.sc-sl.org> and <http://www.charlestaylortrial.org/>. See also the 2006/1-2 issues of this *Newsletter*.

(F. Naert)

### **SCSL Convicts Three**

On 20 June 2007, the Trial Chamber of the Special Court for Sierra Leone convicted Brima, Kamara and Kanu for their role in the conflict in the Sierra Leone on several counts for violations of Common Article 3 to the Geneva Conventions and Additional Protocol II and crimes against humanity, including acts of terrorism, collective punishments, extermination, murder, rape, outrages upon personal dignity and conscripting children under the age of 15 years into armed groups and using them to participate directly in hostilities.

(C. De Cock)

### **Security Council Sets up Hariri Tribunal**

On 30 May 2007, the Security Council in resolution 1757 established a Special Tribunal for Lebanon, after the Lebanese Parliament failed to ratify the agreement negotiated by its Government with the UN on this tribunal. See also *ILIB* of 5 June 2007. Earlier, on 27 March 2007, the Security Council in resolution 1748 extended until 15 June 2008 the mandate of the International Independent Investigation Commission probing the 2005 terrorist attack that killed former Lebanese Prime Minister Rafik Hariri and 22 others. See also previous issues of this *Newsletter*, including issues 2007/1 and 2006/1, and *Sentinelles* Nos. 103, 107, 110 and 112 respectively of 1 and 29 April, 20 May and 3 June 2007.

(F. Naert)

### **ECtHR Dismisses Kosovo Mission Cases**

On 31 May 2007, the Grand Chamber of the European Court of Human Rights (ECtHR) has declared inadmissible the applications brought the cases *Behrami and Behrami v. France* (application no. 71412/01) and *Saramati v. France, Germany and Norway* (no. 78166/01), both concerning conduct of personnel of States Parties in the international presence in Kosovo.

The case of *Behrami and Behrami* concerned two children who, on 11 March 2000, in the Mitrovica area, found a number of undetonated cluster bombs and began playing with them, causing one bomb to detonate, resulting in one of children's death and seriously injuring the other one. The victims claimed that France, as lead nation of the multinational Brigade responsible for the Mitrovica area, had breached its obligation under article 2 of the European Convention of Human Rights (ECHR) to take positive measures to protect life, namely to mark and/or defuse the un-detonated cluster bombs which KFOR allegedly had known to be present on the site in question. Claims in Kosovo had not been successful.

Ruzhdi Saramati, from Kosovo and of Albanian origin, was arrested in April 2001 by UNMIK police and later detained and charged with various offences, including attempted murder and causing serious bodily harm but was released after he appealed his detention. However, on 13 July 2001 he was arrested by two UNMIK police officers pursuant to a detention order by the KFOR Commander (COMKFOR), a Norwegian officer at that time. His detention was subsequently repeatedly extended and was considered necessary to maintain a safe and secure environment and to protect KFOR troops. On 6 September 2001 the applicant's case was transferred to the district court for trial, while he continued to be detained, as of 3 October 2001 under the new French COMKFOR. On 23 January 2002 the applicant was convicted of attempted murder. On 26 January 2002 he was transferred by KFOR to the UNMIK deten-

tion facilities in Pristina. On 9 October 2002 the Supreme Court of Kosovo quashed the applicant's conviction, sent his case for re-trial to Pristina District Court and ordered his release. A re-trial has yet to be fixed. The applicant complained against Norway and France under Article 5 ECHR (right to liberty and security) and Article 13 ECHR (right to an effective remedy) about his detention by KFOR between 13 July 2001 and 26 January 2002. He further complained under Article 6(1) ECHR that he did not have access to court. The applicant initially submitted that it was a German KFOR officer who orally issued the arrest order and informed him that he was being arrested by COMKFOR order but in the end withdrew the claim against Germany.

The Chamber dealing with the cases relinquished jurisdiction in favour of the Grand Chamber and the cases were joined.

The Court considered that the question raised by the cases was, less whether the States concerned exercised extra-territorial jurisdiction in Kosovo but, far more centrally, whether the ECtHR was competent to examine under the ECHR those States' contribution to the relevant civil and security presence exercising control of Kosovo (§§ 69-72).

The Court considered that issuing detention orders fell within the security mandate of KFOR and that the supervision of de-mining fell within the mandate of UNMIK. It went on to hold that the impugned action of KFOR (detention of Mr Saramati) and inaction of UNMIK (the alleged failure to de-mine in the Behrami case) could, in principle, be attributed to the UN because both acted under a delegated UN Security Council (UNSC) Chapter VII mandate (§§ 212-143).

The Court then held that it was not competent to review the acts of the States in question carried out on behalf of the UN, interpreting the Convention in the light of other international law applicable in relations between its Contracting Parties, especially the UN Charter. Since operations established by UNSC Resolutions under Chapter VII of the UN Charter were fundamental to the mission of the UN to secure international peace and security (the primary responsibility of the UNSC as a counterpart to the prohibition, now customary international law according to the Court, on the unilateral use of force) and since they relied for their effectiveness on support from member states, the Convention could not be interpreted in a manner which would subject the acts and omissions of Contracting Parties which were covered by UNSC Resolutions and occurred prior to or in the course of such missions, to the scrutiny of the Court. To do so would be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. That reasoning equally applied to voluntary acts of the States concerned such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts might not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim (§§ 144-152).

The Court distinguished the present cases from its earlier *Bosphorus* judgment, in which it dismissed a claim against Irish actions implementing EC implemented UN sanctions because the EC provided human rights safeguards equivalent to those of the ECHR. It considered that the impugned conduct of KFOR and UNMIK could not be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. Furthermore, there was a fundamental distinction between the international organisation/international cooperation at issue in the *Bosphorus* case and those at issue in the present cases (§§ 145 and 150-151).

In light of that conclusion, the Court considered that it was not necessary to examine the remaining submissions of the parties, including about extra-territorial conduct. The decision is available in English and in French at <http://cmiskp.echr.coe.int> (see especially §§ 69-72 and 121-153). See also *ILIB* of 5 June 2007.

The case is of great significance to the law applicable to peace operations but its exact implications will require further analysis; to this effect, a longer annotation should appear in the *Review 2007*. However, as an initial personal reflection, the attribution of KFOR conduct to the UN seems questionable given that such attribution is generally held to require effective control and that such control is highly questionable in this case and one may wonder whether NATO would be willing to accept such control in view of its claimed independence

from the UN. Furthermore, a logical conclusion of the Court's view would be that the UN is, in principle, internationally liable for any KFOR action within the mandate. However, it is doubtful whether the UN would subscribe to this and the private law claims procedures applied in Kosovo indicate a distinct attribution to KFOR (or even the individual troop contributing nations). Finally, the Court's apparent broad relinquishing of jurisdiction over any State act related to the UN's (Chapter VII) peace and security functions also seems to be at variance with the more limited leeway accepted by the EU's Court of Justice in some of its cases concerning the implementation of UN sanctions (i.e. for obligations only, see especially Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council of the EU*, 12 December 2006, discussed in the previous issue of this Newsletter). While some of the Court's broad arguments do not seem very convincing, its conclusion in respect of the specific conduct at issue may well be justified in that it occurred pursuant to a Chapter VII UNSC mandate and may indeed be considered as an exercise of international jurisdiction (arguably by NATO for KFOR and by the UN for UNMIK) over persons/territory that was not transferred by States Parties who previously exercised such jurisdiction. In any event, while the judgment given States considerable latitude in Chapter VII operations, it should not be an excuse for ignoring human rights concerns altogether to the detriment of the rule of law which such missions usually aim to promote.

(F. Naert)

### **ECtHR Condemns Russia for Disappearance of a Chechnian**

On 5 April 2007 in the case of *Baysayeva v. Russia* (Application no. 74237/01), the European Court of Human Rights ruled that Russia has violated the European Convention of Human Rights and is responsible for the disappearance and (presumed) death of Shakhid Baysayev at the hand of State agents and the failure to investigate these events (violation of the right to life and liberty). The evidence included a video of Baysayev being kicked and taken away by Russian forces. It is not the first such condemnation by the Court and the Court *inter alia* stated: "*The Court notes with great concern that a number of cases have come before it which suggest that the phenomenon of "disappearances" is well known in Chechnya (...). A number of international reports point to the same conclusion (...). ... in the context of the conflict in Chechnya, when a person is detained by unidentified servicemen without any subsequent acknowledgement of detention, this can be regarded as life-threatening*" (§ 119). The Court awarded the widow some 52.000 Euros (mostly for her suffering). Russia has reportedly paid the damages awarded in earlier judgments, but has not prosecuted the military personnel responsible. The judgment is available online at <http://cmiskp.echr.coe.int>. See also <http://www.srji.org/eng>, which also mentions the more recent similar judgment of the Court on 10 May 2007 in *Akhmadova and Sadulayeva v. Russia* (Application No. 40464/02).

(F. Naert)

### **Cambodia Tribunal Operational**

The Extraordinary Chambers in the Courts of Cambodia (see <http://www.eccc.gov.kh>; see also previous issues of this Newsletter), which are to investigate those most responsible for crimes and serious violations of Cambodian and international law between 17 April 1975 and 6 January 1979 with international support, are operational, following the resolution of a dispute about the bar registration fees to be paid by international lawyers, the adoption of the Court's rules of procedure on 12 June 2007 and the swearing in of the Court's investigators on 13 June 2007. See also UN press release of 13 June 2007.

(F. Naert)

## **National Developments**

### **Argentine Judge Annuls Amnesties**

On 25 April 2007, an Argentine federal judge declared unconstitutional the amnesties granted to two members of Argentina's previous military dictatorship by former President Menem and held that the two must serve out their life prison sentences. See [http://jurist.law.pitt.edu/paperchase/2007\\_04\\_25\\_indexarch.php#640399405124772564](http://jurist.law.pitt.edu/paperchase/2007_04_25_indexarch.php#640399405124772564).

(F. Naert)

### **Burundi and UN Agree to Set Up Tribunal and Truth Commission**

On 23 May, the UN and the Government of Burundi agreed to set up a tribunal to try those guilty of serious crimes during the country's civil war (for which there will be no amnesty) and a truth and reconciliation commission. See [http://jurist.law.pitt.edu/paperchase/2007\\_05\\_23\\_indexarch.php#1598093293295020730](http://jurist.law.pitt.edu/paperchase/2007_05_23_indexarch.php#1598093293295020730).

(F. Naert)

### **Canadian Rwanda Trial Commences**

The case against Desiré Munyaneza, a former militia commander, began on 26 March 2007 in Montreal, for charges of genocide, crimes against humanity and war crimes related to the atrocities committed against millions of Rwandans in 1994. Munyaneza is accused of committing murder, psychological terror, physical attacks and sexual violence against Tutsis. Canada passed a new law in 2000 to clarify that Canadian courts can hear such cases. The trial will be presided over by Quebec Superior Court Justice André Denis. See 'First Canadian War Crimes Trial in 15 Years to Begin Monday', Toronto Daily News, 23 March 2007, <http://www.torontodailynews.com/index.php/TorontoNews/20070323010war-crimes-trial> and *Sentinel* No. 103 of 1 April 2007.

(F. Naert)

### **Controversy over Canadian Detainee Transfer in Afghanistan**

Reports that detainees transferred by Canadian forces in Afghanistan to local authorities there have been abused by the latter caused considerable controversy in Canada, resulting *inter alia* in an investigation by NATO into the alleged abuse by the Afghan authorities and the signature of an enhanced agreement on transfer of detainees between Canadian and Afghan authorities. See:

[http://jurist.law.pitt.edu/paperchase/2007\\_04\\_12\\_indexarch.php#6377412668658976964](http://jurist.law.pitt.edu/paperchase/2007_04_12_indexarch.php#6377412668658976964)

[http://jurist.law.pitt.edu/paperchase/2007\\_04\\_23\\_indexarch.php#7610839769058507357](http://jurist.law.pitt.edu/paperchase/2007_04_23_indexarch.php#7610839769058507357)

[http://jurist.law.pitt.edu/paperchase/2007\\_04\\_26\\_indexarch.php#6032737659842348343](http://jurist.law.pitt.edu/paperchase/2007_04_26_indexarch.php#6032737659842348343)

[http://jurist.law.pitt.edu/paperchase/2007\\_04\\_29\\_indexarch.php#7470135445438278557](http://jurist.law.pitt.edu/paperchase/2007_04_29_indexarch.php#7470135445438278557)

[http://jurist.law.pitt.edu/paperchase/2007\\_05\\_01\\_indexarch.php#7521313950559471475](http://jurist.law.pitt.edu/paperchase/2007_05_01_indexarch.php#7521313950559471475)

[http://jurist.law.pitt.edu/paperchase/2007\\_05\\_03\\_indexarch.php#4342420604762394786](http://jurist.law.pitt.edu/paperchase/2007_05_03_indexarch.php#4342420604762394786)

(F. Naert)

### **German Prosecutor Dismisses Complaint against Rumsfeld**

On 27 April 2007, a German Prosecutor dismissed complaints brought against former US Secretary of Defence Rumsfeld in Germany (see the 2006/4 issue of this *Newsletter*), arguing that given Rumsfeld's present and expected future absence from Germany and the lack of any links with Germany, an investigation may be discontinued pursuant to para. 153(f)1 of the German Code of Criminal procedure. See *Sentinel* No. 109 of 13 May 2007 and:

<http://www.generalbundesanwalt.de/de/showpress.php?newsid=273> .

<http://www.ccr-ny.org/v2/GermanCase2006/germancase.asp>;

<http://jurist.law.pitt.edu/paperchase/2007/04/german-prosecutor-rejects-war-crimes.php>;

In response to the earlier dismissal, the UN Special Rapporteur on Independence of Judges and Lawyers expressed concern and expected the German prosecutor to reconsider the new complaints in all independence, see UN Doc. A/HRC/4/25/ADD.1, §§ 154-160 (available online at <http://documents.un.org> and at <http://www.fidh.org/IMG/pdf/unrumsfeld.pdf>). On 11 June 2007, three human rights institutions have submitted a request to reconsider the decision following this report, see <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=ACMRxLuuyb&Content=1054>.

Furthermore, lawyers for the claimants said they would take the case to Spain, see <http://jurist.law.pitt.edu/paperchase/2007/04/lawyers-taking-rumsfeld-war-crimes-case.php>.

(F. Naert)

### **Iraq Struggles with Detention Capacity and Abuse**

A report by the UN mission in Iraq covering the first 3 months of 2007 noted serious human rights concerns, including the "use of torture and other inhumane treatment in [Ministry] detention centers" and "apparent lack of judicial guarantees in the handling of suspects arrested in the context of the Baghdad Security Plan", noting that "The new emergency procedures ... contained no explicit measures guaranteeing minimum due process rights" and re-emphasizing "the urgent need to establish an effective tracking mechanism to account for the location and treatment of all detainees from the point of arrest". See <http://www.uniraq.org/FileLib/misc/HR%20Report%20Jan%20Mar%202007%20EN.pdf>. It appears that the Iraqi justice system is overwhelmed by the high number of detainees, see [http://jurist.law.pitt.edu/paperchase/2007\\_05\\_15\\_indexarch.php#5661970955212714784](http://jurist.law.pitt.edu/paperchase/2007_05_15_indexarch.php#5661970955212714784).

(F. Naert)

### **Iran Detains UK Marines near Iran-Iraq Maritime Border, then Releases Them**

On 23 March 2007, Iranian forces detained 15 British marines and sailors who surrendered after having been surrounded by Iranian forces near the disputed Iraq-Iran maritime boundary in the waters of the Shatt al-Arab waterway, north of the Persian Gulf. The UK claimed its forces were within Iraqi waters, while Iran alleged they were in Iranian waters. On 5 April 2007, the British marines and sailors were set free, following various appeals to do so, including by the UN Security Council (see <http://www.un.org/News/Press/docs//2007/sc8989.doc.htm>). During their detention, the marines and sailors admitted to having crossed into Iranian waters, but after their release they claimed they had made these statements after being tortured and revoked the statements. They were also not granted consular access during their detention. See *Sentinelle* No. 104 of 8 April 2007; S. Lyall, 'Iran Sets Free 15 Britons Seized at Sea', *New York Times*, 5 April 2007 and:

[http://en.wikipedia.org/wiki/2007\\_Iranian\\_seizure\\_of\\_Royal\\_Navy\\_personnel](http://en.wikipedia.org/wiki/2007_Iranian_seizure_of_Royal_Navy_personnel)

<http://www.mod.uk/DefenceInternet/DefenceNews/MilitaryOperations/GovernmentDemandImmediateAndSafeReturnOf15BritishPersonnelSeizedByIranianNavy.htm>;

<http://news.bbc.co.uk/1/hi/uk/6533287.stm>

<http://news.bbc.co.uk/1/hi/uk/6502947.stm>;

<http://news.bbc.co.uk/1/hi/uk/6500583.stm>;

<http://www.dur.ac.uk/ibru/resources/iran-iraq/>;

[http://www.craigmurray.co.uk/archives/2007/03/fake\\_maritime\\_b.html](http://www.craigmurray.co.uk/archives/2007/03/fake_maritime_b.html);

[http://www.craigmurray.co.uk/archives/2007/03/fake\\_maritime\\_b.html](http://www.craigmurray.co.uk/archives/2007/03/fake_maritime_b.html);

[http://www.craigmurray.co.uk/archives/2007/03/captured\\_marine.html](http://www.craigmurray.co.uk/archives/2007/03/captured_marine.html);

(F. Naert)

### **Serbian War Crimes Cases**

First, on 5 April 2007, the Serbian Supreme Court upheld the 13-year sentence of an ethnic Albanian KLA fighter accused of raping and murdering Roma during the 1999 Kosovo

conflict. A lower court had found Anton Lekaj guilty of abducting 11 Roma in June 1999. He and other KLA fighters were also said to have raped a girl, sexually assaulted a man, and murdered four of their captives. See 'Serbia's Supreme Court Upholds Ethnic Albanian's Sentence', *Southeast European Times*, 6 April 2007, [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/newsbriefs/setimes/newsbriefs/2007/04/06/nb-09](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/newsbriefs/setimes/newsbriefs/2007/04/06/nb-09) and AP, 'Serbia Supreme Crt Upholds 13-Yr Sentence For Kosovo Albanian', 6 April 2007.

Second, on 10 April 2007, a Serbian court convicted four former paramilitary police officers in the killings of six Bosnian Muslims from Srebrenica in July 1995, where a massacre of thousands of Muslims took place the same week, in a case prompted by a video that appeared in 2005, showing the Serbian security officers taking six Muslim prisoners from the back of a truck in Trnovo, tormenting them and then killing them. The judge sentenced both the commander of the unit, called the Scorpions, and his assistant to 20 years in prison, the maximum. The one defendant who had pleaded guilty was sentenced to 13 years. A fourth defendant got 5 years and a fifth was freed. However, the judge said she found no evidence directly linking the six killings to the massacre in Srebrenica, 145 kilometers away and said it was not clear that the victims had come from Srebrenica. See N. Wood, 'Serbian court convicts 4 in Srebrenica murders', *International Herald Tribune*, 10 April 2007 and *Sentinelle* No. 105 of 15 April 2007.

(F. Naert)

### **Spanish Indict US Soldiers for Shooting of Journalist in Iraq**

On 27 April 2007, a Spanish judge charged 3 US soldiers with homicide for the shooting of a Spanish cameraman in Iraq in 2003. In May 2007 and appeal against this decision was rejected. The US has refused to extradite the three. See:

[http://jurist.law.pitt.edu/paperchase/2007\\_04\\_27\\_indexarch.php#8775033659741866091](http://jurist.law.pitt.edu/paperchase/2007_04_27_indexarch.php#8775033659741866091);

[http://jurist.law.pitt.edu/paperchase/2007\\_05\\_19\\_indexarch.php](http://jurist.law.pitt.edu/paperchase/2007_05_19_indexarch.php) and

[http://jurist.law.pitt.edu/paperchase/2007\\_05\\_24\\_indexarch.php](http://jurist.law.pitt.edu/paperchase/2007_05_24_indexarch.php).

(F. Naert)

### **Developments in Sudan**

First, following Sudan's consent to the hybrid UN-AU peacekeeping force for Darfur, on 28 March 2007, the UN, AU, Sudanese Government and League of Arab States agreed to re-double their efforts to resolve the conflict engulfing Darfur and to press ahead quickly with plans to deploy the hybrid UN-AU peacekeeping force.

Second, on 30 March 2007, the UN Human Rights Council voiced "deep concern regarding the seriousness of the ongoing violations of human rights and international humanitarian law in Darfur" and agreed to set up a group of independent rights experts to work with the Sudanese Government and the AU to monitor the situation on the ground in Darfur and to ensure that all resolutions and recommendations on Darfur by UN human rights institutions are implemented.

In the mean time, the situation is still grave. For instance, on 11 May 2007, the Office of the High Commissioner for Human Rights described as "indiscriminate" a series of deadly aerial bombardments across the North Darfur region of Sudan, which were said to be disproportionate and to have killed and wounded civilians and destroyed property, school buildings and livestock. Google Earth and the US Holocaust Memorial Museum have started an initiative to increase public awareness of the atrocities being committed in Sudan, see <http://www.ushmm.org/googleearth/>.

Furthermore, on 18 April 2007, the UN Secretary General expressed 'deep concern' over reports of heavy weapons flights into Darfur in violation of the UN embargo and by "reports that private or national aircraft have been illegally provided with UN markings and used for military purposes," which "would be in clear violation of international law and in contravention of the UN's international status".

See UN press releases of 29 and 30 March, 18 April and 11 May 2007, the websites <http://www.un.org/News/Press/docs/2007/sgsm10985.doc.htm>; <http://www.un.org/News/Press/docs/2007/sgsm10952.doc.htm> and <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/4826AF1691C43372C12572AE00583E0B?opendocument> and previous issues of this Newsletter. See also above for the developments at the ICC concerning its Darfur investigation.

(F. Naert)

### **House of Lords Upholds Limited Applicability ECHR in Iraq**

On 13 June 2006, the UK House of Lords dismissed the appeals brought against the Court of Appeal's judgment in the case of *Al-Skeini and others* (also referred to in part as the Mousa case) concerning the deaths of six Iraqis in Basra during the period of British occupation.

In first instance, the Court concluded that "*the case of Mr Baha Mousa's death in the custody of British forces in Iraq comes within the scope of the [ECHR] as falling within the jurisdiction of the [UK] ... but that the other claims ... arising out of shootings of Iraqis by British forces in the field fail on the ground that those shootings occurred outside the jurisdiction of the [UK] and thus outside the scope of the [ECHR]*" (*R (Al-Skeini and others) v Secretary of State for Defence* ([2004] EWHC 2911 (Admin), 14 December 2004, available online at <http://www.bailii.org/ew/cases/EWHC/Admin/2004/2911.html>, § 344). See also the 2004/4 issue of this Newsletter.

The Court of Appeal upheld this decision but took a different position on some of the arguments leading to this conclusion, accepting a somewhat broader reach of the European Convention of Human Rights and UK Human Rights Act (HRA) ([2005] EWCA Civ 1609, 21 December 2005, available online at <http://www.bailii.org/ew/cases/EWCA/Civ/2005/1609.html>, especially § 147: "*the HRA has extra-territorial effect in those cases where a public authority is found to have exercised extra-territorial jurisdiction on the application of [State Agent Authority] principles*").

The relatives of the 5 applicants killed in the shootings appealed to the House of Lords, as did the Secretary of Defence in respect of the reasoning of the Appeals Court relating to the detention death case, while accepting the more narrow reasoning of the Divisional Court in respect of the latter. The House of Lords dismissed all the appeals, unanimously as regards the shootings and with 4 to 1 as regards the detention death, thus confirming a limited applicability of the ECHR to UK forces in Iraq. The decision ([2007] UKHL 26) is available online at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.pdf>.

Meanwhile, on 30 April 2007, one of the 7 soldiers accused of involvement in the death of Mousa was sentenced to one year under the UK International Criminal Court Act 2001. See [http://jurist.law.pitt.edu/paperchase/2007\\_04\\_30\\_indexarch.php#2456294154789889010](http://jurist.law.pitt.edu/paperchase/2007_04_30_indexarch.php#2456294154789889010) and the previous issue of this Newsletter.

(F. Naert)

### **UK Jury Acquits Intruding Peace Activists**

On 22 May 2007, a British jury at Bristol Crown Court acquitted two peace activists (Philip Pritchard and Toby Olditch) of conspiring to cause criminal damage at RAF Fairford in Gloucestershire on 18 March 2003 when they tried to safely disable US B52 bombers to prevent them from bombing Iraq (they were arrested after intruding the base but before they could sabotage anything). The jury seems to have accepted the defence of the accused that they acted to prevent damage to life and property in Iraq, and war crimes by the aggressors but it did not have to rule on the legality of the war. It was the second trial after the first one ended in a hung jury and the decision does not set a direct legal precedent. There are two other similar cases awaiting re-trial. See E. Addley & R. Norton-Taylor, 'Fairford Two Strike Blow for anti-War Protesters After Jury Decide They Were Acting to Stop Crime', *The Guardian*, 25 May 2007, <http://www.guardian.co.uk/Iraq/Story/0,,2088630,00.html> and 'B52 Two Not Guilty', *Indymedia UK*, 23 May 2007, <http://www.indymedia.org.uk/en/2007/05/371356.html>.

(F. Naert)

## Developments in the US

First, on 27 March 2007, David Hicks, an Australian captured in Afghanistan, was sentenced to nine months in jail, to be served in Australia, following a plea deal in which Hicks declared he had not been treated illegally (contrary to his earlier allegations), promised not to publicly talk about his case for one year and waived any claims concerning his captivity (and after the military judge presiding over his arraignment had ejected Hick's two civilian attorneys). See e.g. S. Tully, 'Australian Detainee Pleads Guilty before the First Military Commission', 11(11) *ASIL Insight*, 23 April 2007, <http://asil.org/insights/2007/04/insights070423.html>; C. Rosenberg, 'Full Scope of Tribunals Takes Shape', *The Miami Herald*, 1 April 2007, <http://www.miamiherald.com/579/story/59820.html> and J. White & C. Williams, 'Trial Would Have Done Stalin Proud – Lawyer, in Guantanamo Bay', *The Sydney Morning Herald*, 2 April 2007, <http://www.smh.com.au/articles/2007/04/01/1175366080770.html>.

Second, on 4 June 2007, military judges dismissed the charges brought against *Khadr* and *Hamdan* before Military Commissions. The decisions differ somewhat but both have in common that the judges ruled that Military Commissions Act of 2006 requires that a Combatant Status Review Tribunal (CSRT) or other competent tribunal must first determine that the accused is an alien unlawful enemy combatant before Military Commissions can establish initial jurisdiction. In *Hamdan*, the judge added that a finding that the accused was an enemy combatant was not such a determination. The decisions are available online at <http://www.nimj.com/documents/Khadr%20Order%20on%20Jurisdiction.pdf> and <http://www.nimj.org/documents/Corrected%20Order%20US%20v%20Hamdan.pdf>. For a comment, see e.g. <http://gtmoblog.blogspot.com/2007/06/a-on-recent-decisions-in-military.html>.

Third, on 11 June 2007, the US Court of Appeals for the Fourth Circuit ruled (with one Judge dissenting) that the Pentagon did not have the power to continue to militarily detain *Ali al-Marri*, a citizen of Qatar arrested in the US in December 2001 and the only person on the American mainland known to be held as an enemy combatant. The Court ordered the trial judge to issue a writ of habeas corpus directing the Pentagon "within a reasonable period of time" to release Mr. Marri from military detention and offered the Government the options to charge him in the civilian court system; deport him; hold him as a material witness or release him. The Court held that *al-Marri* did not fall under the Military Commissions Act 2006 as the necessary two step process for that Act to apply had not been followed and further considered that:

*... the Due Process Clause protects not only citizens but also aliens, like al-Marri, lawfully admitted to this country who have established substantial connections here ...*

*... since the legal status of "enemy combatant" does not exist in non-international conflicts, the law of war leaves the detention of persons in such conflicts to the applicable law of the detaining country. In al-Marri's case, the applicable law is our Constitution ...*

*... al-Marri ... is a dangerous enemy of this nation ... But ... [he] is still a civilian: he does not fit within the "permissible bounds of" "[t]he legal category of enemy combatant." ... Therefore, the AUMF provides the President no statutory authority to order the military to seize and indefinitely detain al-Marri. ...*

*... the Constitution does not allow the President to order the military to seize civilians residing within the United States and detain them indefinitely without criminal process, and this is so even if he calls them "enemy combatants ...*

*To sanction such presidential authority to order the military to seize and indefinitely detain civilians, even if the President calls them "enemy combatants," would have disastrous consequences for the Constitution -- and the country. For a court to uphold a claim to such extraordinary power would ... effectively undermine all of the freedoms guaranteed by the Constitution.*

The judgment, the scope of which is limited to persons detained in the US, is available online at <http://caselaw.lp.findlaw.com/data2/circs/4th/067427p.pdf>. See also A. Liptak, 'Court Says Military Cannot Hold 'Enemy Combatant'', *the New York Times*, 11 June 2007.

Fourth, on 2 April 2007, the US Supreme Court denied the petitions for writs of certiorari in *Boumediene v. Bush* (No. 06-1195) and *Al Odah v. US* (No. 06-1196), see <http://www.supremecourtus.gov/opinions/06pdf/06-1195Stevens.pdf> and <http://www.supremecourtus.gov/opinions/06pdf/06-1195Breyer.pdf>. See also *Sentinel* No. 105 of 15 April 2007. A petition for a rehearing has been filed, see <http://www.supremecourtus.gov/docket/06-1196.htm>.

Fifth, on 27 March 2007, the Federal District Court for the District of Columbia rejected all claims against US officials in *Ali et. al. v. Rumsfeld et al.* The decision is available online at <http://howappealing.law.com/DetaineesLitigationDCC032707.pdf>.

Sixth, a military investigation has reportedly found that senior Marine Corps commanders in Iraq showed a routine disregard for the lives of Iraqi civilians that contributed to a "willful" failure to investigate the killing of 24 unarmed Iraqis by marines in 2005. The report, by Maj. Gen. Eldon A. Bargewell of the Army was completed last summer but never made public. It did not conclude that the senior officers covered up evidence or committed a crime but said the Marine Corps command in Iraq was far too willing to tolerate civilian casualties and dismiss Iraqi claims of abuse by marines as insurgent propaganda. See J. White, 'Report On Haditha Condemns Marines', the *Washington Post*, 21 April 2007, [http://www.washingtonpost.com/wp-dyn/content/article/2007/04/20/AR2007042002308\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/04/20/AR2007042002308_pf.html) and P. von Zielbauer, 'Military Cites 'Negligence' in Aftermath of Iraq Killings', *New York Times*, 22 April 2007. Furthermore, in a survey on combat troop ethics fewer than half of Marines and a little more than half of Army soldiers said they would report a member of their unit for killing or wounding an innocent civilian. More than 40 percent support torture, and 10 percent reported personally abusing Iraqi civilians or damaging civilian property. See [http://www.armymedicine.army.mil/news/mhat/mhat\\_iv/mhat-iv.cfm](http://www.armymedicine.army.mil/news/mhat/mhat_iv/mhat-iv.cfm) and <http://www.msnbc.msn.com/id/18496711/from/ET/>. Gen. David Petraeus, the top commanding officer of US troops in Iraq, expressed his concern over the findings and said he was drafting a memo to look for ways to anticipate and prevent future abuses, see [http://jurist.law.pitt.edu/paperchase/2007\\_05\\_07\\_indexarch.php#2641878206588582161](http://jurist.law.pitt.edu/paperchase/2007_05_07_indexarch.php#2641878206588582161). On the other hand, an article by C. Kahl in *Foreign Affairs* of November/December 2006 claims that "U.S. compliance with noncombatant immunity in Iraq has been relatively high by historical standards, and it has been improving since the beginning of the war", see <http://www.foreignaffairs.org/20061101faessay85608/colin-h-kahl/how-we-fight.html>.

Seventh, late May 2007, in a preliminary report the UN special rapporteur on human rights and counterterrorism, Martin Scheinin, said at the end of a US visit that the "enhanced interrogation techniques" used by the US amounted to torture under the International Covenant on Civil and Political Rights, see <http://www.unhchr.ch/huricane/hurricane.nsf/view01/338107B9FD5A33CDC12572EA005286F8?opendocument> and [http://jurist.law.pitt.edu/paperchase/2007\\_05\\_26\\_indexarch.php#1564344706022721793](http://jurist.law.pitt.edu/paperchase/2007_05_26_indexarch.php#1564344706022721793).

Eighth, several US marines are expected to be charged for killing 10 to 12 civilians near Jalalabad, Afghanistan on 4 March 2007 after an attack by a suicide bomber. A preliminary US military investigation found that the Marines fired at bystanders. See [http://jurist.law.pitt.edu/paperchase/2007\\_04\\_27\\_indexarch.php#6759402044326662563](http://jurist.law.pitt.edu/paperchase/2007_04_27_indexarch.php#6759402044326662563) and [http://jurist.law.pitt.edu/paperchase/2007\\_04\\_11\\_indexarch.php#1792326353411923023](http://jurist.law.pitt.edu/paperchase/2007_04_11_indexarch.php#1792326353411923023). Earlier, the Afghanistan Independent Human Rights Commission released a report concluding that the marines violated international humanitarian law by using indiscriminate and excessive force in the case, see <http://www.aihrc.org.af/Investigatoin.pdf>.

(F. Naert)

### **INTERESTING PUBLICATIONS**

#### Notes:

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