



NEWS FLASH N° 16

(December 2013)

International Conference held in Santiago de Chile from 20 to 23 November 2013



The *International Society for Military Law and the Law of War* and the *Auditoría General* of the *Ejército de Chile* jointly organized an international conference, which was wonderfully hosted by the *Auditoría General* in Santiago de Chile from 20 to 23 November 2013. This international conference was graciously supported by the *Comandante en Jefe* of the *Ejército de Chile*, General Juan Miguel Fuente-Alba Poblete and by the *Universidad Mayor* and the *Universidad de Valparaíso*.

The central theme of this conference held in Spanish and English (with French translation) was *Modern Challenges in the Military Legal Domain*. The program included presentations and panel discussions by academic speakers and experienced professionals on:

- Developments in Military Justice Systems;
- Operational Law and the Role of the Armed Forces in Operations other than War;
- Responsibilities in Transparency – the Armed Forces and Military Procurement;
- Hype or Threat ? Legal Challenges in Cyber Warfare.

A detailed report of this memorable conference will be published on the Society's website in the near future and in a subsequent installment of the News Flash.

(Alfons Vanheusden)



Detailed Report of the Brussels Workshop of 23 September 2013



Overview

On the 23 September 2013, the *International Society for Military Law and the Law of War* organized a workshop on the topic *Challenges in the Implementation of International Humanitarian Law*. The aim of this workshop was to provide us with the right questions to ask in the questionnaire which will be prepared for the Society's 20th Congress in 2015 on the same topic. This questionnaire will be sent out all over the world in order to get a general picture of what is going on in the implementation of IHL on a national level. With three excellent speakers on the subject and numerous specialist participants, this workshop produced a fruitful debate in which many interesting topics were discussed.

It was stressed in the introductory speech already that implementation is key: it does not matter how well the rules are written if there is no one to implement them and obey them.

The workshop's program consisted of three renowned individual speakers. First up was Prof. Dr. M. Bothe, Professor Emeritus of Public Law at Goethe University Frankfurt. He was followed by Mr. S. Kolanowski, Senior Legal Advisor at the ICRC Brussels Delegation to the EU and NATO. Last but not least was our third speaker, Lt. Col. Ph. Van Gyseghem, Legal Advisor at the Directorate-General Legal Support and Mediation, Ministry of Defence, Belgium. Each speaker gave a fifteen minute speech about the current challenges the implementation of IHL faces. Afterwards, a debate unfolded between all three speakers with active participation by the audience.

As this workshop was conducted under the Chatham house rule, this report will give a detailed discourse of what has been said but will not reveal the identity of the participant who did so.

Workshop Content

Imperfect Implementation

The greatest problem with IHL does not lie in the fact that there are insufficient rules, but that their implementation is lacking or defective. This is sadly illustrated by situations like the ongoing conflict in Syria. There are three facets to implementation: prevention, control, and repression, and all three aspects face serious challenges. States have to translate their international law obligations into concrete action, as it is them who have the primary responsibility for implementation by adopting national laws, regulations and other measures.

Even though several implementation mechanisms are available (such as the International Humanitarian Fact Finding Commission, the Protecting Powers, and the inquiry procedure), most of them have not been used recently, and some of them never at all. One of the participants noted that this is not because the mechanisms would not be useful. But why then? The ICRC's official reason is that the successful use of these mechanisms depends on the agreement and cooperation of the States and parties concerned. Particularly, as one participant pointed out, all of these procedures require agreement in each particular case. An inquiry cannot be effectively conducted without consent. This is a problem indeed, although not the only one, but we need to ask why the governments would not give the consent to cooperation. Clearly, in order to sufficiently report on the implementation status of IHL in a certain country, access to the information is necessary. But how can we persuade States to share more information on how they implement IHL? One way to

convince States to cooperate and give their consent would be through political pressure from other States and perhaps international actors and NGO's.

In addition, there's also the challenge in the denial of States that IHL is applicable to the situation in the first place, in particular in the case of NIACs. All too often, they claim that what is going on is not an armed conflict, but merely a police operation or riot control. Yet in some of these cases, the military is used and the situation turns out to be something that could very well be called an armed conflict, to which IHL would be applicable.

Progress Through International Criminal Law

In terms of repression, fortunately, big progress has been made, thanks to the developments in international criminal law. The ICTY, ICTR and ICC have done a good job, but they are not perfect either. One problem with international criminal law is that it operates very slowly. The facts of the case, which happened on the battlefield, need to be proven beyond a reasonable doubt, and this takes time. As one participant pointed out, the criminal court system is slow and deliberate—as it well should be to ensure proper carriage of justice. It was therefore an understandable move of the ICC to start off with the Lubanga case on child soldiers, since this was relatively easy to prove. When the Court then tried to go get the “big guys” in other African countries, it was confronted with massive political resistance. Another downside is that the ICC appears to be a selective African court, which upsets many in Africa and harms the Court's credibility. Many feel it is nonetheless very important to signal that violations of IHL will not be tolerated, and that there is an effective criminal mechanism in place to hold perpetrators to account. On the other hand, one participant argued that criminal law does not necessarily deter, and therefore the greatest value of the ICTY can be said to be its contribution to the shaping of an international legal conscience.

While the fight against impunity with the activities of the ICC, ICTY and ICTR is proving to be quite successful, in the field of reparation and compensation not much progress has been made. The ICC does have a fund for compensation, which is an important step but it remains to be developed. If new mechanisms for IHL implementation were to be created, the matter of compensation would have to be left out for obvious political reasons, as it would mean the deathblow to the system. How would reparation for victims then have to be implemented? A few suggestions have been made. The first is international arbitration. Secondly, the ICC fund could be developed further into a true working mechanism. Third, there is the possibility for

reparation to be given through national proceedings. However, the recent International Court of Justice decision in *Germany v. Italy* severely restricted this option by foreclosing the possibility to pursue litigation in the victim country.

Lessons to be Learned from Other Areas of Law

There was significant discussion of how IHL could benefit from what human rights law has accomplished, for example if it would get the chance to use human rights procedures. However, it is important to keep in mind how IHL might be affected by the current shortcomings of the Human Rights Council, such as its problems of political selectivity.

The recent events in Libya are a very good account of how it could ideally work out. In this particular situation, the inquiry commission established by the Human Rights Council had the cooperation of the authorities on the ground, who had a political reason to cooperate! This is not always the case, particularly in IHL situations.

On the subject of institutional development the Geneva Conventions legal regime also has something to learn from other modern international treaties. For example, environmental treaties, the Chemical Weapons Convention, the Convention on the Protection of Cultural Property in Armed Conflict, etc. all have a conference of the parties (COP) which regularly reviews the functioning of the treaty system, and which has the power to establish bodies responsible for the better implementation of the treaty. The treaty regime of the Geneva Conventions would greatly benefit if it had a similar, regularly organised COP.

Regarding the International Humanitarian Fact Finding Commission, a number of participants seemed to agree that the problem is that the members of the commission ("15 poor guys") do not have enough political support. It was suggested that this may be the reason the Human Rights Council has shown resistance in the past to work with the IHFFC, despite the potential complementary roles of the two institutions. However, the integration of the IHFFC into a conference of the parties could give it the necessary political support and legitimacy.

Swiss- ICRC Initiative

The Swiss-ICRC initiative to increase compliance with IHL (intended to implement Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent of late 2011) has also singled out implementation as a major issue in IHL. The initiative has led to a consultation process which, as far as implementation is

concerned, concentrates on the following issues: (1) a regular Meeting of States; (2) a reporting system; (3) fact-finding.

Regular meetings of States would offer a framework for dialogue between States on their implementation of IHL.

The reason why it is a slow process is because it needs the support of a significant majority of States, something that cannot be reached overnight. There is however a strong general support for a regular dialogue like this. Initial meetings have been encouraging and the next meeting of the parties is scheduled for the summer of 2014.

A workshop participant drew the attention of the workshop to existing experience with Meetings of the member States of the Geneva Conventions convened by Switzerland. One of them related to the situation in the occupied Palestinian territory. Some participants seemed to feel that the failure of that meeting had been due to the highly political and polarizing nature of its subject matter. As one participant put it, this was *"the danger of starting with the most difficult problem first."* Other participants felt that there was no way around politics in these types of meetings but that it was still better to have people sit down and talk about the issues than to fight on the battlefield.

Those present at the workshop discussed many ideas of what could be accomplished by such a meeting of States and how it could fulfill the role of a Conference of the Parties. Participants agreed on the importance of an early warning system in order to have knowledge about a conflict before it even begins. Although, the UN has previously tried without success to implement such an early warning system, a COP may be a more promising mechanism to achieve this.

One of the speakers remarked that on many occasions, the establishment of national committees to advise and assist governments in the implementation of IHL has been recommended. Many such committees have been established in recent years. Currently, there are 103 such committees. Maybe the international community should consider making such a committee an obligation. However it is important to acknowledge that Decree N° 2989 of 2 June 2004 created Syria's national committee on IHL, demonstrating that the mere existence of such a committee does not automatically offer the answer to all challenges.

A number of participants reiterated the responsibility of individual States to ensure compliance with IHL. Still in many cases governments do not give clear guidelines to their national committees. Therefore, it would be good for States and their national committees to have a benchmark set: something they can aim to achieve. Ideally, the commissions would be able to receive feedback as well. Nonetheless, a participant mentioned, from his own experience as a manager, that when you have an indicator, this will increase your output, even if there is no authority to check up on you. A COP may be able to play a role in setting key performance indicators for governments or national committees in this area. There would also be an opportunity for NGOs to provide evaluation or grading to States based on these benchmarks.

Specific Responsibilities for Countries Not Directly Involved in the Armed Conflict

One of the participants quoted Ms. Carla Del Ponte, who as a member of the *Independent International Commission of Inquiry on the Syrian Arab Republic*, said that she “believes there is an emerging norm that arms transfers should not be undertaken where there is a real risk that they will be used in the commission of violations of IHL.”

But is there indeed such an *emerging norm*? We can refer here to Art. 6 § 3 of the Arms Trade Treaty, recently adopted by the UN General Assembly in April 2013, which states that “a State Party shall not authorize any transfer of conventional arms covered under the treaty if it has knowledge at the time of authorization that the arms would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions, attacks directed against civilian objects or civilians protected as such, or other war crimes” and Art. 7 of that same treaty, stating “if export is not prohibited under article 6, each exporting State Party shall assess *inter alia* the potential that the arms could be used to commit or facilitate a serious violation of IHL and consider whether measures could be undertaken to mitigate the risks and if an overriding risk remains at stake the State Party shall not authorize the export.”

Ms. Del Ponte also said that States that fund and support the Syrian armed opposition must ensure that those armed groups that benefit from their money and their arms, conduct their hostilities in line with IHL, and she explained that in practice it means that they do not use those arms to target civilians, that they do not torture when they detain, and that they do not execute those they capture. Similarly, she said, Russia and Iran must use their leverage to pressure the Syrian government to conduct their attacks proportionally and observe the distinction between civilians

and those who are directly participating in hostilities. Civilians who are in areas that the government views as sympathetic to the opposition should not be targeted for their geographic proximity, their sectarian affiliation, or their political beliefs

But IHL compliance does not only apply to States: it is also necessary to address the issue of compliance by non-state actors!

Non-state Actors

Non-state actors present a whole set of distinct issues when it comes to the enforcement of IHL. The workshop group discussed the fact that certain IHL enforcement mechanisms such as protecting powers might be difficult to apply to non-international armed conflict, whereas others like the IHFFC could be more easily adapted (by extending the power the Commission has pursuant to article 90 to non-international armed conflicts).

How do we deal with armed opposition groups unknowing about the law? Ignorance might not be an excuse, but it definitely is a real problem, as the majority of the current conflicts in the world are intra-state conflicts. This does not mean that there are no non-state actors who respect IHL. Some larger and better-organized groups such as the FARC and the Taliban have their own military manuals, which they expect their members to obey (although these manuals do not always reflect IHL properly). However when the groups get smaller or more fragmented, such as for example the current situation in Syria with several independent groups, this instantly becomes significantly more difficult. The ICRC did have some dissemination activities with these groups, in an attempt to make them realize the importance of respecting IHL, but there's still a large disregard to it. There is also the work of the organization Geneva Call, which educates approximately 80 armed groups on IHL, and encourages them to sign a so-called deed of commitment. For example they have had significant success regarding the non-use of antipersonnel mines.

Workshop participants generally seemed to feel that it was important to find some way to involve non-state armed groups in order to improve their compliance with IHL. The idea was also suggested to give some sort of status to armed groups in MOPs, COPs, etc. such as an observer status.

An additional problem is presented by the fact that some of these groups are designated as terrorist organizations. The panel and participants did seem to generally agree on the fact that labeling a group as terrorists, which is also impliedly a political decision, runs counter to the goal of increasing compliance with IHL. Referring to the 2010 Holder case in the US, it was noted that there is a difference between the EU style of branding groups as terrorists and the US style. In this case, an organization was convicted under the US Patriot Act for providing material support to terrorist groups because they wanted to advise them on humanitarian law matters. The finding in the case was based on the principle that any assistance could help to legitimate the terrorist organization and free up its resources for terrorist activities. In the EU, on the other hand, the designation of a group as a terrorist organization has implications for the members' movement and assets but does not apply to the dissemination of IHL to that group. A number of participants indicated that the US terrorist designation had not affected their work because they had not planned to engage in IHL training with any of these groups. However one participant pointed out that the US legislation also affects the dissemination of humanitarian aid particularly in cooperative efforts between the American Red Cross and other Red Cross organizations

Non-state actors should have an incentive to follow the rules of IHL. It was pointed out that frequently there is an inherent contradiction in the situation where States want to punish rebels for taking up arms against the government but also want to have them comply with IHL. Also, if they could already be punished or jailed for taking up the weapons against their government, what incentive do they have left to follow IHL? Another participant picked up on the question of how to give incentives to the non-state actors to obey the rules of IHL and pointed out that there is only very limited research available on what is the incentive for any actor to do anything, not only non-state actors but also States themselves. This research would not be a purely legal one, but more of a sociological/psychological research.

The debate then came to the point of why non-state actors are bound by IHL. Several theories were mentioned. This is relevant in terms of trying to convince non-state actors to obey IHL rules. For example under the Chemical Weapons Convention it would be hard to argue that Syria, when it has to declare which chemical weapons it possesses, would also have to declare which chemical weapons and how many are in the hands of the several rebel groups. It could however be made to declare which weapons it previously possessed and now doesn't anymore (because they came

under rebel control). It is worth noting that this would more or less come down to the same thing in terms of knowing which and how many weapons are present in Syria.

A number of participants also pointed out that while there are significant differences in the black letter IHL applicable to international and non-international armed conflict, in practice there are few distinctions on the operational level. The differences in rules of engagement come mostly from politics, and commanders on the ground are restrained by their own ideas about the objectives of the mission rather than an analysis of whether it is an international armed conflict.

Red Light Example

During the debate, one of the participants mentioned an excellent example of a red light. When pedestrians are walking at night on a deserted street with no car in sight and come across a red light, 80% will still stop to wait for the light to turn green before crossing the street. Even though there is no incentive to do so (there are no cars coming, no one sees him, no police officers near to fine him for not obeying traffic rules etc.), most people will still stop at a red traffic light. People follow the light even when a cost-benefit analysis would not require them to do so because most people have internalized the rule that one has to stop when the light turns red. This is what we should be striving to achieve in International Humanitarian Law: respecting IHL should be a moral obligation that we have internalized. Soldiers should not be convinced that they should respect IHL merely because it is “a rule” which will have consequences if broken, they should do so because it is a moral value they have internalized. Ultimately it is the State’s responsibility to transfer this moral apprehension to the individual actors.

According to one of the participants, it is nonsense that “criminal law deters.” Related to this: you don’t stop at the red light because you are afraid to get convicted for traffic offences, but you do so for other reasons. And this is exactly what should be done for IHL: the shaping of a “*legal conscience*” should be one of the fundamental aims in order to improve compliance with IHL. One way to do this might be to use morals and norms already existing in a society as a way to educate people and incorporate IHL into those community norms (without just talking about the black letter law of the Geneva Conventions).

Miscellaneous

Some other interesting resources were mentioned during the workshop:

- The EU Guidelines on Improving Compliance with IHL adopted in 2005, are intended to ensure respect for IHL and clarify the meaning of these IHL obligations. It encourages the EU's use of tools like public denunciations, agreements signed with States, and policies on arms export;
- The 2004 ICRC study on the roots of behavior in war;
- The 2008 ICRC publication on increasing respect for IHL in non-international armed conflict.



Conclusion

The closing remarks to the workshop were given by BGen. J.P. Spijk, the President of the *International Society for Military Law and the Law of War*, who gave a nice overview of what had been said, and concluded that a lot of work remains to be done in the field of implementation of international humanitarian law. Or, in the words of one of the workshop speakers, it is up to us to decide whether the glass is half full or half empty.

(Nicolette Pavlovics & Laura De Schryver)

Upcoming Events

Ireland

The *International Society for Military Law and the Law of War* will hold its **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 the following main subthemes:

- Current Operations and Legal Challenges;
- Accountability, Criminal Jurisdiction and Reconciliation;
- Legal framework for refugees, internally displaced persons and its impact on military operations and the implementation of UN concepts on the protection of children.

For more information on the seminar, please see our website. News Flash N° 15 contained a more detailed description of the subthemes.

Latvia - 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**, titled *Defence Procurement in the Age of Cyber: 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.

22nd National Security Law Institute

The *22nd National Security Law Institute* will take place at the **University of Virginia School of Law (Charlottesville, Virginia, United States)** **1 June 2014 through 13 June 2014**.

The *National Security Law Institute* provides advanced training for professors of law and political science who teach or are preparing to teach graduate-level courses in national security law or related subjects requiring a detailed understanding of National Security Law. Applications are also invited from government attorneys in the national security community who are actively engaged in the practice of national security law or otherwise have a professional need for such training.

This annual intensive two-week course is held at the *Center for National Security Law* of the University of Virginia School of Law in Charlottesville. Prominent scholars and current and former government experts will take part in lectures, panels, and debates to address both theoretical background and important contemporary issues of national security law.

Topics addressed include:

- Contemporary Theory Concerning the Origins of War and the "Democratic Peace"
- Aggression & Self-Defense
- United Nations Peacekeeping
- Legal and Ethical Aspects of Future War
- The International Criminal Court
- War and Treaty Powers under the Constitution
- Intelligence and Counterintelligence
- Counterproliferation
- Counterterrorism
- The Role of the Press in Military Operations

Approximately 25-30 participants are selected to attend each *Institute*. Participants are responsible for providing their own transportation to and from Charlottesville and paying a specified tuition fee, which includes lodging, lunches, course materials, and any group dinners during the Institute. **The deadline for applications for the 2014 Institute is 11 April 2014.** Please contact Ms. Julie Garmel at the Center (jg4e@virginia.edu) if you need additional information. More information is also available at: <http://www.virginia.edu/cnsl/nsli.html>.

The Center has a small fund from which to provide scholarship assistance to a few applicants who might otherwise not be able to attend the program. Please contact Ms. Garmel for further information.

Developments

UN Security Council approves Peacekeeping Force for the Central African Republic

On 5 December 2013, the UN Security Council adopted Resolution 2127 (2013) pertaining to the situation in the Central African Republic (CAR). In the resolution the Security Council expressed deep concern at the continuing deterioration of the security situation in the CAR, characterized by a total breakdown in law and order, the absence of the rule of law and intersectorian tensions. The Security Council also reiterated that all perpetrators of violence targeting members of ethnic and religious

groups and their leaders must be held accountable, and that some of those acts may amount to crimes under the Rome Statute of the ICC, to which the CAR is a State Party.

Acting under Chapter VII of the UN Charter the Security Council *inter alia* requested that the Secretary-General rapidly establish an international commission of inquiry for an initial period of one year, including experts in both international humanitarian law and human rights law, in order immediately to investigate reports of violations of international humanitarian law, international human rights law, and abuses of human rights in the CAR by all parties since 1 January 2013, to compile information, to help identify the perpetrators, point to their possible criminal responsibility and to help ensure that those responsible are held accountable.

The UN Security Council also authorized the deployment of the African-led International Support Mission in the CAR (MISCA) for a period of 12 months, which shall take all necessary measures to contribute to:

- The protection of civilians and the restoration of security and public order;
- The stabilization of the CAR and the restoration of State authority over the whole territory of the CAR;
- The creation of conditions conducive to the provision of humanitarian assistance;
- Disarmament, demobilization, repatriation, reintegration, and resettlement programs;
- Specific efforts to reform and restructure the defence and security sectors.

Resolution 2127 (2013) also authorizes French forces in the CAR, within the limits of their capacities and areas of deployment, and for a temporary period, to take all necessary measures to support MISCA in the discharge of its mandate.

The resolution also imposes a sanctions regime, including a year-long embargo banning the sale or transfer to CAR of weapons of all types.

See UN Press Release of 5 December 2013. UN Security Council Resolution 2127 (2013) is available at: [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2127\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2127(2013))

(Alfons Vanheusden)

Over 150 Soldiers Sentenced to Death in Bangladesh Following Mutiny

On 5 November 2013, a special court of Bangladesh sentenced over 150 soldiers to death and jailed over 400 soldiers for terms ranging from several years to life imprisonment. The charges related to a mutiny that broke out on 25 February 2009

during which 74 people perished including at least 57 top army officers who were heinously killed. The soldiers were agitating for better pay, improved terms and conditions of service during the 2 days mutiny in which they claimed that their pleas for better terms had for a long time been ignored.

This brings the figure to nearly 6,000 of soldiers convicted by dozens of special courts since the mutiny. About 823 soldiers were charged with murder, torture and other offences over the mutiny started by soldiers in the Bangladesh Rifles (BDR - border guards) headquarters before it spread to other military bases whilst 23 civilians were charged with criminal conspiracy. The 823 soldiers were sentenced in a civilian court for masterminding the mutiny at the BDR Headquarters after earlier being found guilty in military courts.

The case was the largest of its type in the world with 554 witnesses testifying in a trial that kicked off in January 2011. However, human rights groups such as HRW and AI have criticized the trial which was conducted on an 'en masse' basis with allegedly limited or no access to lawyers thereby violating international legal standards. They have instead called for a fresh trial. The UN High Commissioner for Human Rights also criticized the trial for failing to meet the most fundamental human rights standards, torture of suspects while in custody and subsequently sentencing them to death and for others, life imprisonment, and called for individual review of each trial and sentencing.

For more information on this please visit;

<http://www.un.org/apps/news/story.asp?NewsID=46431&Cr=Bangladesh&Cr1=#.Up xvzCeN6So>

<http://www.thecambodiaherald.com/world/detail/2?page=17&token=NzJlMjQyMW>

<http://www.dailymail.co.uk/news/article-2487712/Over-150-soldiers-sentenced-death-taking-Bangladeshi-mutiny.html>

<http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/national/06-Nov-2013/bd-sentences-152-mutinuous-troops-to-death>

(Charity W. Njuguna)

UN To Use UAVs to Better Protect Civilians in DRC

The UN launched its first ever UAVs in the DRC city of Goma for purposes of enhancing the protection of civilians in Eastern DRC, one of the primary mandates of the peace keeping mission MONUSCO. The use of the technology was authorized by UN Security Council Resolution 2098 (2013), adopted on 28 March 2013.

The Eastern DRC has been ravaged by years of conflict between the Kinshasa based government and armed rebel groups and between armed groups with the latest one being fronted by the M23 group which recently agreed to sign a peace agreement and integrate into the national army.

For more information on this please visit:

<http://www.un.org/apps/news/story.asp?NewsID=46642&Cr=democratic&Cr1=Congo#.Up9MeCeN6So>

UN Security Council Resolution 2098 (2013) is available at:

[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2098\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2098(2013))

(Charity W. Njuguna)

The UN Security Council, African Union (AU) and Kenya

A UN Security Council resolution following the AU backed Kenyan request for a deferral of the Kenyan cases facing the Kenyan president and the deputy president at the ICC failed to pass on 15 November 2013. 7 out of the 15 members of the UN Security Council (including China and Russia) supported the deferral while 8 members (including the US, the UK and France) abstained.

Kenya sought to have the Security Council defer the Kenyan cases for 1 year by virtue of article 16 of the Rome Statute which prescribes that no investigation or prosecution may be proceeded with by the ICC for a period of 12 months if the Security Council adopts a resolution under Chapter VII of the UN Charter and makes a request to the ICC to that effect. The premise of the request was the need to tackle the security situation left by the September 2013 terrorist attack in a Nairobi mall that left at least 60 people dead. In 2011, Kenya had also sought a deferral which was rejected.

The AU Summit meeting in Addis Ababa on 12 October 2013 had passed a resolution that no sitting African head of State should appear before an international Court during his/her term of office prompting Kenya to write to the UN Security Council to seek a deferral of the trial of Kenya's President Mr. Uhuru Kenyatta and his deputy for crimes against humanity. The start date of the trial has since been moved from 12 November 2013 to 5 February 2014.

For more information on this, please visit;

<http://www.un.org/News/dh/pdf/english/2013/15112013.pdf>

<http://www.reuters.com/article/2013/11/15/us-kenya-icc-un-idUSBRE9AE0S420131115>

<http://justiceinconflict.org/2013/11/19/kenya-and-the-icc-coming-to-a-head/>

[http://www.iccnw.org/documents/Letter to UNSC from the Victims Lawyer in the Kenyatta case.pdf](http://www.iccnw.org/documents/Letter%20to%20UNSC%20from%20the%20Victims%20Lawyer%20in%20the%20Kenyatta%20case.pdf)

(Charity W. Njuguna)

The Assembly of State Parties (ASP) Amends the Rome Statute

The ASP to the Rome Statute held its twelfth session from 20 to 28 November 2013 at the Hague during which eight resolutions were adopted by consensus. The adopted resolutions were:

- The resolution on the 2014 budget;
- The resolution on the ICC's permanent premises which welcomed the commencement of the actual construction of the permanent premises of the ICC;
- The resolution on co-operation which owing to concerns about outstanding arrests and surrender requests against 14 persons adopted a road map towards the enhancement of expeditious execution of arrest and surrender orders;
- The resolution on complementarity, which calls on States, international organizations, the ICC and civil society organizations to appraise the ASP secretariat on activities related to promotion of the principle of complementarity;
- The resolution on victims and affected communities recalling earlier invitation to States Parties to act in solidarity with victims of crimes within the jurisdiction of the ICC. This especially applies to victims of sexual and gender based violence (SGBV) thus States Parties were requested to combat marginalization and stigmatization of victims and promote accountability of perpetrators of SGBV;
- The resolution on the establishment of the independent oversight mechanisms operationalizing the mandates of investigation, inspection and evaluation as envisioned in article 112(4) of the Rome Statute;
- The resolution on amendment to the Rules of Procedure and Evidence targeted several amendments. Rule 68 was amended to enable the use of prior recorded testimony in trial where the Pre – trial Chamber has not taken measures under article 56 in relation to a unique investigative opportunity. In this regard, the Trial Chamber may pursuant to article 69 (2) and (4), and after hearing the parties, allow the introduction of previously recorded evidence, audio or video testimony of a witness or the transcript or other documented evidence of such testimony. However, the application of the new rule should not be to the detriment of the accused as encapsulated in article 51(4) thus does not have retroactive application and must be in accordance with the requirements of the laid out sub-rules. In addition, the amendment should not prejudice the rights of the accused as espoused in article 67 and protection of

victims and witnesses and their participation in the proceedings as espoused in article 68(3). Rule 100 was amended to enable the court's exercise of discretion in the interests of justice to determine the sittings of the court in a State other than the host State for purposes of trial in whole or in part. Rule 134 was also amended pursuant to rules 134bis, 134ter and 134quater for purposes of enhancing the court's efficiency and securing the rights of the accused. Accordingly, rule 134bis, 134ter and 134quater enable the use of video technology, excusal of the accused from presence at trial and excusal of the accused from presence at trial due to extraordinary public duties. The written request by the accused to be present through the use of video technology for part or parts of trial is to be determined on a case by case basis with due regard to the subject matter of the specific hearing in question. The same criteria applies to the written request to be excused from presence at trial and to be represented by counsel for part or parts of the trial though the determination for excusal must satisfy a higher threshold such as demonstration of exceptional circumstances to justify such an absence and confirmation by the chamber that the rights of the accused will be fully ensured in his or her absence. Furthermore, any absence must be limited to what is strictly necessary and must not become the rule. The written request for excusal from presence at trial due to extraordinary public duties at the highest national level and to be represented by counsel only must be specific on the accused's explicit waiver to be present at the trial. However, the chamber must be satisfied that alternative measures are inadequate, that the interests of justice will be served and that the rights of the accused will not be jeopardized. Similarly, the determination is with due regard to the subject matter of the specific hearings in question and is subject to review at any time. These amendments entered into force upon adoption at the ASP;

- The resolution on strengthening the ASP and the court stresses the need for consistent monitoring of the efficiency of the revised legal aid system. Moreover, the ASP endorsed the "Revised Roadmap" of the assembly's study group on governance so as to facilitate efficient and structured dialogue among all stakeholders, to come up with comprehensive and coordinated approach towards the strategic planning of the court and further amended the timeline for nomination of the judges.

The resolution on the amendments to rules 68 and 134 of the rules of procedure and evidence has implications for the Kenyan cases at the ICC. Notably, it is not clear how the court will interpret the new provisions particularly in the Kenyan cases given that the rules of procedure and evidence are subordinate to the statutory provisions particularly article 63 which requires that the accused be present during trial and article 27 which espouses on irrelevance of official capacity. Apparently, the decision to grant an accused person excusal from trial is discretionary.

For a summary of the adopted resolutions, please visit:

http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/PR967.aspx

For more information on the resolutions, please visit:

http://www.icc-cpi.int/en_menus/asp/resolutions/sessions/Pages/2013%20-%202012th%20session.aspx

(Charity W. Njuguna)

Four Arrested for Corruptly Influencing Witnesses in Bemba Trial

Four men were arrested in connection with the ICC trial of the former Vice – President of DRC and Commander in chief of the “Mouvement de Libération du Congo” for “*corruptly influencing witnesses*”. This is the first time that arrests have been made in relation to charges of this nature. The four are alleged to have tampered with witnesses in the war crimes/crimes against humanity trial facing Mr. Bemba before the ICC. They are thus charged pursuant to article 70(1)(b) and (c) of the Rome Statute with “*corruptly influencing witnesses before the ICC and presenting evidence that they knew to be false or forged*”. The four were arrested by State authorities in France, Belgium, Netherlands and DRC and include Mr. Bemba’s lead defense counsel and case manager. Their arrests follow the issuance of arrest warrants against the four by Judge Cuno Tarfusser on 20 November 2013. Bemba, whose trial commenced in November 2010, is facing charges of three counts of war crimes for rape, murder and pillaging and two counts of crimes against humanity for rape and murder committed in the Central African Republic.

For more information on this, please visit:

http://www.icc-cpi.int/EN_Menus/ICC/Situations%20and%20Cases/Situations/Situation%20ICC%200105/Pages/situation%20icc-0105.aspx

(Charity W. Njuguna)

The Situation in Syria

UN High Commissioner for Human Rights Navi Pillay announced that evidence collected by the UN points to the involvement of President Bashar Al Assad and senior officials of his government in crimes against humanity and war crimes. According to a report compiled by the UN investigative team, there is massive evidence that indicates responsibility at the highest level of government including the head of State. The team which has been collecting evidence of violations of international law including suspected massacres, use of chemical weapons, torture,

rape and other atrocities since the conflict broke out has previously blamed both the government and the rebels for the violations. According to the High Commissioner, the investigative team had come up with a list of alleged perpetrators which she however stated would remain confidential until requested by international or national authorities for purposes of future credible investigations and prosecution.

On Syria's chemical weapons, the OPCW has hailed progress made towards destruction of Syria's chemical weapons. The OPCW has also approved Syria's detailed plan on the destruction of the stockpile coupled by Syria's constructive co-operation and support of the international community. The OPCW noted that critical weapons production equipment had been destroyed thus meeting the 1 November 2013 deadline for their destruction. The next step is the identification of a secure environment for the verification and transport of chemical weapons whose success as postulated by the OPCW requires enormous assistance by the international community and donors to equip the joint mission to ensure the removal of the weapons and subsequent destruction within the strict timelines.

The OPCW has also published detailed requirements for the destruction of Syria's chemical weapons outside the territory of the Syrian Arab republic and Syrian chemical weapons production facilities under strict verification by OPCW. This is to be done in a manner consistent with the Chemical Weapons Convention and UN Security Council Resolution 2118 of 27 September 2013 as the process must be prompt and be conducted in the safest possible manner that would assign the highest priority to ensuring the safety of people and protection of the environment.

For more information on this please visit:

<http://www.un.org/News/dh/pdf/english/2013/15112013.pdf>

<http://www.ndtv.com/article/world/syria-crimes-evidence-indicates-bashar-assad-s-role-un-453711>

http://www.opcw.org/index.php?eID=dam_frontend_push&docID=16874

<http://www.unmultimedia.org/tv/unifeed/2013/12/geneva-pillay-6/>

(Charity W. Njuguna)

Publications of Interest/ Publications intéressantes

K.H. GOVERN and S.A. SCHLAGER., *"Guns for Hire, Death on Demand" : the Permissibility of U.S. Outsourcing of Drone Attacks to Civilian Surrogates of the Armed Forces and Challenges to traditional Just war Theory*, Vol. 25, Issue No. 2, Florida Journal of International Law, 2013, pp.147-206

For more information, please visit:

<http://www.peacepalacelibrary.nl/library-services/news-services/new-titles/recent-acquisitions/?code=075&frm=al&abo=OTc3NA>

H. H. KOH., *International Criminal Justice*, Vol. 38, Issue No. 2, Yale Journal of International Law, ISSN 0889-7743, 2013, pp. 525-542

For more information, please visit:

<http://www.peacepalacelibrary.nl/library-services/news-services/new-titles/recent-acquisitions/?code=063&frm=al&abo=OTc3Mg>

J. MEDLONG., *All Other Breaches: State Practice and the Geneva Convention's Nebulous Class of Less Discussed Prohibitions*, Michigan Journal of International Law vol. 34, issue 4, 2013, pp. 829-856

For more information, please visit:

<http://www.peacepalacelibrary.nl/library-services/news-services/new-titles/recent-acquisitions/?code=075&frm=al&abo=OTc3NA>

L. REDALIE., *La conduite des hostilités dans les conflits armés asymétriques: un défi au droit humanitaire*, Genève [etc.] : Schulthess, 2013. - XXIII, 378 p. ; 23 cm. - (Collection genevoise, ISSN 1661-8963) (Thèse de la Faculté de Droit de l'Université de Genève ; no. 845) Bibliogr.: p. 319-364 – 2013

For more information, please visit:

<http://www.peacepalacelibrary.nl/library-services/news-services/new-titles/recent-acquisitions/?code=075&frm=al&abo=OTc3NA>

Y. SHANY., *How Can International Criminal Courts Have a Greater Impact on National Criminal Proceedings? : Lessons from the First Two Decades of International Criminal Justice in Operation*, Vol. 46, Issue No. 3, 2013, Israel Law Review, pp.431-453

S. SHASTHRI., *Armed Conflicts and Protection of Refugees* in (eds.) R. ISLAM and J. HOSSAIN BHUIYAN, *An Introduction to International Refugee Law*, ISBN 9789004226159, 2013

For more information, please visit:

<http://www.peacepalacelibrary.nl/library-services/news-services/new-titles/recent-acquisitions/?code=075&frm=al&abo=OTc3NA>

D. THURER., *The Legality of the Threat or Use of Nuclear Weapons: the ICJ Advisory Opinion Reconsidered*, Wien: Facultas.wuv In: *Völkerrecht und die Dynamik der Menschenrechte : Liber Amicorum Wolfram Karl / Gerhard Hafner, Franz Matscher, Kirsten Schmalenbach (Hg.)*, ISBN 9783708909127: (2012) – 2012

For more information, please visit:

<http://www.peacepalacelibrary.nl/library-services/news-services/new-titles/recent-acquisitions/?code=075&frm=al&abo=OTc3NA>

(Charity W. Njuguna)

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