



NEWSLETTER 2009-2
April/May/June 2009

INTRODUCTION

Dear reader,

On behalf of the Society, in particular the Board of Directors, the Managing Board and myself, I want to thank our members voting at the General Assembly in Tunis for the confidence given us for the three-year term that lies ahead of us until the next General Assembly. Due to unexpected circumstances, I was prevented from saying these words at the end of the 2009 Congress.

In my first job interview after passing Law School, the interviewer remarked about my specialization, which was Philosophy of Law, that they could need a person with a philosophical attitude towards Law. This could be interpreted as not taking the Law too seriously. On the international scene, it may seem that some have practiced such attitudes, but that is not the spirit of our Society.

At the Congress, we discussed a number of issues, possibly leaving the impression that Military Law and the Law of War is full of uncertainties. It should be clear, however, that ninety percent of the Law is clear and uncontroversial, and that discussions centre on the remaining ten. We have been discussing the Law in the spirit of upholding values. We have taken the law seriously, rejecting any temptations to stretch, distort or disregard the Law. This has been facilitated by the hospitality and efforts of our generous hosts, represented first and foremost by the Minister of Defence, H. E. Mr. Kamel Morjane and the Minister of Justice and Human Rights, H.E. Mr. Béchir Tekkari, all under the high patronage of His Excellency President Zine El Abdine Ben Ali.

The theme and venue of our next congress has not been determined yet. We will, however, continue the general thrust that was outlined at the end of the 2006 General Assembly towards increased activities outside Europe, more seminars between congresses and increased co-operation with organisations that have goals and activities that go well together with ours.

I wish all our members fruitful times at activities in their respective national groups, at our international seminars and at other events related to our society and its goals, welcoming all to give their contributions in presentations, discussions and in articles in our Review, hoping to see you all at the 2012 Congress, if not before.

Arne Willy Dahl
President of the Society

NEWS, ANNOUNCEMENTS OF CONFERENCES, SEMINARS, ETC.

◆ The Hungarian Group of the Society and the Military Prosecutor General's Office of Hungary are hosting their **9th International Military Criminal Law Conference** in Budapest from the 3 to 5 September 2009. The President of the Society, Mr. Arne Willy Dahl, will participate and present his views on different ways of organizing military appeals in disciplinary (summary punishment) cases from an international perspective. The deadline for application has been extended to 10 July 2009. For more information please contact Colonel Laszlo Venczl at tel. +36-1 311-5888 or at venczl.laszlo@mku.hu.

◆ The **XVIIIth Congress of the Society** that took place in Tunis from 5 to 9 May 2009 was a great success. The Society appreciates the generous words of praise that many participants gave in their evaluations. Compliments generally revolved around the Congress' structure of events and general organization, as well as the quality of the lectures and topics. The Society also looks forward to addressing the concerns voiced to us in the evaluations in order to improve the next Congress. Suggested topics for the next Congress ranged from the lessons learned from Iraq and Afghanistan to naval warfare and the law of the sea, SOFA issues, targeting, choice of weapons, detention and the use of private contractors and their status under International Humanitarian Law.

◆ The NATO School in Co-operation with the International Institute of Humanitarian Law of San Remo announces its **2009 Workshop on the Law of Armed Conflict and Human Rights in International Peace Support Operations**, 14 – 18 September 2009 at the NATO School, Oberammergau, Germany.

This Workshop will examine the core principles and rules of International Humanitarian Law and Human Rights, and their present application and implementation in International Peace Operations including those which do not rise to the level of armed conflict. Discussion will include exploration of the role of military forces, as well as the role of the United Nations and regional organizations, in the protection and promotion of International Human Rights and Humanitarian Law in International Peace Operations. A basic understanding of LOAC is required.

As the Workshop will strongly focus on case studies and practical exercises, enrolment in this Workshop is limited to 50 participants. The fee is 381,00 Euro, due at in-processing. The admission for participants who are not coming from a PfP, MedDialogue, ICI or NATO Contact country, will be decided on a case to case basis with the assistance of the NATO School's CJ2 Department. Travel, accommodation and per diem are the responsibility of each participant. The NATO School can assist with booking of accommodation in the case it is indicated so in the Joining Report.

For more information about the NATO School and Oberammergau visit: <http://www.natoschool.nato.int>

◆ **The Hague Prize for International Law 2009** has been awarded to the former President of the International Court of Justice, Dame Rosalyn Higgins. This was announced by Dr. Bernard Bot, chairman of The Hague Prize Foundation.

Regarding the decision to nominate Dame Rosalyn Higgins for The Hague Prize 2009, Dr. Bot said: "*Dame Rosalyn has been awarded the prize for her extraordinary contribution to the study and practice of international law. For more than 50 years she has distinguished herself as a legal scholar, barrister, judge, arbitrator and president of the International Court of Justice in The Hague.*"

The Hague Prize for International Law is awarded by The Hague Prize Foundation. Eligible candidates for nomination are individuals and/or organizations who have made – through publications or achievements in the practice of law – a special contribution to the

development of public international law, private international law or to the advancement of the rule of law in the world. The prize consists of a special medal, a certificate and a monetary award of EUR 50,000.

For more information about the The Hague Prize please visit <http://www.thehagueprize.nl/>.

(Alfons Vanheusden and Blake Travis)

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 Documents

Central Asia to Become Nuclear-Weapons-Free-Zone

All five Central Asian nations – Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan – have ratified a Treaty on a Nuclear-Weapon-Free Zone, opened for signature in September 2006. Central Asia joins the four other nuclear-weapon-free zones: Latin America and the Caribbean, the South Pacific, South-East Asia and Africa. See UN press release of 20 March 2009.

(Frederik Naert, KU Leuven)

UN Security Council

The Security Council extended the mandates of the UN missions in Afghanistan (until 23 March 2010 by Resolution 1868 of 23 March 2009), Sudan (until 30 April 2010 by Resolution 1870 of 30 April 2009), Western Sahara (until 30 April 2010 by Resolution 1871 of 30 April 2009) and Cyprus (until 15 December 2009 by Resolution 1873 of 29 May 2009). It also decided to authorize the Member States of the African Union to maintain AMISOM until 31 January 2010 to carry out its existing mandate and recalled its statement of intent regarding the establishment of a UN peacekeeping operation as expressed in resolution 1863 (2009) (Resolution 1872 of 26 May 2009). The Security Council also welcomed and agreed to the designation by the Steering Board of the Peace Implementation Council on 13 March 2009 of Mr. Valentin Inzko as High Representative in Bosnia and Herzegovina (Resolution 1869 of 25 March 2009).

Furthermore, on 12 June 2009, in Resolution 1874, the Security Council condemned in the strongest terms the nuclear test conducted by the DPRK on 25 May 2009 (local time) in violation and flagrant disregard of its relevant resolutions, in particular resolutions 1695 (2006) and 1718 (2006), and the statement of its President of 13 April 2009 (S/PRST/2009/7). The Council strengthened the sanctions against the country under Resolution 1718 (2006) and stated various demands, including that the DPRK not conduct any further nuclear test or any launch using ballistic missile technology; re-establish its pre-existing commitments to a moratorium on missile launches; immediately retract its announcement of withdrawal from the NPT; and return at an early date to the NPT and International Atomic Energy Agency (IAEA) safeguards. See also S/PRST/2009/7 of 13 April 2009.

The Security Council also adopted a number of other Presidential Statements of interest, including S/PRST/2009/3 of 18 March 2009 on Peace and security in Africa (concerning its cooperation with regional and sub-regional organizations in Africa, in particular the African Union); S/PRST/2009/8 of 21 April 2009 on mediation and settlement of disputes; S/PRST/2009/9 of 29 April 2009 on Children and armed conflict and S/PRST/2009/11 of 5 May 2009 on Peace and security in Africa (*inter alia* expressing deep concern over the resurgence of unconstitutional changes of government in a few African countries and stressing the

importance of expeditiously restoring constitutional order including through open and transparent elections).

(Frederik Naert, KU Leuven)

NATO

On 1 April 2009, Albania and Croatia became members of NATO. See http://www.nato.int/cps/en/SID-2DDB3445-7F58E61E/natolive/news_52342.htm?selectedLocale=en.

Furthermore, France's decision to fully participate in NATO's military structures, was welcomed by the 3-4 April 2009 NATO Summit. See http://www.nato.int/cps/en/natolive/news_52837.htm?mode=pressrelease and http://www.diplomatie.gouv.fr/fr/actions-france_830/defense-securite_9035/france-otan_9044/sommet-otan-strasbourg-kehl-03-04.04.09_70821.html.

(Frederik Naert, KU Leuven)

International(ised) Courts

-International Court of Justice (ICJ)

ICJ Order in Habré Case between Belgium and Senegal

On 28 May 2009, the International Court of Justice (<http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=144&PHPSESSID=66df0eb20403f92383dc3ea447d6af5c>) issued an order (<http://www.icj-cij.org/docket/files/144/15149.pdf>) in the case brought by Belgium against Senegal in relation to the prosecution of former Chadian president Hissène Habré. The Court considers that it has prima facie jurisdiction under Article 30 of the Convention against Torture to entertain the case (§ 53) but finds that "*the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures*" because there is no urgency to justify the indication of provisional measures given that Senegal has given a formal assurance that it will not allow Mr. Habré to leave its territory before the Court has given its final decision and that therefore the risk of irreparable prejudice to the rights claimed by Belgium was not apparent on the date of this Order (§§ 71-73). In fact, a Co-Agent of Senegal solemnly declared that "*Senegal will not allow Mr. Habré to leave Senegal while the present case is pending before the Court. Senegal has not the intention to allow Mr. Habré to leave the territory while the present case is pending before the Court*" (§ 68) and a Co-Agent for Belgium stated that such a solemn declaration could be sufficient for Belgium to consider that its Request for the indication of provisional measures no longer had any object (§ 69). See also the previous issue of this Newsletter.

(Frederik Naert, KU Leuven)

-International Criminal Court (ICC)

ICC Confirms Charges Against Former Congolese Vice-President

Jean-Pierre Bemba Gombo will stand trial at a date currently undetermined for his orders to his armed group called the Mouvement de liberation du Congo, which allegedly committed rape, murder and pillaging. A charge of torture was dropped due to the lack of evidence. See UN press release of 16 June 2009.

(Blake Travis)

ICC Lists Sudanese Fugitives as Priority

The ICC issued an arrest warrant on 4 March for Sudanese President Omar Al-Bashir based on allegations of war and humanitarian crimes in Darfur, and said that Sudan bears the responsibility to apprehend him. Al-Bashir is now the first current head of state to be indicted

by the ICC. The ICC has also indicted government minister Ahmed Harun and Janjaweed leader Ali Kushyab. The Rome Statute requires party nations to arrest indicted persons traveling within party member's territory. See UN Press Release of 5 June 2009.

(Blake Travis)

Darfur Rebel Leader Appears Before ICC

Bahr Idriss Abu Garda has been charged with war crimes allegedly perpetrated on 29 September 2007. He appeared voluntarily before the ICC and is allowed to leave the country, but must return for his charges hearing to determine if there is substantial evidence to proceed with the full trial. See UN Press Release 18 May 2009.

(Blake Travis)

-European Court of Human Rights (ECtHR)

ECtHR Upholds Conviction for Torture Based on Universal Jurisdiction

On 17 March 2009, the European Court of Human Rights declared inadmissible (and manifestly unfounded) a complaint brought by a former Mauritanian officer who was convicted in France in 2005 for torture committed in Mauritania on the basis of universal jurisdiction. See *Ely Ould Dah v. France*, Application No. 13113/03, available at <http://cmiskp.echr.coe.int> and the 30 March 2009 press release at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=13113/03&sessionid=25138647&skin=hudoc-pr-en>. See also http://www.croix-rouge.be/UserFiles/File/Publications/dih_newsletter/newsletter_dih_134.pdf.

(Frederik Naert, KU Leuven)

-Court of Justice of the European Communities (ECJ)

Kadi Strikes Back – a further EU Court Ruling on Terrorist Lists

Court of First Instance, *Othman v Council and Commission*, Case No. T-318/01, 11 June 2009 (available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-318/01>).

The Court of First Instance of the European Communities (CFI) has recently examined a case of blacklisting involving a Jordanian national, Omar Mohammed Othman, who is currently held in the UK on terrorist charges, pending deportation to his country of origin. In 2001 Mr. Othman's name was included in the "Consolidated List" by the Sanctions Committee of the UN Security Council, being considered associated with Al-Qaeda or the Taliban regime. As it normally happens, the UN List was shortly after put into effect within the EU territory by means of a list (the "1267 List"¹) annexed to an EC Regulation², on the basis of which, assets, funds and other financial resources belonging to Mr. Othman were temporary frozen. Basically, the 1267 List merely reproduces the UN List's contents, without any further assessment by the competent EU authorities on the merits of the decision taken by the Security Council³.

¹ The nickname is derived from the UNSC Res. which initially established the "Consolidated List" (see UN Doc. S/RES/1267 (1999)).

² Regulation (EC) No. 881 of 27 May 2002 (OJ 2002 L 139, p. 9). The 1267 List is regularly updated in order to timely adapt to the periodic revision of the UN List.

³ Two additional EU blacklists are currently operational. They were initially established *motu proprio* by the EU authorities in order to comply with the obligations to actively fight international terrorism, included in the UNSC Res. 1373 (2001). The two blacklists were originally annexed to the Common Position No. 2001/931/CFSP (OJ 2002 L 344, p. 93) and to the Council Regulation (EC) No. 2580/2001 (*Ibid.*, p. 70). Contrary to the 1267 List, the decision to include individuals and organizations in these blacklists has been considered since 2006 as being entirely attributable to the EU, so that any human rights violation has been so far imputed to the European Communities and thus ascertained by the European Court of Justice (ECJ) (see e.g. *Organisation des Modjahedines du People d'Iran v Council of the European Union*, Case No. T-228/02, 12 December 2006, paras 108-110, 172; *Sison v*

Following his inclusion in the EU List, Mr. Othman filed a petition before the CFI, claiming the annulment of the Regulation concerned.

In its decision, issued on 11 June 2009, the CFI acknowledged that the EC Regulation was adopted in breach of fundamental human rights (see para. 90), such as the right of defence, the right to effective judicial review (see para. 89) and the right to property (see para. 92).

Remarkably, the Court observed that the applicant's «factual and legal situation [was] in every way comparable to that of» the *Kadi* case⁴, whose appellate judgment was delivered by the ECJ on 3 September 2008. In *Kadi*, for the first time, the ECJ had admitted that, notwithstanding the European authorities are competent to adopt such a kind of restrictive measures on the basis of the EC Treaty (Art. 60, 301, and 308), they must communicate - either when such measures are decided upon or, afterward, as soon as possible - to the persons or entities concerned the grounds on which the measures themselves are taken, in order to enable them to exercise their right to defence, also granting them the full access to an effective judicial remedy. According to the Court, although the judicial review would not affect the primacy of UNSC decisions in international law (*Kadi*, para. 288), it is not legally correct to affirm that a EC Regulation enjoys immunity from the ECJ jurisdiction simply because it gives effect to a UNSC resolution (*Kadi*, para. 327), as it had been held *de facto* in previous rulings⁵.

In *Kadi*, the Court gave the Council three months to adapt blacklisting procedures to applicable human rights norms. Following on from that, in April 2009 the Commission presented a proposal for a Council Regulation (<http://www.statewatch.org/terrorlists/docs/COM-2009-187.pdf>), introducing listing and de-listing procedures slightly analogous to those adopted (following the December 2006 decision in PMOI⁶) in cases concerning individuals and organizations included in the EU-compiled "1373 List".

(Matteo Tondini)

-Other International(ised) Courts and Tribunals

Former RUF Members Sentenced in the Special Court for Sierra Leone

The Trial Chamber based sentences ranging from 25 to 52 years for three convicted Revolutionary United Front leaders on the "scale and brutality" of the crimes coupled with the "vulnerability, number and suffering of victims." The sentencing concludes the Freetown based trials while the trial against Charles Taylor continues in The Hague — see below. See UN Press Release 8 April 2009.

(Blake Travis)

UN Backed Court Releases Lebanese Generals Held in Hariri Murder Case

The prosecutor of a special tribunal, established in the Hague to deal with recent political murders in Lebanon, found insufficient evidence to maintain detention of Jamil Mohamad

Council of the European Union and Stichting Al – Aqsa v Council of the European Union, Cases Nos T-47/03 and T-327/03 respectively, 11 July 2007, paras 155-157, 242). Concerning the 1267 List, the principle that before implementing the Consolidated List in the EU territory, it has to be reviewed according to community and human rights law, was only set up in early September 2008, with the ECJ appellate decision in *Kadi* case (see below).

⁴ ECJ, *Kadi and Al Barakaat International Foundation v Council and Commission*, Cases Nos C-402/05 P and C-415/02 P, 3 September 2008.

⁵ See *Yusuf v Council of the European Union*, Case No. T-306/01, 21 September 2005; *Kadi v Council of the European Union*, Case No. T-315/01, 21 September 2005; *Ayadi v Council of the European Union*, Case No. T-253/02, 12 June 2006; *Hassan v Council of the European Union*, Case No. T-49/04, 12 July 2006; *Minin v Commission*, Case No. T-362/04, 31 January 2007.

⁶ See *supra* note 3.

Amin El Sayed, Ali Salah El Dine El Hajj, Raymond Fouad Azar or Mostafa Fehmi Hamdan or to generate indictments against the men who are suspects in the assassination of former Lebanese Prime Minister Rafiq Hariri. See UN Press Release 29 April 2009.

(Blake Travis)

Trial to Proceed Against Former President of Liberia, Charles Taylor

A motion to dismiss for lack of evidence was denied by judges at the Special Court for Sierra Leone. Justice Richard Lissick said "*the Trial Chamber finds that there is evidence that the accused participated in the joint criminal enterprise.*" The trial, where Taylor is expected to testify, is set to begin 13 July 2009. See UN Press Release 4 May 2009.

(Blake Travis)

International Border Dispute to be Resolved by The Permanent Court of Arbitration at the Hague

The border dispute between North and South Sudan involving the Sudanese town of Abyei will be resolved in arbitration according to the 2005 Comprehensive Peace Agreement that ceased the north-south civil war in the African nation. The court will apply the rules for "Arbitrating Disputes between Two Parties of which Only One is a State" to follow through on the peace agreement and decide on a border in the region. See UN Press Release 20 April 2009.

(Blake Travis)

Rwandan Ex-Minister Sentenced to Thirty Years

The UN backed International Criminal Tribunal for Rwanda (ICTR) found Callixte Kalimanzira, former Minister of the Interior of Rwanda, guilty of genocide beyond a reasonable doubt through substantially contributing to an ambush of thousands of Tutsi refugees. He was also found guilty of direct and public incitement to commit genocide. The ICTR's press release states that his crimes were aggravated by his position of prominence in different areas of society that made it more likely for others to follow his example, and that his most significant abuse of his public position was through "*encouraging Tutsi refugees to gather at Kabuye hill where he knew they would be killed in the thousands, he abused the public's trust that he, like other officials, would protect them.*" See the ICTR Press Release at <http://www.ictor.org/ENGLISH/PRESSREL/2009/598.html> and UN Press Release 22 June 2009.

(Blake Travis)

National Developments

Increased Militarization of the Arctic Circle Seen as Climate Change Makes Arctic More Accessible

The melt that is allowing greater access to lands and water in the Arctic Circle also presents a number of issues of public international law as several nations with stakes in the region may eventually battle for control over resources. A article detailing developments and some questions for the future can be found at <http://uk.reuters.com/article/idUKTRE55L00M20090622?pageNumber=3&virtualBrandChannel=11559&sp=true>

(Blake Travis)

Australian Military Justice Review Report

On 13 March 2009, the Chief of the Australian Defence Force publicly released the 'Report of the Independent Review on the Health of the Reformed Military Justice System'. The report is

the first of its kind under new arrangements resulting from a 2005 Senate Committee report entitled 'The Effectiveness of Australia's Military Justice System' (http://www.aph.gov.au/Senate/committee/FADT_CTTE/Legmiljustice/index.htm) and provides an independent evaluation of the effectiveness of reforms made to military justice. The Air Chief Marshal said he and Defence would now carefully consider the Report and its recommendations and develop an action plan. See <http://www.defence.gov.au/media/DepartmentalTpl.cfm?CurrentId=8867>. The report can be found at http://www.defence.gov.au/publications/Report_Reformed_Military_Justice_System.pdf. See also generally <http://www.defence.gov.au/mjs/>.

(Frederik Naert, KU Leuven)

Canadian Judge Convicts Rwandan for Genocide

On 22 May 2009, the Quebec Superior Court in Montreal convicted Désiré Munyaneza, a Rwandan who entered Canada in 1997 claiming refugee status (a claim later rejected), on seven charges related to the 1994 genocide and found him guilty of war crimes, crimes against humanity and genocide. His lawyers said that they would appeal the verdict. Sentencing is to follow and Mr. Munyaneza faces life in prison when he is sentenced. See I. Austen, 'Canadian Judge Convicts Rwandan in Genocide', New York Times, 23 May 2009 and http://www.trial-ch.org/en/trial-watch/perfil/db/facts/desire_munyaneza_423.html. The judgment is available in English at http://www.jugements.qc.ca/primeur/documents/r_c_munyaneza-22052009_an.doc and in French at <http://www.jugements.qc.ca/php/decision.php?liste=37792681&doc=5C5F565F54011B05>.

(Frederik Naert, KU Leuven)

Peacekeepers Killed by Fellow Soldier in Chad

On 7 April 2009, a French soldier of the European Union Force in Chad and the Central African Republic (EUFOR) killed two fellow EUFOR soldiers, a Togolese UN (MINURCAT) peacekeeper and a local peasant in Abeché (eastern Chad). He was apprehended by Chadian gendarmes on 9 April and was subsequently transferred to EUFOR/French authorities. See UN press release of 8 April 2009; <http://www.lefigaro.fr/international/2009/04/07/01003-20090407ARTFIG00578-tchad-un-militaire-francais-tue-trois-autres-soldats-.php>; <http://minurcat.unmissions.org/Portals/MINURCAT/PR-%202008-04-2009-%20Minurcat%20mourns%20the%20victims%20of%20recent%20events%20in%20Abeche.pdf> and http://www.france-info.com/spip.php?article276789&theme=14&sous_theme=18.

(Frederik Naert, KU Leuven)

DRC Amnesty Law

It has been reported that early May 2009, the Parliament of the Democratic Republic of the Congo adopted an amnesty law covering acts of insurrection in the East of the country. The law was promulgated by President Kabila on 7 May 2009. See http://www.humansecuritygateway.info/documents/ICTJ_AministieGenerale_DRC.pdf; X., 'Congolees parlement stemt amnestiewet voor oorlogsdaden', *De Standaard online*, 7 May 2009 and <http://www.lefigaro.fr/flash-actu/2009/05/07/01011-20090507FILWWW00443-rdc-adoption-d-une-loi-sur-l-amnistie.php>.

(Frederik Naert, KU Leuven)

DRC: Convictions by Military Courts

Early June 2009, it was reported that a Kisangani military court convicted 5 Mai-Mai to long prison sentences (30 years for one and forced labour for life for the four others) for large scale rapes. See

http://www.radiookapi.net/index.php?i=53&l=0&c=0&a=23549&da=&hi=0&of=12&s=&m=2&k=0&r=all&sc=62&id_a=0&ar=0&br=gst.

On 29 April 2009, the Special Representative of the UN Secretary General in the DRC welcomed the judgments of the Goma military court the week before, in which 20 DRC soldiers were convicted for crimes against humanity, rape and armed robbery and received sentences ranging from 15 years imprisonment to capital punishment. He considered that the trials had been fair. See

<http://www.un.org/apps/newsFr/storyF.asp?NewsID=19037&Cr=Congo&Cr1=justice> and http://www.croix-rouge.be/UserFiles/File/Publications/dih_newsletter/newsletter_dih_135.pdf.

(Frederik Naert, KU Leuven)

France to Compensate Victims of Nuclear Tests

Late March 2009, the French Minister of Defence announced that France intends to compensate victims of its nuclear tests conducted in Algeria and Polynesia. See <http://www.elwatan.com/Indemnisation-par-la-France-des> and <http://www.reuters.com/article/environmentNews/idUSTRE52N4W720090324>.

(Frederik Naert, KU Leuven)

Inquiries into the Gaza Conflict

On 22 April 2009, the Israeli Defence Force announced the results of investigations by five investigative teams assigned to investigate events relating to the conduct of IDF soldiers during Operation Cast Lead. The statement inter alia says that: *"The investigations showed that throughout the fighting in Gaza, the IDF operated in accordance with international law. The IDF maintained a high professional and moral level while facing an enemy that aimed to terrorize Israeli civilians whilst taking cover amidst uninvolved civilians in the Gaza strip and using them as human shields. Notwithstanding this, the investigations revealed a very small number of incidents in which intelligence or operational errors took place during the fighting. These unfortunate incidents were unavoidable and occur in all combat situations, in particular of the type which Hamas forced on the IDF, by choosing to fight from within the civilian population."* See <http://idfspokesperson.com/2009/04/22/idf-announcement-findings-from-cast-lead-investigations/>.

On 5 May 2009, UN Secretary General Ban Ki-moon sent to the Security Council a summary of the report by the UN Board of Inquiry into incidents affecting the UN's personnel, premises and operations during the recent conflict in Gaza and southern Israel. The Board of Inquiry was tasked with reviewing and investigating several incidents that occurred in the Gaza Strip between 27 December 2008 and 19 January 2009 and in which death or injuries occurred at, and/or damage was done to, UN premises. Mr. Ban emphasized the independent nature of the Board, adding that it does not make legal findings and does not consider questions of legal liability. He also stated that he intends to address any other incidents relating to UN personnel on a case by case basis, and through dialogue with the Government of Israel. See UN press release of 5 May 2009 and <http://www.un.org/apps/sg/offthecuff.asp?nid=1287>

(Frederik Naert, KU Leuven)

Japan Joins Fight Against Pirates

Japanese parliament has approved a bill that allows Japanese forces to defend against pirates off the coast of Somalia. On a side note, the G8 also has plans to create a system for trying pirates. For more details See <http://jurist.law.pitt.edu/paperchase/2009/06/japan->

[parliament-approves-anti-piracy.php](#) and <http://jurist.law.pitt.edu/paperchase/2009/05/g8-leaders-to-develop-legal-system-for.php> .

(Blake Travis)

Five Kenyans Sue the UK for Abuses During The Mau Mau Rebellion in the 1950's

The United Kingdom has expressed regret for the abuses, but plans to argue that the casue of action has lapsed. The attorneys representing the Kenyans state that the claim should not have lapsed since the Mau Mau organization was illegal until 2002, and thus, the abuse victims were unable to band together and prepare appropriate evidence for a trial. For more details, See Lauener, Paul. <http://uk.reuters.com/article/idUKTRE55M4C520090623?pageNumber=1&virtualBrandChannel=11559&sp=true>

The law firm representing the Kenyans also has a press release on their website containing more explicit details of abuses including a statement by one of the claimants, Ndiku Mutua, that "*I live with the physical and mental scars of what happened to me. Not a day goes by when I do not think of these terrible events. At last I can tell my story and at last I can hope for justice from the British Courts.*" <http://www.leighday.co.uk/news/news-archive/mau-mau-claims-to-be-issued-on-23rd-june-2009>

(Blake Travis)

Former President of Peru Convicted

On 8 April 2009, Peru's Supreme Court convicted former President Alberto K. Fujimori of human rights abuses, including the killing of 25 people by a military death squad, and sentenced him to 25 years in prison. See S. Romero, 'Peru's Ex-President Convicted of Rights Abuses', *New York Times*, 8 April 2009.

(Frederik Naert, KU Leuven)

Somalia and Piracy

Anti-piracy operations continued off the coast of Somalia. In June 2009, NATO decided to extend its anti-piracy operation (see http://www.nato.int/cps/en/SID-3D987888-CA435B24/natolive/news_55594.htm) and on 15 June 2009, the EU decided to extend its operation Atalanta for a further year beyond its current end date of 13 December 2009 (see http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/108452.pdf).

Warships captured a number of pirates in various instances. In some cases, the pirates were released (see e.g. <http://www.dw-world.de/dw/article/0,,4222757,00.html> and <http://news.sky.com/skynews/Home/World-News/Somali-Pirates-Crisis-Dutch-Commandos-Catch-Seven-Pirates-But-Are-Forced-To-Release-Them-Says-Nato/Article/200904315264346>). In other cases they were transferred to a State willing and able to try them. E.g., 5 pirates captured by a Danish warship were transferred to the Netherlands and put on trial there (see http://jurist.law.pitt.edu/paperchase/2009_05_18_indexarch.php#4888936211045454993) and the EU operation has transferred several pirates to Kenya under a transfer arrangement (see various press releases at <http://www.consilium.europa.eu/showpage.aspx?id=1520&lang=EN> and the previous issue of this Newsletter; see also J. Gettleman, 'The West Turns to Kenya as Piracy Criminal Court', *New York Times*, 24 April 2009). Some pirates were killed in the course of these operations. See e.g. R.D. McFadden & S. Shane, 'In Rescue of Captain, Navy Kills 3 Pirates', *New York Times*, 13 April 2009 and <http://www.lanouvellegazette.be/actualite/monde/2009-04-27/petrolier-yemenite-repris-pirates-somaliens-698635.shtml>. Also, a few vessels already pirated have been liberated, including by French forces: the *Ponant* and the *Tanit* (see <http://www.meretmarine.com/article.cfm?id=107429>;

francaise-libere-les-otages-du-ponant.php and <http://www.dorffer-patrick.over-blog.fr/article-30122446.html>; in the latter case one hostage died) and by Yemeni forces (see <http://www.lanouvellegazette.be/actualite/monde/2009-04-27/petrolier-yemenite-repris-pirates-somaliens-698635.shtml>).

(Frederik Naert, KU Leuven)

Allegations of IHL/Human Rights Violations in Final Phase of Sri Lankan Conflict

Both the UN Secretary General and the UN High Commissioner for Human Rights called for a proper investigation into human rights abuses allegedly committed against civilians by both the Government of Sri Lanka and Tamil rebels in the final phase of the conflict between them, which ended in May 2009. The rebels have been accused of purposefully preventing civilians from leaving the conflict zone, forcefully conscripting people, and using civilians as human shields. There were also alleged cases of rebels firing on civilians as they sought to flee. The Government reportedly utilized heavy weapons on the small and densely-populated area of conflict in Sri Lanka's north. Further, Government forces allegedly shelled a hospital and there are accusations that the army may have killed rebels as they were trying to surrender. See UN press releases of 11 and 26 May and 5 June 2009 and <http://www.un.org/apps/sg/sgstats.asp?nid=3839>. See also T. Fuller, 'U.N. Says Thousands Killed in Sri Lanka', and 'Doctor Reports 378 Dead in Sri Lanka', *New York Times*, respectively 25 April and 11 May 2009. However, in a special session late May, the UN Human Rights Council did not call for an investigation but condemned "all attacks that the LTTE (Liberation Tigers of Tamil Eelam) launched on the civilian population and its practice of using civilians as human shields" and welcomed "the liberation by the Government of Sri Lanka of tens of thousands of its citizens that were kept by the LTTE against their will as hostages". See <http://www2.ohchr.org/english/bodies/hrcouncil/specialesession/11/index.htm> and the resolution available there.

(Frederik Naert, KU Leuven)

Turkish Officer Arrested in Relation to Missing Kurds

Late March 2009, a Turkish officer was arrested in connection with suspected extrajudicial killings in the 1990s, after an arrest warrant was issued by a court in Diyarbakir, in the southeast of Turkey. See S. Arsu, 'Turk Arrested Over Kurds' Killings in '90s', *New York Times*, 25 March 2009 and <http://theterrorjournal.wordpress.com/2009/03/26/728/>.

(Frederik Naert, KU Leuven)

UK Soldiers Abroad Protected by ECHR Says Court of Appeal

On 18 May 2009, in the case of *Secretary of State for Defence v Smith, R (on the application of)*, [2009] EWCA Civ 441 (<http://www.bailii.org/ew/cases/EWCA/Civ/2009/441.html>) the England and Wales Court of Appeals upheld a lower court judgment (available at <http://www.bailii.org/ew/cases/EWHC/Admin/2008/694.html>), ruling that the European Convention of Human Rights (ECHR) applies to UK forces also when deployed abroad, even outside military bases abroad, and that the inquest into the death should comply with the requirements of article 2 of the ECHR. The case concerns the inquest into the death of Private Jason Smith, who died on 13 August 2003 while serving in Iraq due to a heatstroke. The court *inter alia* stated that:

"29. ... there is no question but that members of the British armed forces are subject to UK jurisdiction wherever they are. They remain subject to UK military law without territorial limit and may be tried by court martial whether the offence is committed in England or elsewhere. They are also subject to the general criminal and civil law. Soldiers serve abroad as a result of and pursuant to the exercise of UK jurisdiction over them. Thus the legality of their presence and of their actions depends on their being subject to UK jurisdiction and complying with UK

law. As a matter of international law, no infringement of the sovereignty of the host state is involved in the UK exercising jurisdiction over its soldiers serving abroad". ...

89. ... Both the English courts and the ECtHR have stressed the difference, at any rate for the purposes of identifying the correct approach to an investigation under article 2, between a case where the deceased is the particular responsibility of the state and those in which he is not. ... cases where the deceased (or in some cases near-deceased) are in custody, are in the former category ...

103. ... the ECtHR applies the same substantive principles to detained mental patients as it does to prisoners and others in custody. ... In these circumstances we do not think that there can be any doubt that the ECtHR would apply the same principles to the kind of investigation that is required in order to satisfy the investigative limb of article 2. ...

104. The question remains whether the same is true of a case in which a soldier dies of heat stroke as a member of the armed forces in Iraq. Our answer to that question is yes. On the basis of the Strasbourg jurisprudence, there is no doubt that it would apply to Private Smith if he were a conscript. We do not think that it could be right to draw a distinction between a regular soldier who is not a conscript and a member of the TA when in active service. ...

105. The question is therefore whether the principles apply to soldiers on active service in Iraq. We conclude that they do. They are under the control of and subject to army discipline. ... The army owes them the same duty of care at common law. ... We see no reason why they should not have the same protection as is afforded by article 2 to a conscript.

106. For these reasons we conclude that the procedural question, which is whether the inquest into Private Smith's death must satisfy the requirements of article 2 of the Convention as set out in *Middleton*, should be answered in the affirmative. ... The precise limits of the inquest will of course be a matter for the coroner but we would expect the coroner to consider the questions whether there were any systemic failures in the army which led to Private Smith's death and, indeed, whether there was a real and immediate risk of his dying from heatstroke and, if so whether all reasonable steps were taken to prevent it."

(Frederik Naert, KU Leuven)

UK Law Lords Reject Use of Secret Evidence for Control Orders

On 10 June 2009, in the case of *Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other action* ([2009] UKHL 28), the UK House of Lords ruled that the procedure that resulted in the making of the control orders against the applicants under the Prevention of Terrorism Act 2005 did not satisfy their right to a fair hearing under Article 6 of the European Convention on Human Rights in conjunction with the Human Rights Act 1998 by reason of the sole or decisive reliance by the judge making the order upon material received in closed hearing the nature of which was not disclosed to the appellants. The unanimous judgment by nine law lords *inter alia* refers extensively to the 19 February 2009 judgment of the ECtHR's Grand Chamber in *A and others v United Kingdom* (Application No 3455/05), and especially its § 220 *in fine* (which reads "Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied"). See <http://www.bailii.org/uk/cases/UKHL/2009/28.pdf>.

(Frederik Naert, KU Leuven)

U.S. Developments

Civilian Casualties in Afghan Airstrikes

Early June, it was reported that a military investigation has concluded that American personnel made significant errors in carrying out some of the airstrikes in western Afghanistan on May 4 that killed dozens of Afghan civilians. An official involved said the civilian death toll would probably have been reduced if American air crews and forces on the ground had

followed strict rules devised to prevent civilian casualties. See E. Schmitt & T. Shanker, 'U.S. Report Finds Errors in Afghan Airstrikes', *New York Times*, 3 June 2009.

In another case, early May 2009, US officials acknowledged that at least some of what might be 100 civilian deaths in western Afghanistan may have been caused by American bombs. See E. Bumiller & C. Gall, 'U.S. Admits Civilians Died in Afghan Raids', *New York Times*, 8 May 2009.

(Frederik Naert, KU Leuven)

Guantanamo Terrorist Suspect Requests Military Defense Counsel to Represent him in Federal Court

Ahmed Khalfan Ghailani is to be tried for his alleged role in Tanzanian embassy bombings and has asked for his military defense counsel to represent him in federal court. If his request is accepted it would be without modern precedent and would offer a right to a suspected terrorist that is typically reserved for U.S. service members in the form of an Individual Military Counsel request. As a side note, it also speaks largely to Ghailani's faith in the capability of his appointed military counsel. Further information about the implications of this decision can be found in Victor Hansen's (New England School of Law) interesting article available at <http://jurist.law.pitt.edu/forumy/2009/06/ghailani-terrorism-case-military.php>.

(Blake Travis)

"Is Bagram the New Guantanamo? Habeas Corpus and Maqaleh v. Gates" from ASIL Insight

Professor Kal Raustiala of UCLA Law School has written an article released in ASIL Insight (Vol. 13, Issue 8, June 17th 2009), that explores the future of detaining suspects captured abroad and their rights in the United States based on recent court decisions. With Guantanamo no longer an option for confinement, Bagram Air Base in Afghanistan appears to be the likely host institution, which already holds over 600 detainees. Bagram maintains a different status than Guantanamo as it is located in a theatre of war and the U.S. maintains less official control of the prison to some degree, and this difference in status forms part of the court's analysis of the rights of the suspects imprisoned there.

Professor Raustiala thoroughly breaks down the court's ruling in *Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009), and explains how the court attempts to balance the recent ruling in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), that extends the reach of *habeas corpus* beyond the sovereign territory of the U.S., with public policy concerns of permitting the President to effectively wage war while still protecting detainee's Constitutional rights.

Professor Raustiala has recently published a book entitled *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law*, which is mentioned below in the Interesting Publications section of this newsletter.

(Blake Travis)

U.S. Habeas Case Outlines Test Establishing How Enemy Combatant Status can be Vitiating

On June 22nd, in the opinion of Abdulrahim Abdul Razak Al Gingo *v. Obama, et al.*, No. 05-1310 (D.D.C. June 22, 2009), the court articulates a test for what it means to be a "part of" a terrorist organization and how that relationship can be extinguished, and then applies this test to Guantanamo detainee, Gingo, who filed a habeas corpus petition in 2005. After the Supreme Court's rulings in *Rasul v. Bush*, 542 U.S. 466 (2004), which held that habeas corpus jurisdiction reached to Guantanamo and *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), which gave the right of habeas corpus to detainees at Guantanamo, a clear image seems to emerge for a public policy concern promoting the ability of detainees, generally, to challenge their detention, which the petitioner invokes and the court recognizes in *Gingo*. No. 05-1310 (D.D.C. June 22, 2009).

In *Gingo*, the court addresses the Government's original argument—that the petitioner is being lawfully detained since he was taken into custody as an enemy combatant in 2002. *Id.*

The court, here, uses the definition of enemy combatant from *Boumediene* and selects the key phrase as being a "part of or supporting Taliban or al Qaeda forces." 583 F. Supp. 2d at 133. Ginco, a Syrian citizen, allegedly went to Afghanistan in 2000, stayed at a Taliban guesthouse briefly and attended an al Qaeda training camp for a short time, yet the story turns when Ginco was allegedly imprisoned and tortured by al Qaeda for potentially being a spy, and later picked up by the United States in 2002 from an abandoned al Qaeda prison. *Ginco*, No. 05-1310, 7 (D.D.C. June 22, 2009).

Therefore, to determine whether or not Ginco is an enemy combatant, the court frames the issue as "whether a prior relationship between a detainee and al Qaeda (or the Taliban) can be sufficiently vitiated by the passage of time, intervening events, or both, such that the detainee could no longer be considered to be 'part of' either organization at the time he was taken into custody." *Id.* at 9. The court answers this issue with a quick yes, and outlines a test to determine whether a relationship has "sufficiently eroded" to where a person can no longer be considered a "part of" that organization. *Id.* at 10. The court uses the following test:

"(1) the nature of the relationship in the first instance; (2) the nature of the intervening events or conduct; and (3) the amount of time that has passed between the time of the pre-existing relationship and the point in time at which the detainee is taken into custody." Id.

Applying this test against the facts, the court finds that he did not have a trusting relationship with al Qaeda, no "longstanding bond of brotherhood" and that his eighteen month incarceration and then abandonment by the group is "even more definitive proof that any preexisting relationship had been utterly destroyed" and that sufficient time had passed. *Id.* at 12. Based on this analysis, the court granted Ginco's petition of habeas corpus believing the weight of the evidence shows that petitioner's relationship with al Qaeda or the Taliban was "sufficiently vitiated" and thus he can no longer be legally held as an "enemy combatant" under the *Authorization for Use of Military Force*. *Ginco*, No. 05-1310, 12 (D.D.C. June 22, 2009); *Authorization for Use of Military Force*, Pub. L. No. 107-40 §§ 1-2, 115 Stat. 224 (Sept. 18, 2001).

If this test withstands appeal, a standard may be set for many detainees to successfully petition for release based on the specific nature of their relationships with Taliban or al Qaeda and the time that had passed before their capture. Additional analysis can be found at <http://www.scotusblog.com/wp/torture-delay-may-end-enemy-status/#more-10038> and <http://jurist.law.pitt.edu/paperchase/2009/06/federal-judge-rules-guantanamo-detainee.php>

(Blake Travis)

ASIL Task Force's Report Suggests U.S. Adopt "Course of Positive Engagement" with the ICC

The American Society of International Law's independent Task Force on U.S. Policy Toward the International Criminal Court has concluded that the U.S. should further "course of positive engagement" with the ICC consistent with the stated policy of the U.S. government "to support the object and purpose of the Rome statute", but does not go so far as to suggest the United States join the ICC in the near future. Two interesting recommendations made by the Task Force are for the "amendment or repeal of the American Service-Members' Protection Act" and other laws in order to "enhance flexibility" for working with the ICC, and also "consideration of amendment to U.S. law to permit full domestic U.S. prosecution of crimes within the jurisdiction of the Court so as to ensure the primacy of U.S. jurisdiction over the Court's." More information can be found in the ASIL Press Release of 27 March 2009. The Task Force's complete report is the source of quotations and can be located at <http://www.asil.org/icc-task-force.cfm>.

(Blake Travis)

Further Developments in the US

Late March – early April 2009, some of the findings of a confidential 2007 ICRC report on its visits to the CIA's "high-value" detainees who had been transferred in 2006 to the Guantanamo Bay were reported in the press. It is reported that the ICRC qualified some of the treatment as torture and cruel, inhuman or degrading treatment. ICRC officials did not dispute the authenticity of the excerpts, but a spokesman expressed dismay over the leak of the material. See M. Danner, 'US Torture: Voices from the Black Sites', *The New York Review of Books*, Volume 56, No. 6, 9 April 2009, <http://www.nybooks.com/articles/22530> and J. Warrick, P. Finn & J. Tate, 'Red Cross Described 'Torture' at CIA Jails', *The Washington Post*, 16 March 2009, p. A01 (http://www.washingtonpost.com/wp-dyn/content/article/2009/03/15/AR2009031502724_pf.html).

On 2 April 2009, Judge John D. Bates of the US District Court for the District of Columbia ruled that some prisoners held by the US military in Afghanistan have a right to challenge their imprisonment. He said that three (two Yemenis and a Tunisian), who claim they were captured outside Afghanistan and taken to Bagram to be imprisoned for more than six years without trials, had the same legal rights that the Supreme Court last year granted to prisoners held at Guantánamo Bay: "*Under Boumediene, Bagram detainees who are not Afghan citizens, who were not captured in Afghanistan, and who have been held for an unreasonable amount of time -- here, over six years -- without adequate process may invoke the protections of the Suspension Clause, and hence the privilege of habeas corpus, based on an application of the Boumediene factors. Three petitioners are in that category. Because there is no adequate substitute for the writ of habeas corpus for Bagram detainees, those petitioners are entitled to seek habeas review in this Court*". Judge Bates has put off ruling that a fourth prisoner — also captured outside Afghanistan, but holding Afghan citizenship — had a right to challenge his detention. He said any order to release the detainee could lead to frictions with the Afghan government, and asked for additional briefings on that case. The US is holding about 600 people at Bagram. An American government official said that fewer than a dozen detainees fell into the category affected by the ruling. See https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cv2143-28 (decision) and C. Savage, 'Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus', *New York Times*, 3 April 2009.

On 8 April 2009, the US Court of Appeals for the Eleventh Circuit upheld a lower court decision denying the habeas corpus petition of former Panamanian military leader Manuel Noriega and authorizing his extradition to France. See <http://www.ca11.uscourts.gov/opinions/ops/200811021.pdf> (decision) and <http://jurist.law.pitt.edu/paperchase/2009/04/eleventh-circuit-upholds-noriega.php> (report).

On 15 April 2009, US Army Master Sgt. John Hatley was convicted of murder and conspiracy in court-martial proceedings for the killing of four unarmed Iraqi prisoners in 2007 and sentenced to life with the possibility of parole. Hatley was acquitted of obstruction of justice and also of murder for the separate death of a seriously wounded Iraqi detainee during early January 2007. Hatley is the third of seven soldiers allegedly involved in the incident to be tried and found guilty of charges. On 30 March 2009, US Army Sergeant First Class Joseph Mayo was convicted and sentenced to 35 years in prison in the case. Sgt. Michael Leahy Jr., was convicted in February and sentenced to life in prison with the possibility of parole. Fellow unit members Spc. Belmor Ramon and Spc. Steven Ribordy pleaded guilty last year to conspiracy and accessory to murder, respectively, in connection with the incident. See http://jurist.law.pitt.edu/paperchase/2009_04_16_indexarch.php#5429277552759499428 and <http://jurist.law.pitt.edu/paperchase/2009/03/second-us-army-segreant-convicted-of.php>.

On 16 April 2009, the US Department of Justice released four previously classified legal memorandums in relation to combating terrorism. See http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/ and http://www.aclu.org/safefree/general/olc_memos.html. The memoranda are also available at <http://graphics8.nytimes.com/packages/images/nytint/docs/justice-department-memos-on->

[interrogation-techniques/original.pdf](#).

http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf.

On 28 April 2009, the Court of Appeals for the 9th Circuit ruled that a lawsuit brought by five men (including Binyam Mohamed, a British resident of Ethiopian nationality) who say they were tortured as part of the CIA's extraordinary rendition program against Jeppesen Dataplan, a Boeing subsidiary, could proceed, rejecting a state secret privilege defense. See <http://www.ca9.uscourts.gov/datastore/opinions/2009/04/27/0815693.pdf> (ruling); <http://jurist.law.pitt.edu/paperchase/2009/04/ninth-circuit-reinstates-lawsuit.php> (report) and C. Savage, 'Court Allows Civil Torture Case to Proceed', *New York Times*, 29 April 2009.

On 12 May 2009, John Demjanjuk, accused of having been a Nazi prison guard, arrived in Germany to face accessory to murder charges for his alleged involvement at the Sobibor concentration camp after being deported by the US after exhausting his appeals. See <http://jurist.law.pitt.edu/paperchase/2009/05/accused-nazi-guard-deported-to-germany.php> and <http://www.usdoj.gov/opa/pr/2009/May/09-crm-463.html>.

On 18 May 2009, the US Supreme Court ruled 5-4 in *Ashcroft v. Iqbal* that a complaint filed against former US Attorney General John Ashcroft, FBI Director Robert Mueller and other officials by a terrorism suspect failed to adequately state a claim under Federal Rule of Civil Procedure 8 and a 2007 decision of the court. Pakistani national Javid Iqbal alleged mistreatment by the FBI based on religious and ethnic bias during his detention in a Brooklyn jail. Without ruling on the substance of the allegations, the Court remanded the case to the Second Circuit Court of appeals so that it may decide whether to allow Iqbal an opportunity to amend his complaint. See <http://www.supremecourtus.gov/opinions/08pdf/07-1015.pdf> (decision) and http://jurist.law.pitt.edu/paperchase/2009_05_18_indexarch.php#4699046669696451262 (report).

On 19 May 2009, the US District Court of New Jersey dismissed a lawsuit alleging that former president George W. Bush violated Congress's constitutional power to declare war by initiating a preemptive war against the nation of Iraq. Granting the government's motion to dismiss the suit for lack of jurisdiction, Judge Jose Linares found that the issue should be resolved by the government's political branches: See <http://jurist.law.pitt.edu/pdf/linaresbushopinion.pdf> (decision) and http://jurist.law.pitt.edu/paperchase/2009_05_20_indexarch.php#3453210005720765808 (report).

Also on 19 May 2009, the US District Court for the District of Columbia rejected the government's argument that an individual who "substantially supports" a terrorist organization but is not a member can be detained pursuant to the 2001 Authorization for Use of Military Force (AUMF), rejecting the Obama administration's "substantial support" standard. The court also found that the government's detention authority does not extend to individuals who have only "directly supported hostilities". According to the court "*Detention based on substantial or direct support of the Taliban, al Qaeda or associated forces, without more, is simply not warranted by domestic law or the law of war*". However, the court did confirm the government's detention authority in other circumstances and stated that it "*is satisfied that the government's detention authority is generally consistent with the authority conferred upon the President by the AUMF and the core law of war principles that govern non-international armed conflicts*". See https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cv1236-116 (decision) and http://jurist.law.pitt.edu/paperchase/2009_05_20_indexarch.php#3453210005720765808 (report).

On 21 May 2009, former US soldier Steven Green was sentenced to life in prison for the rape and murder of an Iraqi teenage girl and the murder of her family in Mahmudiya after being convicted for these crimes by the US District Court for the Western District of Kentucky on 7 May 2009. Green faced a civilian jury due to being discharged for a psychiatric disorder before the charges were brought. He was one of six soldiers charged with involvement in the rape and murders. Earlier, three other soldiers pleaded guilty in court-martial proceedings

and a fourth was convicted. Spc. James P. Barker and Sgt. Paul E. Cortez were sentenced to 90 and 100 years respectively, while Pfc. Bryan L. Howard, who stayed at the checkpoint and had prior knowledge of the plans, was sentenced to 27 months in jail. The fourth, Pfc. Jesse V. Spielman, was convicted by a military jury and sentenced to 110 years. Prosecutors dropped charges of dereliction of duty against the sixth member, Sgt. Anthony Yribe, who was other than honorably discharged. See <http://jurist.law.pitt.edu/paperchase/2009/05/federal-jury-convicts-ex-us-soldier-in.php>; http://jurist.law.pitt.edu/paperchase/2009_05_22_indexarch.php#2777174307146152662 and J. Dao, Ex-Soldier Gets Life Sentence for Iraq Murders, *New York Times*, 22 May 2009.

On 21 May 2009, President Obama gave a speech on National Security (http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/), in which he *inter alia* set out how he intends to deal with the Guantanamo detainees. President Obama distinguished five categories of cases:

"First, whenever feasible, we will try those who have violated American criminal laws in federal courts. ...

The second category of cases involves detainees who violate the laws of war and are therefore best tried through military commissions. Instead of using the flawed commissions of the last seven years, my administration is bringing our commissions in line with the rule of law. ... These reforms, among others, will make our military commissions a more credible and effective means of administering justice, and I will work with Congress and members of both parties, as well as legal authorities across the political spectrum, on legislation to ensure that these commissions are fair, legitimate, and effective.

The third category of detainees includes those who have been ordered released by the courts. ... The United States is a nation of laws and so we must abide by these rulings.

The fourth category of cases involves detainees who we have determined can be transferred safely to another country. So far, our review team has approved 50 detainees for transfer. And my administration is in ongoing discussions with a number of other countries about the transfer of detainees to their soil for detention and rehabilitation.

..., finally, there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. ... this is the toughest single issue that we will face. ... Al Qaeda terrorists and their affiliates are at war with the United States, and those that we capture -- like other prisoners of war -- must be prevented from attacking us again. Having said that, we must recognize that these detention policies cannot be unbounded. They can't be based simply on what I or the executive branch decide alone. That's why my administration has begun to reshape the standards that apply to ensure that they are in line with the rule of law. We must have clear, defensible, and lawful standards for those who fall into this category. We must have fair procedures so that we don't make mistakes. We must have a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified. ... our goal is to construct a legitimate legal framework for the remaining Guantanamo detainees that cannot be transferred. ... If and when we determine that the United States must hold individuals to keep them from carrying out an act of war, we will do so within a system that involves judicial and congressional oversight. And so, going forward, my administration will work with Congress to develop an appropriate legal regime so that our efforts are consistent with our values and our Constitution."

In line with this, in June 2009, the US transferred a number of detainees from Guantanamo Bay to other countries, including three to Saudi Arabia, four to Bermuda (Chinese Uighurs), one to Chad and one to Iraq. Palau is reported to be willing to receive other Chinese Uighur detainees and negotiations with Saudi Arabia for the transfer of a significant number of (Yemeni) detainees are said to be ongoing. Since Mr. Obama took office, the United States has also transferred one detainee to France and one to Britain. See

<http://www.usdoj.gov/opa/pr/2009/June/09-ag-587.html>;
<http://jurist.law.pitt.edu/paperchase/2009/06/three-guantanamo-detainees-repatriated.php>;
W. Glaberson, '6 Detainees Are Freed as Questions Linger', *New York Times*, 12 June 2009 and
M. Landler, 'Palau to Take Chinese Guantánamo Detainees', *New York Times*, 10 June 2009.

On 12 June 2009, the US District Court for the Northern District of California allowed a civil lawsuit to go forward against former Bush administration official, John C. Yoo. Mr. Yoo helped to shape Bush administration detention and interrogation policy in the war on terrorism. The lawsuit was brought by Mr. Padilla, who was held as an "enemy combatant" for more than three years and was subsequently convicted of terrorism. Mr. Yoo had argued that he should be immune from the suit. The judge rejected all but one of Mr. Yoo's immunity claims and found that Mr. Padilla "has alleged sufficient facts to satisfy the requirement that Yoo set in motion a series of events that resulted in the deprivation of Padilla's constitutional rights". As a former government official, Mr. Yoo is being represented by the Justice Department, which is reviewing the decision. See J. Schwartz, 'Judge Allows Civil Lawsuit Over Claims of Torture', *New York Times*, 14 June 2009 and <http://jurist.law.pitt.edu/paperchase/2009/06/federal-judge-refuses-to-dismiss.php>.

Furthermore, on 15 June 2005, an a Joint Statement of the EU and its Member States and the US on the Closure of the Guantanamo Bay Detention Facility and Future Counterterrorism Cooperation, based on Shared Values, International Law, and Respect for the Rule of Law and Human Rights was issued (see http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/gena/108455.pdf), as well as a press statement on Guantanamo Closure endorsed by the EU and the US (see http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/gena/108457.pdf). The former text allows those EU Member States wishing to receive former detainees cleared for release, based on a request by the US, to refer to a common EU framework when doing so and draws upon principles adopted by EU interior ministers on 4 June 2009 (http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/108458.pdf), which stipulate that the US will share with the EU member states the available information relevant to ex-detainees received on the territory of the EU Member States and the Schengen Area. The decision on whether to accept former inmates from Guantanamo remains the exclusive competence of the individual Member States. See also http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/108459.pdf.

It has also been reported that President Obama is considering the creation of a national security court to try cases in which there is enough reliable intelligence to hold a foreign terrorism suspect in preventive detention, but not enough to bring a case in federal court or even through military commissions. See William Fisher, 'Obama Considering a National Security Court For Some Terrorism Prosecutions', 19 May 2009, <http://www.pubrecord.org/law/909-obama-considering-the-creation-of-a-national-security-court.html>.

The US is planning to strengthen its capabilities for cyberwar/operations, including by the possible creation of a new military command for cyberspace. See e.g. D.E. Sanger & T. Shanker, 'Pentagon Plans New Arm to Wage Cyberspace Wars', *New York Times*, 29 May 2009.

(Frederik Naert, KU Leuven)

INTERESTING PUBLICATIONS

hb = hardback pb = paperback.

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A leaflet from Oxford University Press with an overview of their recent publications on Human Rights and the Laws of War is available online at <http://fds.oup.com/www.oup.com/pdf/acad/HRLW2.pdf>. Furthermore, Oxford University Press has kindly donated the following publications, which are among those included in the leaflet, to the Society's Documentation Centre, where our members and other visitors can consult them:

Neil BOISTER & Robert CRYER, *Documents on the Tokyo International Military Tribunal. Charter, Indictment and Judgments*, OUP, 2008, ISBN13: 9780199541928 (hb), \$ 290;

William BOOTHBY, *Weapons and the Law of Armed Conflict*, OUP, April 2009, ISBN: 978-0-19-956994-6 (hb), £ 70;

Simon CHESTERMAN & Chia LEHNARDT (eds.), *From Mercenaries to Market. The Rise and Regulation of Private Military Companies*, OUP, January 2009, ISBN13: 9780199563890 (pb), \$ 55;

Nils MELZER, *Targeted Killing in International Law*, OUP, May 2008, ISBN13: 9780199533169 (hb), \$ 130;

Guénaél METTRAUX, *The Law of Command Responsibility*, OUP, March 2009, ISBN 978-0-19-955932-9 (hb), £ 60;

Guénaél METTRAUX, *Perspectives on the Nuremberg Trial*, OUP, 2008, ISBN: 978-0-19-923234-5 (pb), £ 34.99;

Siobhan WILLS, *Protecting Civilians. The Obligations of Peacekeepers*, OUP, March 2009, ISBN13: 9780199533879(hb), \$ 120.

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Brett BOWDEN, Hilary CHARLESWORTH & Jeremy FARRALL (eds.), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations*, Cambridge University Press, April 2009, 346 pp., ISBN 978-05215-0994-7, \$117.00 (HB), www.cambridge.org

Eric DE BRABANDERE, *Post-conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice*, Martinus Nijhoff Publishers, 2009, 334 pp., ISBN 978-90-04-17023-0, € 100.00 / \$ 148.00 (HB), www.brill.nl

Emanuele CIMIOTTA, *I tribunali penali misti*, Cedam, 2009, 622 pp., ISBN 978-88-13-29070-2, € 58,00, shop.wki.it

Corinna CONTAG, *Der Internationale Strafgerichtshof im System Kollektiver Sicherheit*, Nomos, 2009, 229 pp., ISBN 978-3-8329-3637-2, € 54,00, www.nomos-shop.de

Carla FERSTMAN, Mariana GOETZ & Alan STEPHENS (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the*

Making, Martinus Nijhoff Publishers, 2009, 576 pp., ISBN 978-90-04-17449-8, € 170.00 / \$ 252.00 (HB), www.brill.nl

Thomas KRUESSMANN (ed.), *ICTY: Towards a Fair Trial*, Intersentia, Februari 2009, 416 pp., ISBN 978-90-5095-868-4, € 58,80 (PB), www.intersentia.be

Ellen L. LUTZ & Caitlin REIGER (eds.), *Prosecuting Heads of State*, Cambridge University Press, March 2009, 348 pp., ISBN 978-0-521-75670-9, \$ 29.99 (PB), www.cambridge.org

Guénaél METTRAUX, *The Law of Command Responsibility*, Oxford University Press, 2009, 336 pp., ISBN 978-01995-5932-9, € 60,00 / \$ 120.00 (HB), ukcatalogue.oup.com

Kal RAUSTIALA. *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law*. Oxford University Press, May 2009, 328 pp., ISBN 9780195304596, \$29.95 (HB), oup.com/us/

Friedrich ROSENFELD, *Die humanitäre Besatzung: Ein Dilemma des ius post bellum*, Nomos, 2009, 245 pp., ISBN 978-3-8329-4231-1, € 58,00, www.nomos-shop.de

Michael J. STRAUSS, *The Leasing of Guantanamo Bay*, Praeger Publishers, May 2009, 296 pp., ISBN 978-0-313-37782-2, \$ 75.00 / £ 51.95 (HB), www.praeger.com

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(Marco Benatar and Blake Travis)

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