Société Internationale de Droit Militaire et de Droit de la Guerre

International Society for Military Law and the Law of War

NEWSLETTER JANUARY-JUNE 2010

INTRODUCTION

Dear members and persons interested in our activities,

On 10 October 1980, States assembled in Geneva adopted the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects* (CCW). The CCW is a manifestation of several general principles of the law of armed conflict: the protection of the civilian population against the effects of hostilities, the limitation of belligerents in their choice of methods and means of warfare, and the prohibition of the employment of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. Simultaneously, the CCW is also an instrument of weapons control. Since the adoption of the Mines and Explosive Remnants of War Protocols, the CCW has also begun to take on regulation of the post-conflict phase.

The CCW and its Protocols are instruments which are firmly embedded in the broader context of military-technological developments and the laws regulating them. As for technological developments, the advent of cyber warfare, unmanned and nanotechnological weapons systems, and non-lethal weapons demonstrate some of the new challenges concerning the legal regulation of weapon systems and warfare. Some examples of the legal context can be seen in Article 36 of the First Additional Protocol of 1977 to the Geneva Conventions of 1949 on the review of the legality of new weapons, or treaties such as the Ottawa Convention and the recent Convention on Cluster Munitions.

The 30th anniversary of the adoption of the CCW is an appropriate moment to take stock of the treaty and its Protocols in its broader context of the law of armed conflict, the law of arms control and of post-conflict reconstruction, to consider the challenges that new weapons and weapons systems pose to international legal regulation and the prospects for the law of conventional weaponry, and to consider possible themes for the 2011 Review Conference.

To that end, the *International Law Centre* at the *Swedish National Defence College*, in partnership with the *Viadrina University Frankfurt (Oder)* and the *International Society of Military Law and the Law of War*, has organized an international, two-day conference on the occasion of the 30th anniversary of the CCW. The Conference is aimed at an international audience of military personnel and other practitioners, academics, representatives of States and of humanitarian and non-governmental organizations, as well as other interested individuals. The Conference will assemble speakers of international standing to address the aforementioned issues. The papers delivered at the Conference will subsequently be published in an edited volume, tentatively entitled '*The Certain Conventional Weapons Convention at 30 – Evolution, Contemporary Relevance, Context, and Challenges Ahead*'.

You are cordially invited to participate in this Conference. I look forward to welcoming you in Stockholm for this event!

Ludwig Van Der Veken
Secretary General

NEWS, ANNOUNCEMENTS OF CONFERENCES, SEMINARS, ETC.

The NATO School in Oberammergau, Germany, will be conducting two upcoming events: a seminar on ***Shari'a Law and Military Operations*** from 13-15 October 2010, and a workshop on ***the Law of Armed Conflict and Human Rights in International Peace Support Operations*** from 29 November – 3 December 2010. Any administrative questions about the seminars can be sent to studentadmin@natoschool.nato.int, and the point of contact for the seminars is Dr. iur. Bjoern Schubert (Schubert.Bjoern@natoschool.nato.int).

The International Law Centre at the Swedish National Defence College, in partnership with the Viadrina University Frankfurt (Oder) and the International Society of Military Law and the Law of War, organizes an ***International Conference on the Occasion of the 30th Anniversary of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW).*** The conference will be held in Stockholm, Sweden from 16 to 17 September 2010. For information on the terms and conditions for participation please contact Mrs Catharina Jönsson by e-mail (catharina.jonsson@fhs.se) or telephone (+46-8-55342789) or visit the Society's website.

The International Institute of Humanitarian Law is conducting its first 2010 ***Specialized Workshop on IHL*** from 13 to 17 September 2010 in Sanremo, Italy. This first workshop is focusing on ***Rules of Engagement (ROE)***. The first portion of the workshop will focus on developing and drafting ROE, focusing on multinational operations and practical aspects of ROE construction, using the Sanremo ROE Handbook. The second portion of the workshop will focus on interoperability challenges arising from a multinational environment with ROE. For further information or to register, go to http://bit.ly/cQIBNy. Further details are also available at the IHL Training Courses section of the IIHL website, at http://www.iihl.org.

The International Institute of Humanitarian Law is marking its ***40th Anniversary*** with an official ceremony discussing ***Global Violence: Consequences and Responses***. The ceremony will take place in Sanremo, Italy on 9 September 2010. After the ceremony, there will be three roundtable discussions discussing the ceremony's topic. Further information is available at http://www.iihl.org.

The Society's ***Managing Board*** and ***Board of Directors*** met in Riga on 25 May 2010.

The Society's ***8th Seminar for Legal Advisors to the Armed Forces*** took place in Riga, Latvia, from 25 to 30 May 2010, with the appreciated support of the Latvian Ministry of Defence. The central theme of the seminar was "Commanders and Legal Advisors in International Operations". Participants in the seminar discussed responsibilities of commanders and legal advisors in multinational/coalition operations; prosecution and punishment of crimes committed by military personnel; roles and responsibilities of non governmental organisations; roles and responsibilities of private security companies in international armed conflict; cyber warfare; direct participation in hostilities; maritime counter-piracy operations; and air targeting issues. For more information, please visit the Society's website.

The American Group of the Society held a Conference on ***Controversy and Developments in the Law of Armed Conflict: Customary vs. Treaty Law, Law of the Sea Manual, and Manual on International Law Applicable to Air and Missile Warfare*** on April 23rd, at the Catholic University of America Columbus School of Law, in cooperation with the American Bar Association Standing Committee on Law and National Security.

On 4 and 5 March 2010 the ***HPCR Manual on International Law applicable to Air and Missile Warfare*** was presented to NATO and EU Countries. The use of air power and missiles in military operations raises important policy and legal questions, particularly pertaining to the challenges this raises for the protection of civilians. Yet, many of the rules of international law applicable to such military operations are customary in nature and have not been laid down

formally in international treaties. In an attempt to address this situation, the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR) has convened, over the last six years, an international Group of Experts in a methodical and comprehensive reflection on international legal rules applicable to air and missile warfare. The result of this effort is a Manual, which has been submitted to a worldwide series of consultations with States, including Permanent Members of the UN Security Council. The International Society for Military Law and the Law of War has supported this project. The Manual has been designed to serve the needs of both Operations Officers and Legal Advisers of armed forces. It is intended to represent the most authoritative restatement to date of existing law applicable to air and missile warfare. It also clarifies areas of potential disagreements, and emphasizes the relevance of the law in the conduct of air and missile warfare.

The Belgian Group of the Society has held a ***Conference*** in Brussels on 22 February 2010 on ***Topical Issues pertaining to Means and Methods of Warfare.*** The opening speech was given by the Belgian Minister of Defence, Mr Pieter De Crem.

The Society's ***Managing Board*** was convened in Brussels on 22 January 2010.

The ***Yearbook of International Humanitarian Law (YBIHL)*** invites submissions of manuscripts on international humanitarian law. Sponsored by the TMC Asser Institute in the Hague, the YBIHL is published by Cambridge University Press. The General Editor is Professor Michael Schmitt of Durham University. The Yearbook is advised by an Editorial Board comprised of distinguished jurists, scholars and practitioners.
The YBIHL accepts both articles and shorter pieces on "current developments" in international humanitarian law. Articles may address any topic in international humanitarian law. Current developments pieces typically address international humanitarian law issues that have arisen during the year 2010 including, for example, codification, important publications and decisions of courts and tribunals. Generally, the maximum length for articles is 90 double-spaced pages, inclusive of footnotes. Current developments submission should usually not exceed 30 double-spaced pages, including footnotes.
Submissions may be made by e-mail to the Managing Editor, Dr. Louise Arimatsu of University College London at l.arimatsu@lse.ac.uk. The YBIHL does not require exclusive submissions, but will not consider those whose content has been, or will be, published before it appears in the YBIHL. All submissions are peer reviewed.

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 quotes.

International Agreements and Documents

International Atomic Energy Agency and EU reach agreement on safeguards

The International Atomic Energy Agency (IAEA) and the European Commission have reached agreement on arrangements to apply 'integrated safeguards' in all non-nuclear-weapon States of the European Union that have significant nuclear activities. Once the Agency has sufficient confidence that a State's nuclear activities are purely peaceful, it can apply safeguards measures in a less prescriptive, more customized manner. This reduces the inspection burden on the State and the inspection effort of the IAEA, while enabling the IAEA to maintain the conclusion that all nuclear material has remained in peaceful activities. See UN press release of 8 January 2010.

Agreement on a framework for NATO-Russia military-to-military cooperation

On 26 January, the NATO-Russia Council, meeting at the level of Chiefs of Defence, agreed on a framework for NATO-Russia military-to-military cooperation. All 29 members also exchanged views on the way ahead for practical activities in the field of logistics, combating terrorism, search and rescue at sea, and counter piracy. The agreement of the "NRC-MR Framework for NATO-Russia Military-To-Military Cooperation" will lead to a work plan of military cooperative activities. See NATO press release of 26 January 2010.

The Parliamentary Assembly of the Council of Europe adopts Resolution 1708 on Solving Property Issues of Refugees and Displaced Persons

On 28 January 2010 the Parliamentary Assembly of the Council of Europe adopted Resolution 1708 on the widespread challenges of solving property issues of refugees and displaced persons. See ILIB of 19 February 2010 for a detailed description.

The Convention on Cluster Munitions to enter into force on 1 August 2010

The Convention banning the manufacture, use and stockpiling of cluster munitions will enter into force on 1 August 2010 after the 30th country ratified the pact on 16 February 2010. See UN press releases of 16 and 17 February 2010. For background information, see Priya Pillai, *Adoption of the Convention on Cluster Munitions*, ASIL INSIGHTS, 1 October 2008, at http://www.asil.org/insights081001.cfm.

Russian Federation and the United States conclude START 2

On 26 March 2010 a successor agreement to the 1991 Treaty on the Reduction and Limitation of Strategic Offensive Arms (START) was reached between the Russian Federation and the United States. Both Countries will substantially reduce the number of nuclear warheads in their respective stockpiles. The agreement was signed on 8 April 2010. See *inter alia* UN press release of 26 March 2010 and NATO press release (2010)039 of 26 March 2010.

Western European Union dissolved

On 31 March 2010 the Member States of the Western European Union (WEU) decided to dissolve the WEU. The WEU should be closed down by June 2011. The Member States suggest in their Joint Statement that Protocol 1 (on the role of national parliaments in the European Union) to the Lisbon Treaty can offer a way to take over the important role of the WEU of offering a forum for parliamentary dialogue.

(Alfons Vanheusden)

NPT Review Conference affirms non-proliferation and disarmament

On 28 May 2010 the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) concluded its month-long meeting. The conference urged that the 1995 Resolution on the Middle East be fully implemented, and recommended that a conference be convened in 2012 with the purposes of making the Middle East a "zone free of nuclear weapons and all other weapons of mass destruction." The conference also urged the accession of India, Pakistan, and Israel to the NPT, and recommended that North Korea fulfill its commitments under the Six-Party Talks, including the "complete and verifiable abandonment of all nuclear weapons and existing nuclear programmes." See Final Document of the 2010 NPT Review Conference, available at http://www.un.org/en/conf/npt/2010/ .

EU – US 2010 Declaration on Counterterrorism affirms united anti-terror stance

On 3 June 2010 the European Union and the United States issued a joint declaration for "combat[ing] terrorism within the rule of law." The declaration affirmed opposition to torture, respect for the due process of law, and a commitment to providing fair and effective trials for suspected terrorists. The Spanish Interior Minister stated that the declaration was "a message to the Muslim world" that the EU and US would be "firm in the defence of our values, but...toleran[t] vis-à-vis other cultures." For further information, see ASIL ILIB of 11 June 2010, and the full text of the declaration, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114874.pdf.

(Humza Kazmi)

International Organizations

UN Security Council

Security Council authorizes more UN peacekeepers for MINUSTAH

On 19 January 2010 the Security Council authorized 3.500 more UN peacekeepers (1.500 police officers and 2.000 troops) for MINUSTAH (http://minustah.org/) in Haiti to support the immediate recovery, reconstruction and stability efforts following the 7.0-magnitude earthquake which struck the Country. See UN press release of 19 January 2010.

Security Council extended mandate of the UNMIN

On 21 January 2010 the Security Council extended the United Nations Mission in Nepal (UNMIN) (http://www.unmin.org.np/) through 15 May 2010. See UN press release of 21 January 2010.

Security Council removed five men from Al-Qaida and Taliban Sanctions List

On 25 January 2010, following a review of the so-called UN Consolidated List, the Security Council's Al-Qaida and Taliban Sanctions Committee removed five men from the list of those subject to sanctions in connection with Al-Qaida and the Taliban, including a former minister of foreign affairs and three former deputy ministers of the ousted Taliban regime in Afghanistan. See UN press release of 28 January 2010.

Security Council extended and expanded mandate of Monitoring Group for Somali sanctions

On 19 March 2010 the Security Council extended the United Nations panel of experts monitoring compliance with sanctions related to the conflict in Somalia for another year and expanded its mandate to also probe activities (financial, maritime or in another field) which generate revenue used to violate the embargoes. It is also now required to investigate "*any means of transport, routes, seaports, airports and other facilities*" used to break the embargoes, and to also identify ways in which the capacities of the region's States can be strengthened to better implement the arms embargo. See UN press release of 19 March 2010.

(Alfons Vanheusden)

Security Council converts MONUC into stabilization mission

On 28 May 2010, the Security Council extended the mandate of MONUC, the UN peacekeeping force stationed in the Democratic Republic of the Congo, by one month, and began provisions to convert MONUC into a stabilization force for the nation. The stabilization force, to be designated MONUSCO (United Nations Organization Stabilization Mission in the Democratic Republic of the Congo), has a mandate to remain within the DR Congo until 30 June 2011. For further information, see UN Press Release of 28 May 2010.

Security Council condemns Israeli interception of flotilla

On 1 June 2010, the Security Council issued a call to Israel to release the ships and civilians captured as a result of the Israeli interception of the Gaza aid flotilla. The Council called for a "prompt, impartial, credible, and transparent investigation" into the deaths resulting from the flotilla's interception. For further information see UN Press Release of 1 June 2010.

Security Council imposes additional sanctions on Iran

On 9 June 2010, the Security Council voted to pass Resolution 1929, which imposes additional, new sanctions on Iran. The Security Council is seeking to halt the Iranian enrichment of uranium and compel a disclosure about the state of the Iranian nuclear program. Resolution 1929 prevents Iran from acquiring an interest in any commercial activity related to uranium mining or nuclear materials, restricts the sale of various categories of military hardware, and establishes provisions to impede Iranian access to the international financial system. For further information, see UN Press Release of 9 June 2010.

(Humza Kazmi)

UN gathers experts to examine terrorists' use of internet

The UN Counter-Terrorism Implementation Task Force (CTITF - http://www.un.org/terrorism/cttaskforce.shtml) convened experts from around the world in a two-day workshop in Berlin from 25 to 26 January 2010 on terrorists' use of the Internet (including how it is utilized to recruit, organize criminal acts and raise money). Participants also discussed the effectiveness of laws currently in place regarding direct attacks on networks and computer systems. The results of the workshop will be included in a comprehensive guide for Member States on how to meet the challenge.

The meeting was part of a larger project falling under the aegis of CTITF's Working Group on Countering the Use of the Internet for Terrorist Purposes, which was set up in 2006 and brings together 24 UN entities.

The same CTITF's Working Group has also been holding talks with computer giants, including Microsoft, Google, CISCO and Symantec, to identify ways to combat terrorists' use of the Internet to recruit members, organize criminal acts and raise money.

Currently, the UN is the only international organization working on the links between the Internet and terrorism, said Jean-Paul Laborde, who heads the CTITF.

There are eight other CTITF working groups which focus on, among other issues, protecting human rights while countering terrorism and conflict prevention and resolution. See UN press releases of 28 January 2010 and 22 February 2010.

(Alfons Vanheusden)

UN Special Rapporteur criticizes use of targeted killings

On 2 June 2010, Phillip Alston, the UN Special Rapporteur on Extrajudicial Executions, released a report criticizing the increased use of targeted killings by states, noting that their continued use could undermine the prevention of extrajudicial executions. While Alston acknowledged that there can be circumstances where targeted killing is legal, such as zones of armed conflict where combatants are targeted, he also suggested that this was being interpreted too broadly. Alston rejected the theory that state actors can legally use force within the territories of other states in the name of self-defense even if they are targeting a non-state actor which they are engaged in armed conflict with.

Alston also discussed the role of accountability in targeted killings, criticizing the use of armed drones by the United States Central Intelligence Agency. The Rapporteur compared the classified nature of the CIA's drone operations with the accountability practices utilized by the United States Department of Defense, noting that "the United States military has a relatively public accountability process," and concluding that "intelligence agencies, which by definition...remain unaccountable except to their paymasters, have no place in running programmes that kill people in other countries." For further information, see UN press release of 2 June 2010 and Rapporteur Alston's report at http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf .

UN creates independent probe for Gaza conflict

In March, the United Nations Human Rights Council called upon both the Israeli and Palestinian governments to conduct investigations into the violations of international and humanitarian law which occurred during the Israeli military action "Operation Cast Lead", and indicated that a panel of independent experts would be appointed to monitor the efficacy of the investigations. On 14 June, the Human Rights Council named Christian Tomuschat, Mary McGowan Davis, and Param Cumaraswamy to the independent committee. Tomuschat is a German jurist and emeritus professor of international law at Humboldt University. McGowan Davis is a retired Acting New York State Supreme Court Justice. Cumaraswamy served as UN Special Rapporteur on the Independence of Judges and Lawyers from 1994-2003, For further information, see UN press releases of 14 June 2010.

UNODC and Kenya create new high-security anti-piracy courtroom

On 26 June, the United Nations Office on Drugs and Crime and Kenya opened a high-security courtroom for the purpose of hearing piracy and other serious criminal offenses. The new courtroom was created to provide a secure environment for hearing cases and to improve the trial efficiency of the system. Kenya currently holds the highest number of piracy suspects, most of whom were arrested off the Somalian coast. UNODC is also reportedly considering the creation of a new regional trial center in the Seychelles, which is also engaged in detaining suspected pirates. For further information, see UN press release of 26 June 2010.

(Humza Kazmi)

International(ised) Courts

International Criminal Court (ICC)

On 20 January 2010 the Trial Chamber I of the ICC issued a decision in the case of Lubanga clarifying the disclosure of evidence requirements, including the ability of the prosecution to contact defense witnesses and obtain photographs of those witnesses. For more information see ILIB of 29 January 2010.

On 3 February 2010 the ICC Appeals Chamber reversed the Pre-Trial Chamber's decision not to issue a warrant of arrest against Omar Hassan Ahmad Al Bashir, the president of Sudan, for the crime of genocide. The ICC's appeals chamber found the standard of proof set by the pre-trial chamber to be too demanding at the arrest warrant stage, amounting to an "*error of law*". For more information see ASIL Insights of 17 February 2010 (http://www.asil.org/insights100217.cfm), ILIB of 19 February 2010 and UN press release of 3 February 2010.

On 3 March 2010, following a request for additional information from the ICC's pre-trial chamber, the ICC Prosecutor provided a sealed list of 20 people he says are most responsible for the deadly post-election ethnic violence in Kenya in December 2007 and January 2008, following disputed polls in which President Mwai Kibaki (Party of National Unity (PNU)) was declared the winner over opposition leader Raila Odinga (Orange Democratic Movement

(ODM)). The Prosecutor said that senior political and business leaders associated with the two parties organized, enticed and/or financed attacks against civilians on account of their perceived ethnic and/or political affiliation pursuant to or on furtherance of a State and/or organization party. The Prosecutor stressed that at this stage, the names are indicative only and that the allegations concerning the named individuals will have to be measured against the evidence gathered independently by his office. Article 7 of the Rome Statute defines a crime against humanity as "*a widespread or systematic attack directed against the civilian population*." Kenya became a State Party to the Statute in June 2005 and is now under the jurisdiction of the ICC if genocide, war crimes or crimes against humanity are committed within its territory or by its citizens. Under the ICC's complementarity principle, it can only intervene if there are no national proceedings against those responsible for the crimes. Mr. Kibaki and Mr. Odinga, who agreed to serve in a power-sharing administration following the violence, had promised to cooperate with any investigation. See UN press releases of 19 February 2010 and 3 March 2010.

On 23 March 2010, Bangladesh became the first South Asian country to ratify the Rome Statute. As the Rome Statute entered into force for Bangladesh on 1 June, the country became the 111th State Party to the ICC. See UN press release of 24 March 2010.

(Alfons Vanheusden)

On 31 March 2010, the ICC authorized prosecutor Luis Moreno-Ocampo's investigation of the post-election violence which occurred in Kenya after its elections in December 2007.

On 26 April 2010 the ICC pre-trial chamber rejected a prosecutorial appeal to overturn the dismissal of charges against the Darfur rebel leader Bahar Idriss Abu Garda. On 8 February 2010 the Pre-Trial Chamber I of the ICC dismissed charges against Abu Garda for lack of evidence. Abu Garda is the commander of a splinter group of the Justice and Equality Movement (JEM), and was accused of murder, pillaging, and attacks against a peacekeeping mission resulting from a 2007 attack on the Haskanita camp of the African Union Mission in southern Darfur. The pre-trial chamber declined to confirm the charges in February, when it concluded that the evidence presented by the prosecution was insufficient to establish substantial grounds to believe that Abu Garda could be held responsible for the commission of the war crimes with which he was charged. In April, the pre-trial chamber concluded that the prosecution's appeal did not fulfill the requirements for an appeal under the Rome Statute, which governs the ICC's operation. For further information, see UN press releases of 8 February and 26 April 2010.

On 1 June 2010, the ICC signed an agreement with Belgium, Denmark, and Finland where the three nations will now enforce tribunal judges' rulings of imprisonment. Previously, Austria and the United Kingdom have signed similar agreements with the ICC.

(Humza Kazmi)

The first Review Conference of the ICC, convened in Uganda's capital Kampala from 31 May 2010 to 11 June 2010, adopted two amendments to the Rome Statute.

On 10 June 2010 the Review Conference adopted a resolution amending the Rome Statute to bring under the jurisdiction of the Court the war crimes of employing poison or poisoned weapons, employing asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices, and employing bullets which expand or flatten easily in the human body, when committed in armed conflicts not of an international character. By the same resolution, the Conference amended the Elements of Crimes by the inclusion of the elements of the war crimes included in article 8, paragraph 2 (e), of the Rome Statute. In introducing the draft resolution amending article 8 of the Rome Statute, the delegation of Belgium explained in respect of the expanding bullets that the draft amendment was intended to extend the jurisdiction which the Court already had over the crime in article 8, paragraph 2 (b) (xix) of the Rome Statute, to armed conflicts not of an international character.

Furthermore, it was noted that there was no absolute prohibition on bullets which expand or flatten easily in the human body and that the crime was committed only if the perpetrator employed the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law. It was also stressed that law enforcement situations are excluded from the Court's jurisdiction. As regards the Elements of Crimes, the delegation of Belgium indicated that they mirrored precisely the Elements of Crimes for the war crime contained in article 8, paragraph 2 (b) (xix) of the Rome Statute, except that the crimes occurred in conflicts not of an international character. The Review Conference explicitly confirmed the understanding that the crime of employing bullets which expand or flatten easily in the human body as reflected in article 8, paragraph 2 (e), is "*committed only if the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets*". The Review Conference also considered that the abovementioned relevant Elements of Crimes can help in their interpretation and application in that they *inter alia* specify that the conduct took place in the context of and was associated with an armed conflict, which consequently confirms the exclusion from the Court's jurisdiction of law enforcement situations. The amendment will enter into force for each State Party one year after the instrument of ratification is deposited or the amendment is accepted, in accordance with Article 121(5) of the Rome Statute.

The second amendment adopted by the Review Conference relates to the crime of aggression. This crime has always been included in the Rome Statute but the crime could not be investigated and prosecuted before the ICC until the Rome Statute was amended to provide a definition of the crime and to set out the conditions under which the ICC shall exercise jurisdiction with respect to this crime. Member States of the ICC have agreed in Kampala on what constitutes the crime of aggression, a long-running source of contention in international law, after nearly one decade of discussion. Nations agreed to amend the Rome Statute to define the crime of aggression as "*the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations*". The amendment also focuses on the different means of referring or initiating an investigation of the crime of aggression before the ICC; temporal jurisdiction; and the authority of the Security Council. For a description of the complex amendment see ASIL Insight of 22 June 2010.

(Alfons Vanheusden)

On 25 June 2010, ICC prosecutors rejected the idea that serious crimes committed during the 2008 conflict in South Ossettia, Georgia, could receive impunity. Prosecutor Luis Moreno-Ocampo noted that primary investigation and prosecution of war crimes is a state responsibility, but the ICC may step in if the domestic courts fail to take effective action. Since Georgia is a State Party to the Rome Statute authorizing the creation of the ICC, the ICC may potentially exercise jurisdiction over any war crimes committed during the 2008 conflict between Georgia and Russia. The ICC prosecution delegation has received briefings from both Georgia and Russia on the investigation of potential war crimes during the conflict.

(Humza Kazmi)

European Court of Human Rights (ECtHR)

On 1 March 2010 the ECtHR Grand Chamber ruled in the case *Demopoulos v. Turkey brought* by seventeen Cypriot nationals of Greek-Cypriot origin. The ECtHR held that the applications were inadmissible given that the applicants had not exhausted all available domestic remedies. The Grand Chamber also held that the amended law and the Immovable Property Commission (IPC) were accessible and effective. The IPC has been established pursuant to the amended law to remedy alleged deprivation of property in northern Cyprus following the invasion by Turkey in 1974. The Grand Chamber dismissed the argument that by legitimizing the IPC's compensation awards, the Court was legitimizing the illegal occupation of Cyprus. For more information see ILIB of 18 March 2010.

On 2 March 2010 the ECtHR ruled in the case *Al-Saadoon & Mufdhi v. United Kingdom*, brought by two Iraqi nationals who had been transferred by UK authorities to Iraqi authorities. The ECtHR held that the UK did nothing to ensure that the applicants' rights under the ECHR would be guaranteed once they were transferred to Iraqi authorities. Specifically, there was no record of negotiations on this issue between the two governments. By failing to elicit binding assurance from the Iraqi government as to the safety of the applicants, the U.K. violated Articles 2 and 3 of the Convention. In addition, by failing to comply with an earlier interim measure by the Court, the UK violated Articles 13 and 34 of the Convention. The Court also held that the UK did not violate the applicant's Article 6 rights as the applicants failed to establish that at the time of their transfer there was a risk of unfair trial. For more information see ILIB of 5 March 2010.

On 29 March 2010 the ECtHR ruled on appeal in *Medvedev* v. *France* on the interpretation of the right of prompt access to judicial proceedings under art. 5 ECHR following a detention in a specific maritime context. In the judgment France was condemned because the deprivation of liberty was not lawful within the meaning of Article 5 § 1 ECHR "*for lack of a legal basis of requisite quality to satisfy the general principle of legal certainty*" but the 13-day detention on board that was necessary to reach France was not deemed in breach of art. 5§3 ECHR.

International Criminal Tribunal for Rwanda (ICTR)

On 11 February 2010 the ICTR handed down a 15-year prison sentence to former Rwandan Lieutenant Colonel Tharcisse Muvunyi, convicting him of direct and public incitement to commit genocide. The decision follows retrial after in 2008, the ICTR's appeals chamber set aside the ICTR's earlier convictions and sentence, but ordered a retrial. For more information see UN press release of 11 February 2010.

On 18 March 2010 the ICTR appeals chamber affirmed the conviction and 15-year sentence of Simon Bikindi, a famous Rwandan singer and composer, for his direct and public incitement to commit genocide based on public exhortations to kill Tutsis, which he made on the Kivumu-Kayove road in Gisenyi prefecture in late June 1994. The appeals chamber also reduced the sentence to 40 years instead of life imprisonment handed down against Simèon Nchamihigo, a former deputy prosecutor in Cyangugu Prefecture, after reversing a number of his convictions. For more information see UN press release of 18 March 2010.

(Alfons Vanheusden)

International Criminal Tribunal for the former Yugslavia (ICTY)

On 10 June 2010, the ICTY sentenced two Bosnian Serb officers to life imprisonment, after convicting them of genocide based on their actions in the 1995 Srebrenica massacre. Between 5,000 to 8,000 Bosnian Muslim civilians were massacred by the Drina Corps of the Serbian forces (VRS). Vujadin Popovic, Drina Corps chief of security, and Ljubiša Beara, VRS head of security, were both found guilty of genocide, murder, extermination, and persecution, and sentenced to life imprisonment. Five other military and police officers were also sentenced for lesser crimes, given sentences ranging from 5 to 35 years of imprisonment.

(Humza Kazmi)

National Developments

Investigation into tragedy in Afghanistan

On 21 February 2010 an airstrike launched in the Afghan province of Uruzgan by Special Forces helicopters operating under ISAF command against what the troops believed to be a group of insurgents killed over 20 civilians, including women and children. The commander of ISAF immediately apologized to the Afghan President Mr. Karzai and ordered an investigation

into what had happened. Also the NATO Secretary General expressed condolences to the Afghan people for the tragic loss of innocent Afghan lives. He emphasized that NATO is in Afghanistan to protect the Afghan people, and that NATO will continue to make every effort to reduce civilian casualties to the absolute minimum. Robert Watkins, Deputy Special Representative of the UN Secretary-General for Afghanistan, repeated the UN Security Council's call for all parties to the conflict to avoid civilian casualties. "*I appreciate International Security Assistance Force (ISAF) statements that the armed forces currently engaging insurgents in southern Afghanistan have taken great precautionary measures to safeguard civilians*," said Mr. Watkins. "*I also appreciate the quick acknowledgement of responsibility and the apology by ISAF regarding yesterday's loss of life in Uruzgan. However, measures highlighted in the tactical directives and guidelines issued by ISAF on the use of lethal force must be fully implemented at all times and under all circumstances*," he stated. See NATO and UN press releases of 22 February 2010. See also New York Times of 23 February 2010.

(Alfons Vanheusden)

On 29 May 2010, Major General Timothy McHale released a report discussing the civilian deaths resulting from the 21 February 2010 airstrike. The report stated that four American officers had been reprimanded, and two officers disciplined, for their role in the events.

An American military Special Operations team was tracking insurgents near Shahidi Hassas when a truck and two SUVs began moving towards their position. The ground commander requested surveillance of the vehicles by Predator drones. After three and a half hours of surveillance, the drone operators reported that there were only military-age males in the truck, causing the ground commander to request an airstrike on the vehicles. A Kiowa helicopter fired at the vehicles with missiles, but the crew aborted their attack when they noticed brightly colored clothing, which possibly indicated the presence of civilians.

General McHale stated in the report that the "inaccurate and unprofessional" reports of the Predator drone operators failed to provide the ground commander with evidence of a civilian presence in the vehicles, causing the commander to wrongly believe that the vehicles contained insurgent reinforcements. McHale also criticized the commander for not reporting the possible death of civilians in a timely fashion.

Military officials in Washington and Afghanistan, speaking anonymously to the *New York Times*, stated that intelligence analysts warned the drone operators and ground command posts that children were visible in the vehicles.

For further information, see Dexter Filkins "Operators of Drones are Faulted in Afghan Deaths," *New York Times*, May 29, 2010. Available at http://www.nytimes.com/2010/05/30/world/asia/30drone.html .

(Humza Kazmi)

New Belgian anti-piracy legislation

The Belgian Law of 5 June 1928 on revision of the Disciplinary and Criminal Code for merchant shipping and fisheries constitutes a legal basis for combating maritime piracy, but its scope is limited to Belgian-flagged merchant or fishing vessels. Consequently, this law cannot provide a legal ground for prosecuting piratical acts committed against Belgian pleasure yachts or warships, or non-Belgian-flagged ships. This prompted the government to propose changes to the Belgian legislation in order to enable the Belgian authorities to counteract maritime piracy in optimal conditions. The government therefore introduced two related bills to fill this lacuna. On 19 December 2009, parliament approved these bills. On 30 December 2009 both laws were promulgated and on 14 January 2010 they were published in the *Belgisch Staatsblad* [official bulletin] and entered into force.

New Belgian legislation authorizing intrusive methods of data collection for intelligence services

On 4 February 2010 a law was promulgated concerning the methods of data collection by the military and civilian intelligence and security services of Belgium, including wiretapping. The aim of this new law is to provide the intelligence services a legal basis to use intrusive methods to gather information in certain cases, notably in the context of the fight against terrorism. The law also attributes specific competences to the military intelligence service in the field of cyber force and the protection of the country's defence related scientific and economic potential. The law was published in the *Belgisch Staatsblad* [official bulletin] and will enter into force on 1 September 2010.

Canada's Supreme Court not willing to intervene in foreign relation matters

The Supreme Court of Canada reversed an order by the Federal Court of Appeal ordering Canada to request repatriation of Omar Ahmed Khadr, a Canadian citizen captured in Afghanistan in 2002 for allegedly throwing a grenade that killed a US soldier and held in Guantanamo Bay, awaiting trial on war crime charges. The Court held that separation of powers prohibited the courts from intervening in foreign relation matters. For more information see ILIB of 19 February 2010.

(Alfons Vanheusden)

German government qualifies ISAF deployment

On 10th of February, the German government for the first time qualified the nature of the country's ISAF-deployment in Afghanistan a non-international armed conflict. In a speech to the parliament German Foreign Minister Guido Westerwelle redefined the situation "*an armed conflict within the parameters of international humanitarian law*".

This reclassification not only opens the way to the application of the law of armed conflicts, but also has legal consequences for a potential criminal evaluation of the soldiers' acts by German Courts. These will have to determine whether the acts in question will be judged under ordinary criminal law applicable in peace time or under the code of crimes against international law. Even though this assessment remains subject to the judiciary, the latter will at least have to take into account the government's qualification.

(http://www.pressrelations.de/new/standard/result_main.cfm?r=399768&aktion=jour_pm (in German))

(Birgit Kessler)

Agreement in principle reached between Israel and the United Nations on payment for damage to UN property in Gaza

Israel and the United Nations have reached agreement in principle on the terms of an arrangement under which reimbursement would be made for losses sustained by the UNO during the 2009 Israeli offensive against Hamas in Gaza. During the three-week offensive Israeli shells struck the UN's main centre in Gaza City, setting ablaze a warehouse with hundreds of tons of food and medicine, and at least three UN schools run for Palestinian refugee children were attacked, among other losses. See UN press release of 7 January 2010.

Two senior Israeli officials reprimanded for the firing of artillery shells on UN property in Gaza

Israel reprimanded a brigadier general and a colonel for the firing of artillery shells on a UN compound during the 2009 Israeli offensive against Hamas in Gaza. For more information see New York Times of 2 February 2010 or De Standaard (in Dutch) of 1 February 2010.

(Alfons Vanheusden)

IDF Military Advocate General defends legality of IDF flotilla actions

On 3 June 2010, the Israeli Defense Force (IDF)'s Military Advocate General released a report defending the legality of intercepting the Gaza aid flotilla on 31 May 2010. In the report, the IDF stated that Israel has been involved in an ongoing armed conflict with Hamas, especially after Hamas established control over the Gaza strip in June 2007. The MAG states that Israel is abiding by the Law of Armed Conflict, which authorizes state parties to establish blockades of hostile coasts for security reasons. The report states that Israel's blockade complies with the requirements of International Humanitarian Law as established in the San Remo Manual, which deals with armed conflict at sea, and that the authority to capture ships in international waters intending to breach a blockade is extended to the blockading state under the ICRC Model Manual of the Law of Armed Conflict for Armed Forces. For further information, see the MAG report, available at http://www.mag.idf.il/592-4071-en/patzar.aspx, and Douglas Guilfoyle's article in *The Times*, available at http://business.timesonline.co.uk/tol/business/law/article7142055.ece.

(Humza Kazmi)

The 'Iraq Report' Released in the Netherlands

On 12 January 2010 the Independent Commission of Inquiry on Iraq (*Onderzoekscommissie Irak*) – established following a formal request made by the Government in March 2009 – released its final Report on the Dutch contribution to the invasion of Iraq in 2003 (Full Report in Dutch: http://www.nrc.nl/multimedia/archive/00267/rapport_commissie_i_267285a.pdf; Press Release: http://www.onderzoekscommissie-irak.nl/Content/www.onderzoekscommissie-irak.nl/Documenten/press_release_conclusions_of_the_committee_of_inquiry_on_iraq.pdf; Conclusions: http://download.onderzoekscommissie-irak.nl/conclusions_rapport_commissie_irak.pdf). The Netherlands is the first country in the world to adopt a document which directly assesses the legality of the military intervention and the conduct of the Dutch Government in the period preceding the invasion. The Commission was composed by seven well-known academics in different disciplines (mostly experts in public and international law) and chaired by Willibrord Davids, former President of the Supreme Court of The Netherlands. Following the establishment of the Dutch Commission, a similar commission of inquiry (the 'Iraq Inquiry' - http://www.iraqinquiry.org.uk) was launched in the UK on 30 July 2009. Its works are still to be concluded.
The 'Davids Commission' 's mandate generally concerned an in depth investigation into the preparations for the war in Iraq (from Summer 2002 to Summer 2003), including the internal decision-making process and the participation of the Dutch armed forces to the military intervention of 2003. The Commission also specifically addressed matters of international law, intelligence and the use of confidential information.

On the legality of the military intervention, the Commission made clear that the invasion had no legal basis ('no sound mandate under international law'), since the paragraph of the UN Sec. Council Res. 1441 which offers Iraq a final opportunity for disarmament, 'cannot reasonably be interpreted as authorizing individual member states to use military force to compel Iraq to comply with the Security Council's resolutions'. Besides, neither 'the Security Council resolutions on Iraq passed during the 1990s […] constitute[d] a mandate for the US-British military intervention in 2003'. Even though the military intervention was to be considered illegal, the Commission found no evidence that would confirm an active military contribution by the Dutch armed forces to the preparations for the invasion. The Netherlands deployed a

frigate and a submarine in the Persian Gulf and three Patriot missile systems for defensive purposes in Turkey (see the Dutch Government's statement under http://www.netherlands-embassy.org/files/pdf/patriotmissilesletter.pdf). In addition, a Dutch military officer was noted at the Gen. Franks' (the Commander of Operation Iraqi Freedom) press conference in Qatar at the beginning of the military operations. While the naval assets were held as having not contributed to the military efforts (thus relieving the Executive from any responsibility), the Government's statement relating to the defensive character of the Patriot batteries' deployment was eventally questioned by the Commission. Ultimately, the presence of the Dutch officer at the Gen. Frank's press release was explained as the result 'of a misunderstanding and incorrect instructions'.

The Report lays most of the political responsibility for the Dutch support to the war at the door of the former Minister of Foreign Affairs Jaap de Hoop Scheffer (who shortly after became NATO Secretary General), on whom the – at that time – newly-elected Prime Minister Jan-Peter Balkenende apparently left most of the decisions on the legitimacy of the Iraq invasion. On the other hand, the Report also explicitly confirms that the political support for the Iraq War was not influenced by the potential appointment of Mr de Hoop Scheffer to the NATO. According to the Commission, however, the political proximity to the US Government is at the basis of the little or no attention paid by the Dutch Executive (in particular by the MFA) to the legality of the invasion and to the information reports submitted by domestic intelligence agencies, according to which there was little or no evidence of weapons of mass destruction in Iraq.

The Dutch intelligence agencies (AIVD – civilian/domestic; and MIVD – military/external), on their side, did not possess significant intelligence information on the Iraq's WMD programme and mostly relied on information provided by allied security agencies. The Executive then cherry-picked from intelligence agencies' reports only the parts which seemed to support the existence of a WMD programme, in order to back its interventionist policy. Some crucial documentation – in particular a letter of the US Government sent on 15 November 2002 concerning a possible contribution of the Netherlands to the forthcoming military expedition – was kept confidential by the Dutch Executive and not submitted to the Commission.
Some of the Davids Report's conclusions were rejected by the outgoing Prime Minister Balkenende (see an official statement here: http://english.minaz.nl/News/Press_releases_and_news_items/2010/Januari/Balkenende_thorough_report_by_Davids_Committee), who is still formally in charge until the forthcoming general elections.

(*Matteo Tondini*)

The Netherlands sentences Somali pirates to five years prison

On 18 June 2010, the Netherlands became the first Western nation to render convictions against pirates operating off the coast of Somalia, as a Rotterdam court sentenced five Somali citizens to a prison term of five years for their attempt to hijack the Dutch Antilles-flagged cargo ship *Samanyolu* on 2 January 2009. While the defense lawyers argued that the Netherlands lacked jurisdiction over the crime, and that any prosecution should be brought by the Dutch Antilles, the judge ruled that the Netherlands possessed universal jurisdiction, especially since the Antilles are part of the Kingdom of the Netherlands. For further information, see "Vijf jaar cel voor Somalische piraten," (Dutch), *De Standaard*, 18 June 2010.

United States Court of Appeals denies Bagram Detainees *Habeas* Access

On 21 May 2010, the United States Court of Appeals for the District of Columbia ruled in the case of *Maqaleh v. Gates* (D.C. Cir. May 21, 2010) that three detainees being held at Baghram Airbase in Afghanistan do not have access to United States courts, as a result of § 7(a) of the Military Commissions Act of 2006 (MCA). The detainees, Fadi Al-Maqaleh, Redha Al-Najar, and Amin Al-Bakri, had sought habeas corpus relief from their detention by the

American government. This decision overturns the earlier decision by the trial court, which agreed that § 7(a) of the MCA would deprive the court of jurisdiction, but that the MCA could not constitutionally be applied based on the Supreme Court of the United States's decision in the 2008 case *Boumediene v. Bush,* 128 S. Ct. 2229 (2008), and the earlier *Johnson v. Eisentrager,* 339 U.S. 763 (1950), both of which addressed the topic of detainees seeking writs of *habeas corpus*. *Boumediene* ruled that detainees being held at Guantanamo Bay did have access to *habeas corpus*.

In *Boumediene*, the Supreme Court created a three-part test for determining whether detainees could invoke the Suspension Clause of the United States Constitution, which used "*(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made, (2) the nature of the sites where apprehension and then detention took place, and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ*." *Boumediene* 128 S. Ct. at 2259. The Court of Appeals noted that the Unlawful Enemy Combatant Review Board which the Bagram prisoners had been subjected to "afford[s] even less protection to the rights of detainees in the determination of status than was the case with the CRST [Combatant Status Review Tribunal, the review process in *Boumediene*]," but that the lack of American *de facto* sovereignty over Bagram compared to Guantanamo Bay and the active nature of the Afghan conflict preclude the Bagram detainees from exercising *habeas* rights. For further information, see the opinion by Chief Judge Sentelle, available at http://pacer.cadc.uscourts.gov/common/opinions/201005/09-5265-1245894.pdf , and *New York Times* coverage, available at http://www.nytimes.com/2010/05/22/world/asia/22detain.html . An assessment by Faiza Patel of ASIL can be found at http://www.asil.org/files/insight100603pdf.pdf.

US Supreme Court denies immunity from suit to individual members of foreign governments

On 1 June 2010, the Supreme Court of the United States ruled that the Foreign Sovereign Immunities Act (FSIA) does not apply to the actions of an individual member of a foreign government. The FSIA grants the agencies or instrumentalities of a foreign sovereign immunity from suit within the United States. However, the Supreme Court rejected the argument that "an individual acting on behalf of [a] state" should also receive the benefits of sovereign immunity. In this case, the petitioner, Mohamed Ali Samantar, was first Minister of Defense, and then later Prime Minister, of Somalia. The respondents in this case are members of the Isaaq clan, who allege that Samantar not only knew of, but aided and abetted in, the persecution, detention, torture, and murder of members of their family. The Supreme Court ruled that since the legal use of "agency or instrumentality" in the FSIA is typically used to refer to individuals, the FSIA specifically mentions officials in other cases when they are eligible for sovereign immunity, and it is not clear that Congress intended to codify the principle of state doctrine in the FSIA, that individuals cannot seek to utilize the protections of the FSIA under the "agencies or instrumentalities" clause of §1603 of the FSIA. For more information, see *Samantar v. Yousuf,* No. 08-1555, slip op. (2010). Available at http://www.supremecourt.gov/opinions/09pdf/08-1555.pdf .

(Humza Kazmi)

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(Stanislas Horvat, Director of the Documentation Centre)

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