



NEWS FLASH N° 15

(October 2013)

Upcoming Events

Ireland

The *International Society for Military Law and the Law of War* will hold the 10th *Seminar for Legal Advisers of the Armed Forces in Galway, Ireland* from **6 to 10 May 2014**. The thematic topic for the seminar hosted by the *Defence Forces Ireland* is **Legal Advisers and International Military Operations on the African Continent**. The **Keynote speech** will be on “Military Operations on the African Continent: Challenges and Conditions for Success”. The seminar will focus on three main subthemes.

The first is “Current Operations and Legal Challenges” which shall entail an examination of the hybrid operation of the United Nations African Union Mission In Darfur (UNAMID), the African Union Mission in Somalia (AMISOM), the United Nations Mission in DRC (MONUSCO, including the Intervention Brigade), and the European Union Mission in Mali.

The second subtheme will be on “Accountability, Criminal Jurisdiction and Reconciliation” and will comprise an evaluation of the developments in international tribunals and national courts; effective command and control in multinational operations; the United Nations tracking system of national military criminal and disciplinary cases; developments in piracy trials, developments and current challenges of the ICC; and factors for successful reconciliation.

The final subtheme will undertake an appraisal of the current legal framework for refugees, internally displaced persons and its impact on military operations and the implementation of UN concepts on the protection of children. The subtheme shall also include an evaluation of the interface between peacekeeping operations and the use of force; targeting during non-international armed conflict; and the attendant caveats. The focus of the subtheme shall also incorporate an interrogation of the required threshold of armed conflict; the interrelationship between human rights law and international humanitarian law; soldiers and human rights obligations and limitations; and territorial application of human rights.

Additional information on this event is available on the Society's website.

Please save the date:

The *International Society for Military Law and the Law of War* will hold an international conference in **Riga (Latvia)** from **28 to 30 May 2014**, entitled **Defence Procurement in the Age of Cyber Warfare: Recalibrating Government and Contractor Responsibilities**.

Additional information on this event hosted by the *Latvian Ministry of Defence* will be announced on the Society's website.

Developments

U.S Forces Capture an Al-Qaeda Operative in Libya and Stage an Unsuccessful Raid in Somalia

International media has over the past weeks reported how U.S forces undertook operations in Libya and Somalia in the context of the war on terror. The operations undertaken on 5 October 2014 saw the capture of Abu Anas Al Libi in the Libyan capital of Tripoli by the U.S. Army Delta Force. However the Southern Somali operation in the port city of Baarawe by U.S. Navy SEALs, was not successful as the team did not manage to capture Ikrima, a targeted foreign fighter commander for the Al – Shabaab, a terror group linked to Al – Qaeda.

Both Al Libi and the Al – Shabaab commander were deemed high value targets. In particular, Al Libi, an Al – Qaeda operative, was wanted for his role in the 1998 bombings of U.S. embassies in Kenya and Tanzania while Ikrima a Kenyan of Somali origin is considered the architect of the terrorist attack on an upscale shopping mall in Nairobi on 21 September 2013. He was also an associate of two Al – Qaeda operatives, Harun Fazul and Saleh Nabhan both deceased. The two deceased Al – Qaeda operatives played a role in the 1998 U.S. embassy bombing in Nairobi and the 2002 attacks on an Israel owned Mombasa hotel and an Israeli airliner as it took off from Mombasa International Airport. Notably, Al – Qaeda claimed responsibility for all the attacks.

Al Libi is indicted under U.S. law on charges of conspiracy to kill U.S. nationals, murder, destruction of government buildings and government property and destruction of national defense utilities of the U.S. Immediately following his capture, he was taken to a U.S. warship for interrogation and was later taken to the U.S where he was arraigned before a federal court in the Southern District of New York on 15 October 2013. He denied the charges and pleaded not guilty.

Legal Conundrum

The Libyan interim government termed the capture of Al Libi a kidnapping and sought an explanation over the raid as the government preferred to have Al Libi tried on Libyan soil. The two raids further continue to raise some fundamental questions on use of force regarding the U.S. extra – territorial military operations in the context of the “war on terror” and legality of some of its counter terrorism measures. This is because controversy continues to brew among publicists over whether the current counter terrorism measures in the realm of human rights law, international humanitarian law and criminal justice regimes are adequate for the preservation of national security. The argument further goes that because of this conundrum, exceptionalism should be allowed for the sake of national security.

In particular, the capture of Al Libi brings the matter into the realm of extraordinary rendition under international human rights law. The problem is complicated by the fact that there is no generic definition of terrorism, a fact which is heightened by failure to pass the UN Draft Comprehensive Convention on International Terrorism. Moreover, UN Security Council Resolution 1373 of 28 September 2001 adopted following the events of 11 September 2001 which sets out wide ranging comprehensive steps and counter-terrorism strategies and measures on suppressing the financing of international terrorism among other measures has been faulted for failing to define terrorism and for spurring different and uncoordinated definitions of terrorism in domestic laws.

Furthermore, international law on the use of force at article 2(4) of the UN Charter espouses the general prohibition of use of force by outlawing any threat or use of force by a Member State against the political independence or territorial integrity of a State or in any other manner inconsistent with the purposes of the UN. The Charter however provides for two contexts in which force against a State may be used. These are self–defence as encapsulated in article 51 and where the UN Security Council may authorize collective action under Chapter VII if there is a disclosed threat to international peace and security as determined under article 39. Most notably, a State possesses an inherent right of individual or collective self-defence but may only exercise this right when an armed attack has occurred though this right ceases once the UN Security Council takes measures to maintain international peace and security.

For more information on this please visit;

<http://www.hrw.org/news/2013/10/08/us-ensure-rights-libyan-detainee>

<http://opiniojuris.org/2013/10/06/raids-somalia-libya-theories-self-defense/>

<http://opiniojuris.org/2013/10/13/speaking-evolving-approaches-counterterrorism-ii/>

(Charity W. Njuguna)

Nizar Trabelsi Extradited to United States

On 3 October 2014, Nizar Trabelsi, a Tunisian national and a former football player in the German Bundesliga was extradited to the U.S. to face charges for conspiring to kill U.S. citizens abroad, conspiring to use weapons of mass destruction, providing material resources to a terrorist organization and supporting a terrorist organization. Trabelsi was convicted in 2003 and imprisoned for the maximum sentence of 10 years by an Antwerp court following prosecution for attempting to drive a car into Kleine Brogel Airforce base, a NATO military camp in Belgium. The base houses U.S. forces.

The U.S District Court in Washington had indicted Trabelsi in 2006 but sealed the indictment while an extradition request was lodged with the Belgian government in November 2008. According to the indictment which was unsealed following his extradition, Trabelsi planned to travel to Afghanistan to train for Jihad and also met Osama Bin Laden in 2001. He further made contact with Al-Qaeda's chief military planner at the behest of Osama Bin Laden. If found guilty of the alleged charges, Trabelsi risks life imprisonment.

Trabelsi had appealed against his extradition to the U.S. for fear of "inhumane treatment" after the Belgian authorities authorized his extradition to the U.S. in 2009 but these efforts were unsuccessful. Trabelsi had also appealed to the European Court of Human Rights which chose not to render a final decision on the matter until the Belgian Council of State made a ruling on his claims that he would be subjected to inhumane treatment if extradited to the U.S. His appeal to Belgium's highest administrative court, the Belgian Council of State, was declined his appeal on 23 September 2013 citing assurances by the U.S. government that he would be tried by a civilian court and not a military tribunal and that he would not receive the death penalty if convicted hence setting the stage for his extradition. In this regard, the Belgian Minister of Justice decided not to await the final verdict of the European Court of Human Rights.

For the first decision of the European Court of Human Rights, please visit;

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115504#{"itemid":\["001-115504"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115504#{)

For the decision of the Belgian Council of State, please visit;

<http://www.raadvanstate.be/Arrets/224000/700/224770.pdf#xml=http://www.raadvanstate.be/apps/dtsearch/getpdf.asp?DocId=24433&Index=c%3a%5csoftware%5cdtsearch%5cindex%5carrets%5ffr%5c&HitCount=89&hits=22+23+66+69+1fa+1fb+221+22b+22e+236+240+241+2aa+2ab+344+345+377+378+494+495+51b+51c+549+54a+58c+58d+8ad+8ea+903+a3c+a3d+c5d+c98+cb1+141d+14ee+17d3+17d4+1802+1803+2f78+2f79+2f94+2f95+2fce+2fcf+2fe3+2fe4+2ff0+2ff1+3008+3009+3022+3023+3045+3046+3067+3068+307a+307b+3098+3099+30ae+30af+30d1+30d2+30ee+30ef+3106+3107+3127+3128+313d+313e+31>

[68+3169+318f+31b6+31b7+31c8+31c9+31f0+31f1+3200+3201+324c+324d+327c+327d+&010583720133113](http://www.10583720133113.com)

For more information on these developments please visit;

<http://www.lawfareblog.com/2013/10/nizar-trabelsi-extradited-indictment-unsealed/>

<http://www.bbc.co.uk/news/world-us-canada-24393770>

<http://www.globalpost.com/dispatch/news/thomson-reuters/131003/tunisian-man-extradited-us-nato-base-attack-case>

(Charity W. Njuguna)

The Situation in Syria

Pursuant to the unanimous vote of United Nations Security Council resolution 2118 of 27 September 2013 for the expeditious and verifiable destruction of Syria's stockpile of chemical weapons, the Organisation for the Prohibition of Chemical Weapons (OPCW) has observed that Syria had provided complete co-operation to the 27 weapons inspectors in Syria as the inspectors had by 23 October 2013 inspected 18 of Syria's 23 chemical weapons sites. The OPCW further observed that Syria would meet the deadline of 1 November 2013 set by the executive council of OPCW for the destruction of all equipment involved in the production and mixing of chemical weapons and machinery used for filling munitions with mustard gas, sarin or other poison agents. As such, Syria will no longer have the capability to produce any more chemical weapons. According to an OPCW timetable backed by the said UN Security Council Resolution, Syria must complete the destruction of its stockpile of chemical weapons by mid 2014. For more background information please see News Flash No. 14 of the ISMLLW.

For more information on this please also visit;

<http://www.opcw.org/news/article/syria-completes-destruction-activities-to-render-inoperable-chemical-weapons-production-facilities-a/>

<http://www.un.org/News/dh/pdf/english/2013/11102013.pdf>

<http://www.theguardian.com/world/2013/oct/23/syria-deadline-chemical-weapons-opcw>

<http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10371547/Syria-crisis-chemical-weapons-inspectors-complete-visit-to-three-sites.html>

(Charity W. Njuguna)

Libya and the ICC

The ICC ruled on 11 October 2013 that Abdullah Al – Senussi would be tried in Libya instead of the Hague where the ICC is based. Al – Senussi a former military intelligence head under the fallen Gaddafi regime was indicted by the ICC in 2011 for

war crimes committed during the uprising against Gaddafi's regime. Following an admissibility challenge lodged by Libya in April 2013, Pre-trial Chamber I determined on 11 October 2013 that Libya had demonstrated that it was willing and able genuinely to carry out investigations against Mr. Al – Senussi who was currently the subject of on-going investigations in Libya. The chamber also determined that the Libyan and ICC investigations covered the same subject matter. This was in line with article 17 of the Rome Statute which lays out various prescriptive demands that the court must consider before it determines that a case is admissible. More importantly, the gravity of the case and evidence that the State with primary jurisdiction over the case has taken steps to investigate or prosecute is underscored by the Statute. However, the proceedings being undertaken in national realm must not be geared towards shielding the accused from criminal responsibility for crimes that are within the jurisdiction of the ICC.

Moreover, the Chamber also found that solid and progressive steps had been taken towards the investigation of Al – Senussi as evidenced by his detention and past judicial proceedings of officials in Gaddafi regime as well as efforts made to seek international assistance to correct particular bottlenecks in Libya's justice system. However, the decision does not affect the status of the case against Saif Al – Islam Gaddafi which is awaiting an appeal decision by the Appeals Chamber on an admissibility challenge lodged by Libya after the Pre – trial Chamber declined its first challenge on 31 May 2011 because it had not been sufficiently demonstrated that the domestic investigation covers the same case that is before the ICC.

Background

The Libyan situation before the ICC was unanimously referred to the Court by the UN Security Council pursuant to resolution 1970 of 26 February 2011 which was closely followed by the issuance of warrants for the arrest of Muammar Mohammed Gaddafi, Saif Al – Islam Gaddafi and Abdullah Al – Senussi on 27 June 2011. The three were alleged to have committed crimes against humanity between 15 and at least 28 February 2011 through State machinery and security forces during the anti-Gaddafi civil unrest. However, the case against Muammar Gaddafi was terminated in November 2013 following his death.

The press release is available at;

http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr953.aspx

The Pre – trial Chamber's decision is available at;

http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/court%20records/chambers/pretrial%20chamber%20i/Pages/466.aspx

For a summary of the decision please visit;

http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/pr953/Summary%20AL-Senussi%20English.pdf

And for more information please visit;

http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/Pages/icc01110111.aspx

(Charity W. Njuguna)

The ICC for the First Time Invokes article 70 of the Rome Statute to Unseal a Warrant of Arrest against Walter Barasa for Allegedly Corruptly Influencing Witnesses

The Pre-Trial Chamber II of the ICC for the first time invoked article 70 of the Rome Statute to unseal warrants of arrest on 2 October 2013 against Walter Barasa a Kenyan national who is charged with the commission of various offences that obstruct the court's administration of justice. Pursuant to the said article, the accused is charged with corruptly influencing or attempting to corruptly influence witnesses.

The sealed warrant was initially issued on 2 August 2013. In this regard, it was Judge Cuno Tarfusser's view that reasonable grounds existed to believe that Mr. Barasa was criminally responsible as direct perpetrator for the offence of corruptly influencing or in the alternative attempting to corruptly influence witnesses. This was executed by offering witnesses money so that they could withdraw as witnesses for the ICC prosecution in the Kenyan cases pending before the ICC in a bid to achieve the objectives of a section of Kenyan authorities. Accordingly, it was the view of the judge that Mr. Barasa should be arrested to forestall further interference of witnesses or prejudice investigations or the proceedings.

Article 70 of the Rome Statute enumerates various offences against the administration of justice when committed intentionally. These include giving false testimony when one is under an obligation to tell the truth as per article 69(1), presenting evidence knowing that it is false or forged, corruptly influencing a witness, obstructing or interfering with attendance or testimony of a witness, et al. If convicted, the accused could be sentenced to imprisonment not exceeding 5 years or a fine or both in accordance with the Rules of Procedure and Evidence.

The warrant is set to be forwarded to the High Court of Kenya for the court to ascertain the details contained in the warrant in accordance with International Crimes Act of Kenya before handing him over into the custody of the ICC. Meanwhile, Mr. Barasa has moved to Kenya's Constitutional Court to challenge any

attempts by the government to arrest him and hand him over the ICC citing fear that he would not receive a fair trial and would thus be exposed to oppression and injustice.

The decision of the Pre-Trial Chamber II is available here;

http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/ICC-0109-0113/Pages/default.aspx

For more information on this please visit;

<http://www.nation.co.ke/news/politics/Barasa-in-court-ICC-arrest-warrant/-/1064/2024740/-/bixr2gz/-/index.html>

(Charity W. Njuguna)

African Union, Kenya and the ICC

Following the passage of a motion by Kenya's Parliament to suspend any links, co-operation and assistance to the ICC and for withdrawal of Kenya from the Rome Statute, the African Union floated a proposal on 11 October 2013 during an extraordinary session in Addis Ababa for a continent wide walkout of African countries from the Rome Statute. This was based on the premise that African countries are being unfairly targeted.

Accordingly, the AU Summit meeting in Addis Ababa on 12 October 2013 passed a resolution that no sitting African head of state should appear before an International Court during his/her term of office. However, the AU's plans to pass a motion to withdraw from the ICC failed to garner the necessary support. The Summit further asked Kenya to write to the UN Security Council seeking a deferral of the trial of Kenya's President Mr. Uhuru Kenyatta whose trial for crimes against humanity kicks off in November 2013. Besides Mr. Kenyatta's trial, the other sitting head of state who has been indicted by the ICC is Sudan's President Omar El Bashir for war crimes committed in Darfur region whose warrant of arrest was issued in 2009 but is yet to be arrested.

Article 27 of the Rome Statute enunciates that the Statute applies equally to all persons regardless of official capacity as a head of state or government or immunity provided by national or international law as this does not exempt a person from criminal responsibility or bar the Court from exercising its jurisdiction over the person. In this regard, the AU has come under sharp criticism from civil rights groups such as Human Rights Watch and Amnesty International as these steps are seen as exacerbating impunity. These events come after Kenya's President, Mr. Uhuru Kenyatta who stands accused of crimes against humanity filed an application at the ICC to have his trial permanently stayed. Through his defence lawyers, Mr.

Kenyatta in a 38 paged document cites intimidation of defence witnesses, abuse of the legal justice process and massive interference with the court process by the Office of the Prosecutor.

Following the AU Summit resolution, diplomats are said to be preparing a UN Security Council Resolution that would defer the case against Kenya's President for 1 year apparently to avert a rift between the AU and the ICC. Article 16 of the Rome Statute provides that no investigation or prosecution may be proceeded with by the ICC for a period of 12 months if the UN Security Council adopts a Resolution under Chapter VII of the UN Charter and makes a request to the ICC to that effect. The request may be renewed by the UN Security Council under similar conditions.

For more information on this please visit;

<http://america.aljazeera.com/articles/2013/10/10/kenyatta-asks-icc-case-to-be-tossed-while-african-union-floats-walkout.html>

<http://www.bbc.co.uk/news/world-africa-23969316>

<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/10376302/Kenyan-president-Kenyattas-ICC-trial-set-to-be-suspended.html>

(Charity W. Njuguna)

Discount

Oxford University Press is giving a special discount rate of 20% to members of the *International Society for Military Law and the Law of War* as an online promotion for one of their recent publications, *The Handbook of International Humanitarian Law*, 3rd Edition edited by Dieter Fleck.

More information about the book including sample material can be found here:

<http://ukcatalogue.oup.com/product/9780199658800.do>

Publications of Interest/ Publications intéressantes

Books

R. BAXTER., *Humanizing the Laws of War: Selected Writings of Richard Baxter*, Vagts, Detlev F. (ed), Oxford, 2013, 380pp.

For more information, please visit;

<http://www.peacepalacelibrary.nl/plinklet/?sid=recacq&ppn=355222221>

P. DE HERT, J. FLAMME, M. HOLVOET, O. STRUYEN (eds)., *Code of International Criminal Law and Procedure, annotated*, Larcier, 2013, 826 pp., ISBN 9782804452384, €160. (English).

For more information, visit;

<http://larciernl.fb.email.addemar.com/c652/e1430073/hf3ad7/140854/index.html>

This book may also be obtained as an e-book by contacting herman.verleyen@larciergroup.com

V. KOUTROULIS., *Jus ad/contra bellum, Droit international humanitaire : un régime spécial de droit international?*, sous la dir. de Raphaël van Steenberghe, 2013.

For more information, please visit;

<http://www.peacepalacelibrary.nl/plinklet/?sid=recacq&ppn=364445203>

N.D. WHITE, C. HENDERSON (eds)., *Research Handbook on International Conflict and Security Law: "Jus ad Bellum, jus in bello" and "jus post bellum"* Cheltenham, 2013, 685pp., ISBN 9781849808569, 1849808562.

For more information, please visit;

<http://www.peacepalacelibrary.nl/plinklet/?sid=recacq&ppn=343020734>

Miscellaneous

M. AARON., *Naar een universele uitleg van een militair doel, Militair-rechtelijk tijdschrift*, Vol. 106, Issue 4, 2013, pp. 117-126.

For more information, please visit;

<http://www.peacepalacelibrary.nl/plinklet/?sid=recacq&ppn=364438894>

E. LAFAYETTE., *The Prosecution of Child Soldiers: Balancing Accountability with Justice*, *Syracuse Law Review*, Vol. 63, Issue 2, 2013, pp. 297-325.

For more information, please visit;

<http://www.peacepalacelibrary.nl/plinklet/?sid=recacq&ppn=363644814>

News Flash of the International Society for Military Law and the Law of War - Terms and conditions: The News Flash is circulated electronically as an e-mail attachment. The selected authors contributing to an issue of this News Flash do so in their personal capacity. All views expressed and all descriptions of facts in any issue of this News Flash are solely those of its respective author. The *International Society for Military Law and the Law of War* holds the right to modify any issue of this News Flash as deemed necessary, including after initial publication. All issues of this News Flash, as modified if deemed necessary, will be published at www.ismllw.org. This official website of the *International Society for Military Law and the Law of War* shall serve as the source for referencing to this News Flash. The *International Society for Military Law and the Law of War* is the exclusive copy right holder of this News Flash. Reproduction under any form and of any issue of this News Flash is only authorized after having received the written approval thereto of the General Secretariat of the *International Society for Military Law and the Law of War*.

News Flash de la Société Internationale de Droit Militaire et de Droit de la Guerre – Conditions : Le News Flash est distribué en format électronique sous la forme d'un attachement au courrier électronique. Les auteurs sélectionnés contribuent à ce News Flash de leur propre chef. Toutes opinions émises et toutes descriptions de faits dans ce News Flash est uniquement celles de leurs auteurs respectifs. La *Société Internationale de Droit Militaire et de Droit de la Guerre* se réserve le droit de modifier tous les points de ce News Flash en cas de besoin, même après publication initiale. Tous les numéros de ce News Flash, modifiés en cas de besoin, seront publiés sur www.ismllw.org. Ce site Web officiel de la *Société Internationale de Droit Militaire et de Droit de la Guerre* sera la source de référence pour ce News Flash. La *Société Internationale de Droit Militaire et de Droit de la Guerre* est titulaire exclusive des droits d'auteur de ce News Flash. La reproduction sous toutes ses formes, d'un point de ce News Flash n'est autorisée qu'après en avoir obtenu l'autorisation par écrit du Secrétariat général de la *Société Internationale de Droit Militaire et de Droit de la Guerre*.