



## NEWS FLASH 24

(November 2015)

### Upcoming Events

#### **Conference on Military Law - Lima, 20-22 April 2016**

The *International Society for Military Law and the Law of War*, together with the *Fuero Militar Policial*, is organising an international *Conference on Military Law* in Lima (Peru) on 20-22 April 2016. More information will follow later.

#### **Conference on International Law in Military Operations - Exeter, 21-23 June 2016**

The *International Society for Military Law and the Law of War*, together with its UK Group and the University of Exeter, is organising an international *Conference on International Law in Military Operations* in Exeter (UK) on 21-23 June 2016. More information will follow later.

#### **International Order and Justice Lecture Series - Ghent University, 12 October 2015 to 3 May 2016**

During the academic year 2015-2016, the Ghent law faculty will organize a series of lectures and closed seminars featuring eight heavyweights in the broader international legal domain. The common theme of their interventions is '*International Order and Justice*', symbolizing the structure of arguments in international law.

Eight experts with recognized expertise and a close affinity with the deep roots of international law and its place in the international community will each deliver a public lecture on topics ranging from international criminal law, and arbitration as a method of dispute settlement, to the treatment of property in international law. Particular attention is paid to the interaction between law and politics, the historical roots of international law, and the evolution of its place in the international community.

More information and programme:

<http://www.ugent.be/doctorschools/en/doctoraltraining/courses/specialistcourses/ahl/international-order-and-justice-lecture-series.htm>

### **Brussels Workshop on the Use of Armed Forces in Domestic Situations**



*Workshop of the ISMLLW in Brussels, 21 September 2015*

On 21 September 2015, the *International Society for Military Law and the Law of War* organised a workshop in Brussels on the topic *The Use of Armed Forces in Domestic Situations - A Comparative Law Analysis*. The aim of this workshop was to provide us with the right questions to ask in the questionnaire to be prepared for the Society's 21th Congress. This questionnaire will be sent out all over the world in order to get a picture of what each State's opinion and practice on the use of armed forces in domestic situations is. With three excellent speakers on the subject and several specialist participants, this workshop produced a fruitful debate in which many interesting subjects were raised and discussed. The report of this workshop will be published on the website of the *International Society for Military Law and the Law of War*.

### **Colombian government and FARC agree on the question of transitional justice**

On 23 September 2015, the Colombian government and the head of the FARC (*Fuerzas Armadas Revolucionarias de Colombia*) issued a joint communiqué on a Transitional Justice Accord concluded in the framework of negotiations aimed at ending the 51 year old non-international armed conflict between them. The unprecedented joint statement, outlining the announced agreement, marks a crucial step in the Colombian peace process. The agreement is based on an integral model of Truth, Justice, Reparation and Non-Repetition. Within this framework, the creation of a Commission for Truth, Peaceful Coexistence and Non-Repetition is envisioned. With regard to the Justice component, the accord provides in particular that, when hostilities cease, in accordance with international humanitarian law, the Colombian State will extend the broadest possible amnesty for political and related crimes. An amnesty law will spell out the scope of the notion of "relatedness". Crimes against

humanity, genocide, serious war crimes, hostage-taking or other serious privation of liberty, torture, forced displacement, forced disappearance, extrajudicial executions, or sexual violence, however, are excluded. These crimes will be subject to investigation and trial by the Special Jurisdiction for Peace, created by the accord. This special court will consist of two sections, namely the Chambers of Justice and the Tribunal for Peace. The essential function of this Court is to end impunity, uncover truth, contribute to reparation for the victims of the conflict and try and impose sanctions on those responsible for the grave crimes committed during the conflict with the aim to guarantee the non-repetition thereof.

To these ends, the special court will have jurisdiction over all persons who, in a direct or indirect fashion, participated in the conflict, including the FARC-EP and State agents, for crimes committed in the context and for the purpose of the conflict, with particular respect to the most grave and representative cases.

Two distinct procedures will be held before the Special Jurisdiction for Peace: one for individuals who recognize their responsibility and come forward from the beginning, and one for those who do not do so or who do so but only late in the proceedings. The former will be imposed a sanction based on recognized investigations, having taken into account previous investigations carried out by Colombian authorities, earlier existing convictions and information from victims and human rights groups. The latter will face trial before the Tribunal for Peace, and if found guilty could spend up to 20 years in regular prisons. Those who recognize their responsibility later in the proceedings will enjoy reduced sentences of only five to eight years in regular prisons, during which they will contribute to their re-socialization through work, training, or study. To be eligible for these reduced sentences, a full contribution to the truth, reparations to victims and guarantees of non-repetition are required.

The accord also foresees in a disarmament condition that entails that all FARC members lay aside their weapons, a process which will begin no later than 60 days after the signature of a final accord (which is to be concluded within the next six months). This demilitarization condition is an important step in the transformation of the FARC into a legal political movement, which has been described as a shared objective by both Parties.

A summary in English of the main points of the agreement may be found here: <http://colombiapace.org/>, while the communiqué (in Spanish) is available here: [http://wp.presidencia.gov.co/Noticias/2015/Septiembre/Paginas/20150923\\_03-Comunicado-conjunto-N-60-sobre-el-Acuerdo-de-creacion-de-una-Jurisdiccion-Especial-para-la-Paz.aspx](http://wp.presidencia.gov.co/Noticias/2015/Septiembre/Paginas/20150923_03-Comunicado-conjunto-N-60-sobre-el-Acuerdo-de-creacion-de-una-Jurisdiccion-Especial-para-la-Paz.aspx)

This important step towards peace in Colombia happened less than a year after an International Conference on Military Law, entitled “*Transitional Law and Beyond*”, co-organised by the *International Society for Military Law and the Law of War*, was held in Bogota.

See also: <http://colombiareports.com/colombias-peace-deals-in-depth-transitional-justice/> & <https://www.justsecurity.org/26327/transitional-justice-deal-reached-colombian-conflict/>

*(Sophie Duroy de Suduiraut & Sabrien Rezkallah)*

### **The Bemba, Kilolo et al. trial started at the International Criminal Court**

The trial of former members of Jean-Pierre Bemba's defence team has started on Tuesday 29 September 2015 at the International Criminal Court. The suspects are accused of having committed offences against the administration of justice during the trial of the main Bemba case.

In 2008, Jean-Pierre Bemba, former vice-president of the Democratic Republic of Congo was arrested by the Belgian authorities and surrendered to the ICC pursuant to an arrest warrant accusing him of allegedly committing crimes against humanity and war crimes as a military commander of the Mouvement de Libération du Congo (MLC) on the territory of Central African Republic. His trial commenced at the ICC on 22 November 2010. Proceedings against Jean-Pierre Bemba are now in the final deliberation phase. The final verdict is expected in early 2016.

During the trial, it appeared to the Prosecutor that there were reasonable grounds to believe that several witnesses testifying before the Court had been corruptly influenced into giving false testimonies. Subsequent arrest warrants were issued against Jean-Pierre Bemba and four other suspects: Aimé Kilolo (his lead counsel), Jean-Jacques Mangenda (his case manager), Fidèle Babala and Narcisse Arido (both close to the defence team). These four new suspects were arrested and transferred under the custody of the ICC at the end of 2013.

The offences against the administration of justice incriminated in Article 70 of the Rome Statute are the smallest offence under the jurisdiction of the ICC, with a maximum term of imprisonment of five years. Possible offences listed in the Statute comprise, among others, false testimony, encouraging a false testimony, presenting false evidence, accepting a bribe as a Court official.

The charges against the suspects were confirmed on 11 November 2014, but they were eventually released from the custody of the Court in the expectation of the trial as they had already served more than a year in custody.

The Prosecutor has indicated her intention to rely on 15 witnesses at trial. During the hearings, the Prosecutor will first examine the witnesses before allowing the defence teams of each of the five accused to perform a cross-examination.

The decision of confirmation of charges in the Bemba, Kilolo et al. case may be accessed on: <http://www.icc-cpi.int/iccdocs/doc/doc1857534.pdf>

See also, the statement of the ICC Prosecutor Fatou Bensouda on the start of Bemba et al. trial, on 29 September 2015: <https://www.youtube.com/watch?v=I8ALr-teI9Y>

(Arthur Fallas)

### **Situation in Ukraine**

On 8 September 2015, the Ukrainian Government issued a declaration to the ICC under article 12(3) of the Rome Statute, which provides that a State not party to the Rome Statute can decide to accept the Court's jurisdiction with regard to crimes committed on their territory. In this declaration, the Ukrainian State accepted the Court's jurisdiction with respect to crimes allegedly committed on Ukrainian territory since 20 February 2014.

A previous declaration by Ukraine under the same jurisdictional ground was issued on 9 April 2014, whereby Ukraine accepted the Court's jurisdiction over alleged crimes committed in its territory for the period from 21 November 2013 until 22 February 2014. By submitting the new declaration Ukraine seeks to extend the Court's jurisdiction *ratione temporis* on its territory.

The declaration is now to be assessed by the ICC Prosecutor, who can decide to request the Judges' authorisation to open an investigation, if she is of the opinion that the information available provides a reasonable basis to do so. After an investigation is opened, the Prosecutor has the discretion, based on evidence gathered during the investigation phase, to request the judges to issue arrest warrants or summonses to appear for persons charged with committing crimes that fall under ICC's jurisdiction. Pursuant to article 53(1) of the Rome Statute, the Prosecutor considers issues of jurisdiction, admissibility, and the interests of justice.

The Ukrainian declaration is to be contextualised in the armed conflict on its territory, which emerged at the end of 2013 between Ukrainian armed forces and pro-Russian rebels. In its declaration the Ukrainian government expressed its desire to cooperate closely with the Court.

The text of the declaration may be accessed on: [http://www.icc-cpi.int/iccdocs/other/Ukraine\\_Art\\_12-3\\_declaration\\_08092015.pdf](http://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf)

Also on 8 September 2015, the UN Human Rights Monitoring Mission in Ukraine issued its eleventh report in a row of reports published on the human rights situation in the concerned State. Created in March 2014 by the Office of the United Nations High Commissioner for Human Rights, the mandate of the Mission consists of evaluating and reporting on the human rights situation in Ukraine. Additionally, its task is to provide support to the Government of Ukraine in the promotion and protection of human rights. The report spans the period from 16 May to 15 August 2015. Although the time frame covered in the report is not characterized by large-scale hostilities, local eruptions of violence in various places in the Donetsk and Luhansk regions did occur. Throughout, the report notes violations of human

rights and humanitarian law in varying degrees as a common denominator of the conduct of various armed forces and groups.

Within the context of the right to life, liberty, security and physical integrity, the report observes an increased number of civilian casualties compared to the preceding reporting period (more than 105 civilians killed and 308 injured opposed to 60 civilians killed and 102 injured), pursuant to the hostilities. In line with previous reports, the Mission continues to document cases of ‘killings, abductions, torture and ill-treatment, sexual violence, forced labour, ransom demands and extortion of money, committed by the armed groups’. Ukrainian law enforcement entities claim that investigations are impeded by the lack of due access to the sites and the difficulty in identifying suspects and weapons. On the other hand, a practice of arbitrary and incommunicado detention by the Ukrainian authorities, often along with torture and ill-treatment, and violations of procedural rights is observed. Moreover, a government order restricting the passage through areas under control by armed groups opposed to the government severely hinders the freedom of movement of the population as well as the access of humanitarian assistance. People living in armed groups controlled areas consequently experience limited access to government facilities in combination with deteriorating water and food quality, and mounting prices due to scarcity, which leads to a decreasing standard of living. The path to progressive development of social and economic rights by the Ukrainian Government is thus severely impaired. Despite government imposed movement restrictions, the number of internally displaced persons has increased.

On 5 June 2015, the Ukrainian Government lodged a declaration to the UN and the Council of Europe, stating its decision to derogate from certain human rights obligations under the ICCPR and the ECHR, pursuant to “annexation and temporary occupation by the Russian Federation” of Crimea and “military aggression of the Russian Federation” “on the territory of certain districts of Donetsk and Luhansk regions”. The concerned rights are: the right to liberty and security, fair trial, effective remedy, respect for private and family life, and freedom of movement. Some of these rights have been interpreted by the UN Human Rights Committee as being non-derogable. They include the right to an effective remedy and procedural rights, such as the supervision by a judicial body of the lawfulness of detention. The report expresses worries that the derogation will negatively affect the enjoyment of human rights in certain areas of the Donetsk and Luhansk regions.

The report devotes a separate section to the human rights situation in the autonomous republic of Crimea, scrutinizing incidents, related to the right to life, liberty, security and physical integrity, the freedom of movement, of expression, of peaceful assembly, of association, of religion, as well as the right to an adequate standard of living, the right to social security and protection, the right to health and cultural rights. A flawed enjoyment of these rights by the population in the area is documented, with references to individual cases.

The central scheme of the report is that the ongoing existence of an armed conflict is detrimental to the human rights situation in Ukraine. The presence of foreign fighters allegedly identified as members of the Russian Federation’s armed forces, combined with the debilitated control by the Ukrainian Government over parts of its territory to the advantage of armed groups, however, seriously hampers the chance of cessation of the hostilities. Therefore, the Mission calls upon the parties to end the hostilities in the affected areas as soon as possible. All the while, the report urges the parties to the conflict to display respect for international human rights and humanitarian law, especially by complying with the principles of distinction, proportionality and precaution. The report also puts emphasis on the

issue of accountability of the involved parties, calling on the parties to conduct investigations with regard to due process into violations and abuses of international humanitarian law and international human rights law, with the eventual aim of providing victims with access to effective remedies and justice. Lastly, the support of humanitarian efforts is recommended.

The text of the report may be accessed on:  
<http://www.ohchr.org/Documents/Countries/UA/11thOHCHRreportUkraine.pdf>

*(Sabrien Rezkallah)*

### **The Independent International Commission of Inquiry on the Syrian Arab Republic publishes its fourth report**

On 3 September 2015, the Independent International Commission of Inquiry on the Syrian Arab Republic released its ‘report on the Syrian Arab Republic’ of 13 August 2015, its fourth in a series of reports on the Syrian conflict.

The Commission was created on 22 August 2011 under the auspices of the UN Human Rights Council and mandated with the task to carry out an independent investigation on alleged violations of international human rights law carried out in the Syrian Arab Republic since March 2011, as well as identify those responsible thereof with the eventual aim of holding them accountable for crimes committed during the non-international armed conflict. The findings in the report are based on 335 interviews with witnesses and victims, carried out from 10 January to 10 July 2015 with people in hospitals and camps in neighbouring countries. Victims and witnesses who remained inside the country were interviewed via telephone and Skype, given that the Commission has not yet been allowed access to the country by the Syrian Government to conduct its investigations. Additionally, the Commission relied on United Nations reports, academic analyses, reports originating from both governmental as well as non-governmental sources and evidence contained in a variety of material, such as photographs, video recordings, satellite images, forensic and medical reports. The standard of proof held by the Commission in assessing the corroboration of the testimonies consisted of that of a ‘reasonable ground’.

The internationally appointed Commission’s team currently comprises of Paulo Sérgio Pinheiro (Brazil), Carla del Ponte (Switzerland) and Vitit Muntarbhorn (Thailand), and Karen Koning AbuZayd (United States).

The report starts by analysing the dynamics of the conflict. The conflict has transformed into a clew of ‘complex and often unpredictable frontlines’, which are manned by both members of Government forces and anti-Government forces as well as extremist groups such as ISIS. Added to that, the report notes a trend of internationalization of the conflict, as it is increasingly driven by international and regional powers. All these distinct factors contribute to the intensification of the gruesome violence during, in between and after the hostilities. Without stronger efforts to bring parties to the peace table, ready to compromise, current trends suggest that the Syrian conflict – and the killing and destruction it wreaks – will

continue for the foreseeable future.

At its core, the report, without however claiming to be exhaustive, deals at great length with the impact of the Syrian conflict on various civilian groups and communities – such as women, children, detainees, and religious and ethnic communities like the Yezidi people – who are, by their nature, especially vulnerable to the effects of the belligerent violence. As a general remark throughout, the report notes a flagrant disregard by the parties to the conflict of the principle of distinction, as attacks are being carried out towards the aforementioned groups without regard to their protected status.

Conclusively, the report identifies violations of human rights and international humanitarian law, even rampant war crimes and crimes against humanity committed by both Government as anti-Government forces as well as ISIS. Whilst reiterating its recommendations in the previous reports, and calling for ‘justice, accountability and peace’, the report adds that all parties are urged to abide by the standards of international humanitarian and human rights law, with special emphasis on giving due respect and protection to civilians during hostilities. Addressing the international community, the report recommends making special efforts towards the curbing of the proliferation and supply of weapons, as a contributing cause to the violence of the conflict. Above that, providing support to humanitarian efforts and protection of the rights of asylum-seekers are encouraged. The Commission recommends *inter alia* that the UN Security Council take appropriate action by referring the situation to justice, possibly to the International Criminal Court or an ad hoc tribunal, bearing in mind that, in the context of the Syrian Arab Republic, only the Security Council is competent to refer the situation. In order to be able to carry out its mandate, the Commission also calls on the Syrian Government to grant its members access to the territory.

The next report by the Commission is to be presented to the Council on 18 February 2016.

The text of the report may be accessed on:  
[http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A.HRC.30.48\\_AEV.pdf](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A.HRC.30.48_AEV.pdf)

(*Sabrién Rezkallah*)

### **The UN OHCHR releases its report on Sri Lanka**

On 16 September 2015, the Office of the United Nations High Commissioner for Human Rights, pursuant to Human Rights Council [resolution 25/1](#), released its report on “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka”.

This report includes the findings of the OHCHR investigation on Sri Lanka (OISL), a special team established by the former High Commissioner Navi Pillay to conduct a comprehensive investigation on crimes committed in Sri Lanka between 2002 and 2011, mandated in Human Rights Council resolution 25/1, which are detailed in the accompanying report [A/HRC/30/CRP.2](#). Below we highlight some of the main findings of the OHCHR report.

Among the most serious crimes documented in the OISL report, which are summarized in Section IV of the OHCHR report, are the following:

**Unlawful killings (§§25-27):** between 2002 and 2011, numerous cases of unlawful killings were allegedly committed by both parties to the conflict, as well as by paramilitary groups linked to the security forces. Concerning Sri Lankan security forces and paramilitary groups, "there appears to have been discernible patterns of killings, for instance in the vicinity of security force checkpoints and military bases, and also of individuals while in custody of the security forces." For both parties to the conflict, the report concluded that, if established before a court of law, those killings may amount, depending on the circumstances, to war crimes and/or crimes against humanity.

**Violations related to the deprivation of liberty (§§28-30):** the report documented long-standing patterns of arbitrary arrest and detention, facilitated by the Prevention of Terrorism Act (PTA), by Government security forces, as well as abductions by paramilitary organisations linked to them, which often reportedly led to enforced disappearances and extrajudicial killings.

**Enforced disappearances (§§31-33):** there are reasonable grounds to believe that enforced disappearances may have been committed as part of a widespread and systematic attack against the civilian population. The mass detention regime after the end of hostilities also led to enforced disappearances, and there are "reasonable ground to believe that those who disappeared after handing themselves over to the Army at the end of the conflict were deliberately targeted because they were or were perceived to be affiliated with LTTE forces".

**Torture and other forms of cruel, inhuman or degrading treatment (§§34-35):** on the basis of the information obtained by OISL, there are reasonable grounds to believe that acts of torture were committed on a widespread or systematic scale. According to the OISL report, one of the more commonly used centres had rooms that were set up with torture equipment, illustrating the premeditated and systematic nature of the use of torture. These rooms contained objects including metal bars and poles for beatings, barrels of water used for waterboarding, and pulleys from which victims were suspended. Victims interviewed for the report explained seeing bloodstains on the walls or floors of these rooms, and described their own torture in detail.

**Sexual and gender-based violence (§§36-37):** the information gathered by OISL provides reasonable grounds to believe that rape and other forms of sexual violence by security forces personnel was widespread against both male and female detainees, particularly in the aftermath of the armed conflict. The patterns of sexual violence appear to have been a deliberate means of torture to extract information and to humiliate and punish persons who were presumed to have some link to the LTTE. Sexual torture was performed in a wide range of detention locations by different security forces, both during and after the conflict. Not a

single perpetrator of sexual violence related to the armed conflict is so far known to have been convicted.

**Recruitment of children and their use in hostilities, as well as abduction and forced recruitment of adults (§§38-41):** information indicates patterns of abductions leading to forced recruitment of adults by the LTTE, which intensified towards the end of the conflict. Extensive recruitment and use of children in armed conflict by the LTTE and by the paramilitary Karuna group, which supported the Government following its split from the LTTE in 2004, was also documented. Children were often recruited by force from homes, schools, temples and checkpoints, and, after basic training were sent to the frontlines. According to numerous reports, in the last few months of the conflict, the LTTE increasingly recruited children below the age of 15. These practices would amount to war crimes if established in a court of law. The OISL reports also notes “the State’s failure to date to prosecute those responsible, including individuals widely suspected of child recruitment, some of whom have since been appointed to public positions. ”

**Impact of hostilities on civilians and civilian objects (§§42-48):** there are reasonable grounds to believe that many attacks during the last phase of the war did not comply with international humanitarian law principles on the conduct of hostilities, and particularly the principle of distinction. The report documents repeated shelling by Government forces of hospitals and humanitarian facilities in the densely populated ‘No Fire Zones,’ which the Government itself had announced but which were inside areas controlled by the LTTE. The report recalls that directing attacks against civilian objects and/or against civilians not taking direct part in hostilities is a serious violation of international humanitarian law and may amount to a war crime. The presence of LTTE cadres directly participating in hostilities and operating within the predominantly civilian population, launching attacks from close proximity of these locations, and the LTTE policy of forcing civilians to remain within areas of active hostilities, may also have violated international humanitarian law. However, as the OISL recalls, this would not have absolved the Government of its own responsibilities under international humanitarian law. Indeed, the duty to respect international humanitarian law does not depend on the conduct of the opposing party, and is not conditioned on reciprocity.

**Control of movement (§§49-50):** there are reasonable grounds to believe that the LTTE had a clear high level policy of preventing civilians from leaving the Vanni, thereby unlawfully interfering with their liberty of movement. The report indicates that a number of individuals, including several children, were shot dead, injured or beaten by LTTE cadres as they tried to leave, in contravention of their right to life and physical integrity, which can amount to a war crime. By compelling civilians to remain within the area of active hostilities, the LTTE also violated its obligation under international humanitarian law to take all feasible measures to protect the civilian population under its control against the effects of attacks from the security forces.

**Denial of humanitarian assistance (§§51-53):** there are reasonable grounds to believe that the Government placed considerable restrictions on freedom of movement of humanitarian personnel and activities, and may have deliberately blocked the delivery of sufficient food aid and medical supplies in the Vanni in the Northern Province, which may amount to the use of starvation of the civilian population as a method of warfare. Such conduct, if proven in a court of law, may constitute a war crime. There are reasonable grounds to believe that the LTTE also failed to respect its obligations to respect and protect humanitarian relief personnel and not to restrict their freedom of movement.

**Violations during the detention of internally displaced people (IDPs) in closed camps (§§54-55):** the manner in which the screening processes were carried out, to separate former LTTE combatants from civilians, failed to meet international standards and facilitated ill-treatment and abuse. Almost 300,000 IDPs were deprived of their liberty in camps for periods far beyond what is permissible under international law. There are also reasonable grounds to believe that IDPs were treated as suspects and detained because of their Tamil ethnicity. This may amount to discrimination and the crime against humanity of “persecution.”

Summarized in Section IV, the OISL report therefore documents years of denials and cover-ups, failure to carry out prompt investigations, stalled investigations and reprisals against the family members of victims and others who have pushed for justice. It notes that the repeated failure of successive domestic inquiries to bring justice has led to scepticism, anger and mistrust on the part of victims, particularly since “many of the structures responsible for the violations and crimes remain in place.” The report demonstrates the systemic weakness in addressing these crimes, especially when the military or security forces are involved. It also describes “reprisals against judicial and other professionals who try to prosecute human-rights related cases involving State officials.”

In Section V, the OHCHR report lists the steps towards accountability and reconciliation. It particularly highlights the progress and efforts made by the presidency since the change of regime in January 2015, but also notes that those are still insufficient.

It first assesses the work of the Presidential Commission on Missing Persons (§§60-64), created under the old regime but whose mandate has been extended since the elections. Then, it lists emblematic cases (§§65-71), but recalls that many are stalling and that the vast majority of the violations have not been investigated. The report also targets the issue of mass graves (§§72-73) and recalls that “ensuring the preservation and investigation of the sites will be critical to any future criminal investigations, as well as tracing of the missing for their families”.

In Section VII, entitled “Looking Ahead”, the report recalls that Human Rights Council resolution 25/1 stressed what is needed is a “comprehensive approach to transitional justice incorporating the full range of judicial and non-judicial measures”, including individual prosecutions, reparations, truth-seeking, institutional reform and vetting of public employees

and officials. However, the report finds that “the unfortunate reality is that Sri Lanka’s criminal justice system is not yet ready or equipped to conduct the “independent and credible investigation” into the allegations contained in the OISL report, or “to hold accountable those responsible for such violations”, as requested by the Human Rights Council.”

The report then assesses the lacks of the Sri Lankan justice system, namely "the absence of any reliable system for victim and witness protection, particularly in a context where the threat of reprisals is very high" ; " the inadequacy of Sri Lanka’s domestic legal framework to deal with international crimes of this magnitude"; "the degree to which Sri Lanka’s security sector and justice system have been distorted and corrupted by decades of emergency, conflict and impunity”; and concludes that “against this backdrop, the High Commissioner believes that the Government will need to embark on fundamental reforms of the security sector and justice system, including a fully-fledged vetting process to remove from office security forces personnel and public officials suspected of involvement in human rights violations, before it can hope to achieve a credible domestic accountability process and hope to achieve reconciliation”.

A final section, “Conclusions and Recommendations”, highlights particular recommendations from the OISL report, directed to Sri Lanka and to the United Nations. The recommendations to Sri Lanka are divided in 5 subsections, namely “general”; “institutional reforms”; “Justice”; “Truth/right to know”; and “Reparations”. They contain ambitious reforms goals, and particularly emphasise the necessity to access to IHL and IHRL and to launch a vetting procedure for the reconciliation process to be successful.

*(Sophie Duroy de Suduiraut)*

### **Malian Ansar Dine member surrendered to the International Criminal Court**

On 26 September 2015, the Nigerien authorities surrendered Ahmad al Faqi al Mahdi to the custody of the International Criminal Court. An arrest warrant against him had been confidentially issued on 18 September 2015.

Pre-Trial Chamber I of the ICC found that there were reasonable grounds to believe Mr al Faqi committed the war crime of wilful destruction of religious and protected historical buildings (article 8(2)(e)(iv) of the Rome Statute), namely nine historic mausoleums and one mosque in the ancient city of Timbuktu, Mali (a World Heritage Site) around July 2012.

Ahmad al Faqi al Mahdi, a member of the Touareg terrorist group Ansar Dine, with links with al-Qaida in Islamic Maghreb (AQIM), is the first suspect to be transferred to the Court in the framework of the investigations on the situation in Northern Mali. The Office of the Prosecutor had opened an investigation on the crimes committed in the region since January 2012.

This arrest warrant which, in ten days, has become the fastest to be executed in the Court’s history, also marks the first case before the ICC to deal with destruction of protected cultural

property, an act prohibited by, *inter alia*, the 1907 Hague Convention (article 27) and the First Additional Protocol to the Geneva Conventions (Article 53).

Ahmad Al Faqi's initial appearance took place on 30 September 2015. The confirmation of charges hearing has been provisionally scheduled for 18 January 2016.

The Arrest Warrant against Ahmed al Faqi al Mahdi (in French) may be accessed on : <http://www.icc-cpi.int/iccdocs/doc/doc2068383.pdf>

For more information on the situation in Mali at the ICC, see: [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/icc0112/Pages/situation%20index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Pages/situation%20index.aspx)

(Arthur Fallas)

### **English Court of Appeal rules that Serdar Mohammed's detention was unlawful**

On 30 July 2015, the English Court of Appeal unanimously affirmed the High Court of Justice (Queen's Bench Division)'s judgment in [Serdar Mohammed v. MoD](#), finding that IHL does not contain authority to detain in non-international armed conflicts.

In a lengthy judgment, the Court determined that Serdar Mohammed's first 96 hours of detention by UK forces participating in the ISAF operation in Afghanistan were lawful, and afforded him appropriate procedural guarantees for those four days, but that the next 106 days were unlawful on the basis of Article 5 of the European Convention on Human Rights. Mohammed, an alleged Taliban chief, was captured by UK soldiers in April 2010, and was not handed over to the Afghan security services until July that year, despite regulations requiring any transfer to take place within 96 hours.

In front of the Court of Appeal, the Secretary of State for Defence sought to rely on the judgment of the ECtHR in [Hassan v UK](#) to claim that Article 5 can be modified in times of armed conflict because international humanitarian law constitutes the *lex specialis* to IHRL, so that its rules should take primacy over human rights law.

The Court approached the issue using several steps. First, it sought to assert whether there was any legal authority deriving from Afghan domestic law or UN Security Council resolutions that would have allowed Mohammed's detention by UK forces. Having determined that Afghan law authorised detention for up to 72 hours, while UN Security Council [Resolution 1890](#) provided the International Security Assistance Force (ISAF) in Afghanistan with an authority to detain, limited to 96 hours by the NATO coalition itself, the Court found sufficient authority and grounds to cover the first 96 hours of detention. It then sought to determine whether IHL authorised detention by the UK after this point.

The Justices came to the conclusion that IHL applicable in a non-international armed conflict (NIAC) (whether 'internationalised' or not) does not authorise nor grant grounds for the

detention of Mohammed after the first 96 hours. In the first place, they rejected the view that the absence of prohibition of detention in NIAC means that it is authorised. They also rejected the view that there is an implicit authority to detain in NIAC to derive from customary law, common article 3 or Additional Protocol II. The Court noted in particular that States purposefully refused to grant the authority to detain under IHL to prevent non-state armed groups from having authority to detain. It added that it would be problematic if an authority to detain could be implied in IHL applicable in NIAC because that body of rules contains no grounds or procedures for security detention. The Court added that the purpose of common article 3 and articles 5 and 6 of Additional Protocol II is simply to guarantee a minimum level of humanitarian protection.

As Justice Leggatt remarked in first instance, approved by the Court of Appeal (para. 218): “The need to observe such minimum standards is equally relevant to all people who are in fact detained, and does not depend on whether or not their detention is legally justified” (para 244).

Regarding conditions of detention and procedural safeguards, the Justices concluded that “even if Article 5 had to be modified to reflect the fact that this detention was in the course of a non-international armed conflict, the minimum procedural safeguards required by international law in such a conflict would not have been met.”

The Secretary of State has appealed, and the case is now heading to the UK Supreme Court. The Justices suggested that all the Secretary of State had to do to prevent this from happening was to pass legislation, which “might have taken the form of a bar of specified claims by foreign nationals or have provided for specific authority for HM [Her Majesty’s] armed forces to detain in operations overseas.” (para. 363). The last option has been used by the United States and seems to be the most promising if the UK is to avoid further claims on the same grounds.

For more information and different opinions on the decision, see:  
<https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges>  
<https://www.judiciary.gov.uk/judgments/mohammed-and-others-v-secretary-of-state-for-defence-rahmatullah-v-mod/>  
<http://www.ejiltalk.org/the-uk-court-of-appeal-in-serdar-mohammed-treaty-and-customary-ihl-provides-no-authority-for-detention-in-non-international-armed-conflicts/>  
<https://www.justsecurity.org/25184/reason-uk-lost-serdar-mohammed-case/>  
<http://www.ejiltalk.org/some-thoughts-on-the-serdar-mohammed-appeals-judgment/>

*(Sophie Duroy de Suduiraut)*

## Recent publications

The new issue of the European Journal of International Law (EJIL) has been published on September 7. For more information and to order: <http://ejil.oxfordjournals.org/>

The Netherlands Annual Review of Military Studies 2015: “The Dilemma of Leaving: Political and Military exit strategies”, has been published. For more information and to order: <http://www.springer.com/us/book/9789462650770>

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