



NEWS FLASH N° 23

(September 2015)

Upcoming events

Non-State Actors and Responsibility in Cyberspace, University of Sheffield - 18 September 2015

The University of Sheffield, School of Law, is organising a one-day conference on Non-State Actors and Responsibility in Cyberspace entitled: “State Responsibility, Individual Criminal Responsibility and Questions of Evidence”.

More information at:

http://www.sheffield.ac.uk/polopoly_fs/1.486320!/file/Programme_CyberspaceConference.pdf

Expert Workshop: “The Use of Armed Forces in Domestic Situations - A Comparative Law Analysis” - Brussels, 21 September 2015

The International Society for Military Law and the Law of War is organising a small expert workshop on the use of armed forces in domestic situations in preparation of its next Congress. Invitations to members of the Society will follow soon.

International Conference: “International Humanitarian Law in Light of Islamic Sharia - Implementation Guarantees and Contemporary Challenges” - Gaza, 13-14 October 2015

The Faculty of Sharia and Law at the Islamic University of Gaza (IUG), in cooperation with the International Committee of the Red Cross (ICRC), is organising an international conference on “International Humanitarian Law in Light of Islamic Sharia - Implementation Guarantees and Contemporary Challenges”. It will take place at the Islamic University of Gaza on October 13-14, 2015.

More information and registration at: <http://hlsharia.iugaza.edu.ps/en>

International Conference : “International Humanitarian Law and Modern Warfare” Rome, 23-24 October 2015

The Carabinieri Officers Academy is organising an international conference on International Humanitarian Law and Modern Warfare.

Keynote speakers will include: H.E. Judge Ronny Abraham and H.E. Judge Abdulqawi Ahmed Yusuf, respectively President and Vice-President of the International Court of Justice, H.E. Fatou Bensouda, Prosecutor of the International Criminal Court.

Deadline for registration: **5 October 2015** (ihl.conference.rome@carabinieri.it)

More information at: <http://www.esil-sedi.eu/node/1008>

Recent developments



Beginning of the ICC Trial of Bosco Ntaganda

On 2 September 2015, the ICC trial of Bosco Ntaganda, former alleged deputy chief of staff and commander of operations of the Forces Patriotiques pour la Libération du Congo [Patriotic Forces for the Liberation of Congo] (FPLC), opened.

Based on a total amount of 69,000 pages of submitted evidence, Pre-Trial Chamber II found that the FPLC, in which Ntaganda allegedly held a leadership position, had adopted an organisational policy aimed at the widespread and systematic attack of the non-Hema civilian population, in the context of the non-international armed conflict between the FPLC and other organized armed groups that is believed to have occurred in the period between 6 August 2002 and 31 December 2003 in Ituri Province, DRC. According to the Chamber, the alleged crimes were committed during two specific attacks, carried out in the Banyali-Kilo collectivité (in the period around 20 November until 6 December 2002) and the Walendu-Djatsi collectivité (in the period around 12 until 27 February 2003), besides war crimes carried out by the FPLC throughout the entire conflict.

On 9 June 2014, the Chamber confirmed by unanimity a total of 18 charges against Ntaganda, comprising 13 counts of war crimes (murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects ; destroying the enemy's property; and rape, sexual slavery, enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities) and 5 counts of crimes against humanity (murder and attempted murder; rape; sexual slavery; persecution; forcible transfer of population). Ntaganda is being charged in a variety of liability modes, namely: direct perpetration, indirect co-perpetration (article 25(3)(a) of the Statute); ordering, inducing (article 25(3)(b) of the Statute); any other contribution to the commission or attempted commission of crimes (article 25(3)(d) of the Statute); or as a military commander for crimes committed by his subordinates (article 28(a) of the Statute).

Ntaganda is being held in ICC custody since 22 March 2013.

Additional information on the case can be found on the ICC's website:

<http://www.icc->

[cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206/Pages/icc%200104%200206.aspx](http://www.cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206/Pages/icc%200104%200206.aspx)

The Trial can be followed via live stream on the following link:

http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx

(Sabrien Rezkallah)

IACHR adopts a report on the closure of Guantanamo

In June 2015, the Inter-American Commission on Human Rights (IACHR) released a 137-pages report entitled "Towards the Closure of Guantanamo".

Divided in six chapters, the report puts a particular emphasis on issues related to conditions of detention (chapter 3) and access to justice (chapter 4), before outlining international obligations with regard to the transfer or release of detainees in view of the closure of the detention centre (chapter 5). In a final chapter, the Commission summarizes its conclusions and recommends several steps towards the closure of the detention centre.

For more information, see:

<http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantanamo.pdf>

(Sophie Duroy de Suduiraut)

ECtHR published an update of its factsheet on terrorism

In July 2015, the European Court of Human Rights Press Unit published an update of its factsheet on *Terrorism and the European Convention on Human Rights*. Below we highlight specific cases and standards of interest to military practice and order maintenance.

Derogation

The factsheet first recalls the possibility of derogation in case of emergency threatening the life of the nation, under Art. 15, which has been used by certain member States in the context of terrorism. It also recalls that some rights covered by the Convention are non-derogable.

(Suspected) terrorists

Article 3 - Prohibition of torture and inhuman or degrading treatment or punishment

A derogation to Art. 3 is prohibited.

Art. 3 covers conditions of detention for terrorism suspects. The factsheet gives several examples of what constitutes a violation of Art. 3, and what constitutes acceptable conditions of detention based on the Court's case-law.

Examples of cases regarding ill-treatment allegedly sustained while held incommunicado in police custody are also given: there is thus a violation of Art. 3 on account of the lack of effective investigation into applicant's allegations of ill-treatment, even where such ill-treatment cannot be proved beyond reasonable doubt because of the lack of effective investigation (*Etxebarria Caballero v. Spain*, (2014)).

The obligation not to send an individual to a State where there is a real risk of ill-treatment is also an absolute one, regardless of the offence or charges brought against this individual. A series of cases examine what constitutes a real risk of ill-treatment, and what assurances are necessary to make sure such risk does not exist. In *Omar Othman v. the United Kingdom* (2012), where such assurances were judged to be good enough for the deportation not to violate Art. 3, the Court however found that

deportation of the applicant to Jordan would violate Art. 6 (right to a fair trial), given the real risk of admission of evidence obtained by torture at his retrial.

Secret “rendition” operations were also held to violate Art. 3, especially on account of the failure of States to carry out an effective investigation into the applicant's allegations of ill-treatment, even where it may not be proved beyond reasonable doubt that the respondent State had directly participated in inflicting ill-treatment (*El-Masri v. The Former Yugoslav Republic of Macedonia* (2012); *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland* (2014)).

Finally, a sentence to life imprisonment without any possibility of conditional release and in the absence of any review mechanisms was held to constitute a violation of Art. 3 in *Öcalan v. Turkey* (no. 2) (2014).

Article 5 - Right to liberty and security

The factsheet recalls that Art. 5§1(c) prohibits the detention of an individual for questioning merely as part of an intelligence gathering exercise.

There needs to be an objectively determined “reasonable suspicion” for the arrest to be lawful (*Fox, Campbell and Hartley v. the United Kingdom* (1990)). Indefinite detention of non-nationals without a view to deportation was also held to violate Art. 5§1 (among others) in *A. and Others v. the United Kingdom* (2009).

The factsheet also recalls that an arrested person is to be brought “promptly” before a judge or other office, and that time starts running at the point of arrest (Art. 5§3). Although a delay of more than four days was held not to be “prompt” in *Brogan v. the United Kingdom* (1988), a similar delay was held not to violate Art. 5§3 in *Brannigan and McBride v. the United Kingdom* (1993) on account of the emergency derogation made by the United Kingdom.

Extension of detention pending removal from the country of an individual who has already served his sentence constitutes a violation of Art. 5§1 and §4 (*M.S. v. Belgium* (2012)).

Art. 6 - Right to a fair trial

The factsheet recalls that security and public order concerns cannot outweigh the right to silence and against self-incrimination (Art. 6§1) and the presumption of innocence (Art. 6§2) of detained suspected terrorists (*Heaney and McGuinness v. Ireland* (2000)).

A lack of legal assistance to a terrorism suspect while in custody also constitutes a violation of Art. 6§3(c) (right to legal assistance of one’s own choosing) in conjunction with Art. 6§1 (right to a fair trial) (*Salduz v. Turkey* (2008)).

In *El Haski v. Belgium* (2012), the Court held that a violation of Art. 6 could occur whenever the applicant could demonstrate that there was a “real risk” that evidence to be used at his trial was obtained using treatment contrary to Art. 3.

In *Ibrahim and Others v. the United Kingdom* (2014 - Chamber Judgment), the Court found that there had been no violation of Art. 6§1 and §3(c) despite the temporary delay in allowing the applicants’ access to lawyers on account, especially, of the exceptionally serious and imminent threat to public safety at the time. The case was referred to the Grand Chamber on request of two of the four applicants.

Victims of terrorism

Art. 2 - Right to life

In *Finogenov and Others v. Russia* (2011), the Court found a violation of Art. 2 on account of the inadequate planning and implementation of a rescue operation, and on account of the ineffectiveness of the investigation into the allegations of the authorities' negligence as well as the lack of medical assistance to hostages.

Prevention of terrorism

Art 2 - Right to life

Art. 2§2 justifies the use of force by a State in self-defence or defence of another only if it is "absolutely necessary".

In *McCann and Others v. the United Kingdom* (1995), there had been a violation of Art. 2 because the operation could have been planned and controlled without the need to kill the suspects.

Art. 8 - Right to respect for private and family life, home and correspondence

There was no violation of Art. 8 in *Klass and Others v. Germany* (1978) despite legislation granting secret surveillance powers to the authorities, because under exceptional circumstances, such legislation may be necessary in a democratic society in the interests of national security and/or the prevention of disorder or crime.

A police power to stop and search individuals without reasonable suspicion of wrongdoing was held not to be in accordance with the law, and therefore constituted a violation of Art. 8, in *Gillan and Quinton v. the United Kingdom* (2010).

Art. 10 - Freedom of expression

Orders/notices restraining the broadcasting of interviews or reports of interviews and any words spoken by a person representing or supporting terrorist organisations were held not to violate Art. 10 in *Purcell and Others v. the United Kingdom* (1991) and *Brind v. the United Kingdom* (1994).

For more information, see:

http://www.echr.coe.int/Documents/FS_Terrorism_ENG.pdf

See also, the factsheet of the Office of the High Commissioner for Human Rights on the relationship between human rights, terrorism and counter-terrorism (2008):

<http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>

(Sophie Duroy de Suduiraut)

United Nations General Assembly adopts its 2030 Agenda for Sustainable Development

On 1 September 2015, the General Assembly adopted a resolution transmitting to its seventieth session a sweeping post-2015 development agenda aimed at eliminating poverty and hunger, protecting the planet and fostering peace, to be acted on during a high-level summit later this month.

Known as “Transforming our world: the 2030 Agenda for Sustainable Development” — annexed in draft resolution A/69/L.85, which was adopted as orally revised — the text most notably lays out a set of 17 sustainable development goals with concrete targets ranging from the achievement of gender equality to taking urgent action to combat climate change.

For more information:

UN report on the meeting: <http://www.un.org/press/en/2015/ga11670.doc.htm>

The draft text of the resolution:

http://www.un.org/en/ga/search/view_doc.asp?symbol=A/69/L.85

(Sophie Duroy de Suduiraut)

Agreement on the Resolution of the Conflict in South Sudan

On 28 August 2015, the Security Council welcomed the recent signature of the Agreement on the Resolution of the Conflict in South Sudan by President Salva Kiir, a week after the SPLM (Sudan People’s Liberation Movement) chairman Riek Machar signed it.

This Agreement comprises several reform points, such as a the establishment of a Transitional Government, a National Legislative Assembly, Transitional Justice, a Permanent Ceasefire, and Security Arrangements.

Transitional Government of National Unity (TGoNU)

The 1st chapter of the agreement concerns the *Transitional Government of National Unity (TGoNU)*. The agreement provides that “there shall be a TGoNU established in South Sudan with the task of implementing this Agreement, it shall commence 90 days after signature of the Agreement. The term of office shall be 30 months preceded by 90 days of a Pre-transitional Period. 60 days before the end of the Transition Period, the TGoNU shall hold elections in order to establish a democratically elected Government”. The power sharing ratio is detailed in chapter 1.

The TGoNU shall, amongst others, “implement this Agreement and restore peace, security and stability in the country” and “work closely with the IGAD-PLUS Member States and Organizations and other partners and friends of South Sudan, to consolidate peace and stability in the country”.

The Agreement also requests that a competent and impartial National Elections Commission (NEC) be established to conduct free and fair elections before the end of a Transitional Period and to “ensure the outcome [is] broadly reflective of the will of the electorate”. The composition of the TGoNU can be consulted in chapter 1.

It is also provided that there shall be a First Vice President and a Vice President. “For the duration of the Transition, there shall be established the office of the First Vice President to supervise the implementations of the reforms outlined in the Agreement and the powers, functions and responsibilities” detailed below in chapter 1, 6th point. “There shall be a collegial decision-making and consultation between the President, the First Vice President and the Vice President during the Transition”.

The National Legislative Assembly shall be expanded during the duration of the Transitional Period and the Transitional National Legislative Assembly is effective 90 days after the signing.

Concerning the members of the National Legislative Assembly and the Council of States, unseated States following the crisis in the Republic of South Sudan on 15 December 2013 shall be reinstated to their seats and shall continue to serve during the Transitional Period.

There shall also be reconstituted existing Commissions and Institutions such as the “Peace Commission”, and the “Human Rights Commission” at the national level.

Permanent Ceasefire and Transitional Security Arrangements

In the second chapter, the Agreement asks for a Permanent Ceasefire to enter into force within 72 hours of the signing. It covers the cessation of hostilities, separation and withdrawal of forces and their allies.

In order to ensure Transitional Security, all military forces within Juba shall be redeployed outside a radius of 25 km from the centre of the national capital, beginning 30 days after the signing. There shall be Presidential Guards, Guard Forces to protect military bases and warehouses, and a Joint Integrated Police. The Integrated Police shall also be deployed in the other cities and shall focus on areas where Protection of Civilians (POC) sites are located.

The Strategic Defence and the Security Review is detailed in chapter 2, 6th point. The 3rd chapter concerns the Humanitarian Assistance and the Reconstruction. The 4th chapter concerns the Resource, the Economic and the Financial Management.

Transitional Justice, Accountability, Reconciliation and Healing

The 5th chapter is about the principles for the establishment of a Transitional Justice. It is provided that “upon inception, the TGoNU shall initiate legislation for the establishment of The Commissions for Truth, Reconciliation and Healing (CTRH), an independent hybrid judicial body, to be known as the Hybrid Court for South Sudan (HCSS) and finally, a Compensation and Reparation Authority (CRA)”.

The functions of the CTRH are, *inter alia*, to receive applications from alleged victims, identify and determine their right to remedy, “recommend guidelines to be endorsed by the Transitional National Assembly for determining the type and size of compensation and reparation for victims, investigate the causes of conflicts and their circumstances and make recommendations regarding possible ways of preventing recurrence”. Finally, the CTRH shall implement measures to protect victims and witnesses, in particular women and children.

The HCSS shall be established to investigate and prosecute individuals bearing the responsibilities for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the Transitional Period. Its mandate includes genocide, crimes against humanity, war crimes, and “other serious crimes under international law and relevant laws of the Republic of South Sudan, including gender based crimes and sexual violence”.

The CRA shall be run by “an Executive body to be chaired by an Executive Director appointed by TGoNU”. Details about the executive body may be found in the Agreement.

Parameters of Permanent Constitution

The 6th chapter discusses the parameters of a Permanent Constitution. It provides that the TGoNU shall initiate and oversee a Permanent Constitution-making Process during the Transitional Period. Its principles shall include the guarantee of peace and stability, national unity and territorial integrity of the Republic of South Sudan.

For more information, see:

http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PRST/2015/16

<https://unmiss.unmissions.org/Portals/unmiss/Documents/agreements/IGAD%20Agreement%20on%20the%20Resolution%20of%20the%20Conflict%20in%20South%20Sudan%2017%20August%202015.pdf>

(Inès van Oldeneel tot Oldenzeel)

The United Nations celebrates its seventieth anniversary

The United Nations celebrates this year its seventieth anniversary. For Secretary-General Ban Ki-moon, "The 70th anniversary of the United Nations is an opportunity to reflect – to look back on the UN's history and take stock of its enduring achievements. It is also an opportunity to spotlight where the UN – and the international community as a whole – needs to redouble its efforts to meet current and future challenges across the three pillars of its work: peace and security, development, and human rights." For this occasion, a website has been launched, and several events and special publications commemorate the anniversary.

For more information: <http://www.un.org/un70/en>

(Sophie Duroy de Suduiraut)

The Polisario Front is now bound by the 1949 Geneva Conventions and the 1977 Protocol I

The Polisario Front, a Sahrawi national liberation organisation, has unilaterally declared to be bound by the Geneva Conventions and its First Additional Protocol in its armed conflict aiming to end Moroccan presence in Western Sahara.

Pursuant to Article 96 of the First Additional Protocol to the Geneva Conventions, the authority representing a people engaged in an armed conflict against a State Party to the Conventions may undertake to apply the Conventions and the Protocol by means of a unilateral declaration addressed to the depositary. The unilateral declaration was transmitted to Switzerland, the depositary of the Geneva Conventions since their creation, which in turn notified the State Parties on 26 June 2015.

The Polisario Front has entered into agreements to respect the Geneva Conventions since 1975 (see [ICRC Annual Report 1975](#), p. 8) but this event marks the first official adhesion of a non-State armed group to the Geneva Conventions.

In the past, the Palestinian Liberation Organization (PLO) also tried to become a party to the Geneva Conventions by means of a unilateral declaration. The Swiss Government notified the declaration to the State Parties on 13 September 1989 but added that due to the uncertainty regarding Palestinian statehood the Swiss Government was not in a position to determine if this declaration should be considered as an adhesion instrument (*Revue Internationale de la Croix Rouge*, 1990, p. 69). Palestine has eventually been accepted as an ordinary State Party to the Conventions and the first additional protocol on [10 April 2014](#).

The absence of clearly determined statehood does not appear to be an obstacle for a non-State armed group to adhere to the Geneva Conventions anymore as there was no such mention in the notification of the unilateral declaration of the Polisario Front.

See notification by the Swiss Federal Department of Foreign Affairs (26 June 2015):

https://www.eda.admin.ch/content/dam/eda/fr/documents/topics/aussenpolitik/voelkerrecht/Geneve/150626-GENEVE_en.pdf

(Arthur Fallas)

Kosovar Parliament creates ad hoc war crimes court

On 3 August 2015, with 82 out of 120 votes, the Kosovar Parliament passed an Amendment to the Kosovar Constitution, establishing the ‘Specialist Chambers’ and the ‘Specialist Prosecutor’s Office’, intended for the prosecution of former Kosovo Liberation Army (KLA) members for crimes committed during and after the Kosovo War. The Special Court will be able to exercise jurisdiction over war crimes, crimes against humanity and organised crimes that were either commenced or committed in Kosovo, between 1 January 1998 and 31 December 2000.

The Court’s creation is the product of an EU-instigated effort to address the serious allegations of war crimes and organised crime committed during the Kosovo War, made in a 2011 Council of Europe (CoE) report by Swiss Senator Dick Marty, entitled: “Inhuman treatment of people and illicit trafficking in human organs in Kosovo”. This report prompted the creation of the EU Special Investigative Task Force (SITF), an independent, international team set up in 2011, under the authority of the EU rule of law mission in Kosovo (EULEX) and mandated with the task to conduct a thorough investigation into these allegations.

On 29 July 2014, SITF Chief Prosecutor Clint Williamson announced that the SITF investigation had yielded compelling evidence that allowed the indictment against certain individuals, former officials of the KLA, for crimes consistent with those contained in the Marty report. Such indictment would be filed ‘once a judicial mechanism is established to host a fully independent, impartial and transparent trial that ensures the safety of witnesses and of criminal proceedings’.

In providing the necessary legal framework, the recently adopted Constitutional Amendment thus finally paved the way to the materialisation of such a judicial mechanism, in the form of the Specialist Chambers and Specialist Prosecution’s Office. The process of creating the Specialist Court has, however, yet to be finalised, as several practical issues still need to be addressed.

Link to the text of Amendment:

<http://www.kuvendikosoves.org/common/docs/ligjet/05-L-053%20a.pdf>

Link to the Marty Report:

http://assembly.coe.int/CommitteeDocs/2010/20101218_ajdoc462010provamended.pdf

Statement on the adoption of the constitutional amendments and the law by the Kosovo Assembly by Mr. David Schwendiman, Lead Prosecutor of the Special Investigative Task Force (SITF): <http://www.sitf.eu/index.php/en/press-r/49-statement-on-kosovo-assembly-approval-vote>

Statement by the Chief Prosecutor of the Special Investigative Task Force (SITF) on investigative findings: <http://www.sitf.eu/index.php/en/news-other/42-statement-by-the-chief-prosecutor-clint-williamson>

(Sabrien Rezkallah)

First Conference of the State Parties to the Arms Trade Treaty was held in Cancún, Mexico, on 24-27 August 2015

From 24 until 27 August 2015, the First Conference of the States Parties to the Arms Trade Treaty (ATT) took place in Cancún, Mexico.

Adopted in 2013 by the UN General Assembly, and having entered into force on 24 December 2014, the Treaty earned a landmark reputation as the first international convention to address the demand for international regulation of the conventional arms trade. Its goal is to prevent and eradicate the illicit trade in conventional arms and to prevent their diversion, thereby aiming to contribute to the

maintaining of international peace and security and the reduction of human suffering (article 1).

To these ends, the Treaty foresees, amongst others, the establishment of national control systems regulating the transfer of conventional arms (article 5).

By virtue of article 17 of the Treaty, the Review Conference is charged with reviewing the implementation of the Treaty, including developments in the field of conventional arms technology; considering and adopting recommendations regarding the implementation and operation of the Treaty, in particular the promotion of universality; considering amendments; and considering issues arising from the interpretation of the Treaty.

A report on the Conference has not yet been issued, but should be available soon at: <http://www.un.org/disarmament/ATT/>

Text of the Convention:

[http://www.un.org/disarmament/ATT/docs/ATT_text \(As adopted by the GA\)-E.pdf](http://www.un.org/disarmament/ATT/docs/ATT_text_(As_adopted_by_the_GA)-E.pdf)

For more information on the Treaty, see: News Flash n° 21, <http://www.ismllw.org/NEWS/NEWS-FLASH-21.pdf>

(Sabrien Rezkallah)

Publications of interest

The Military Law and the Law of War Review, volume 53 (2014), is now available in its entirety on HeinOnline. Printed issues have been sent earlier this month. The table of contents may be accessed here: <http://ismllw.org/mlwr.php>

The Netherlands International Law Review published a Special Issue on the Impact of the Fall of Srebrenica (1995-2015), in which seven authors were invited to contribute in commemoration of the tragedy with papers related to various areas of international law. See <http://link.springer.com/journal/40802/62/2/page/1>

The third edition of the Emerging Voices Symposium was held by *Opinio Juris* in August, featuring a variety of contributions written by graduate students, early-career practitioners and academics. All contributions may be consulted here: <http://opiniojuris.org/2015/08/03/emerging-voices-2015-starts-this-week/>

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