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# INT'L LAW IN BRIEF

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## Resolutions, Declarations, and Other Documents

### **Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (International Committee of the Red Cross, June 2009)**

[Click here](#) for document (approximately 94 pages)

The International Committee of the Red Cross (ICRC) issued an interpretative guide on the issues surrounding direct participation in hostilities under international humanitarian law (IHL). According to the introduction, “[t]he purpose of the Interpretive Guidance is to provide recommendations concerning the interpretation of international humanitarian law (IHL) as far as it relates to the notion of direct participation in hostilities.” As such, the Guidance is not meant to replace rules already in place, but instead “reflect the ICRC’s institutional position as to how existing IHL should be interpreted in light of the circumstances prevailing in contemporary armed conflicts.”

Part 1 of the Guidance enumerates the ICRC’s recommendations on the issue of direct participation in hostilities, and Part 2 provides a detailed discussion on each of the recommendations. According to the guidelines, the transformation and modernization of warfare has led to “confusion and uncertainty as to the distinction between legitimate military targets and persons protected against direct attacks.” As a result, there is a need to clarify three questions under IHL applicable in both international and non-international armed conflict:

1. Who is considered a civilian for the purposes of the principle of distinction?
2. What conduct amounts to direct participation in hostilities?
3. What modalities govern the loss of protection against direct attack?

The Guidance concludes that “IHL neither prohibits nor privileges civilian direct participation in hostilities.” In other words, once civilians discontinue their participation in hostilities or stop being members of an organized armed group, “they regain full civilian protection against direct attack.” On the other hand, “in the absence of combatant privilege, they are not exempted from prosecution under national criminal law for acts committed during their direct participation or membership.” Finally, civilians who directly participate in hostilities must abide by IHL rules and may be liable for war crimes and other types of international criminal law violations.

### **Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework (Report of the United Nations Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, April 22, 2009)**

[Click here](#) for document (approximately 27 pages)

The Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises submitted a report summarizing the main features of a human rights policy framework for transnational corporations. In 2008, the Human Rights Council had unanimously approved the Special Representative’s proposal to establish guidelines with respect to human rights and the transnational corporate structure, “the first time the Council or its predecessor had taken a substantive policy position on business and human rights.”

An organizational human rights framework is especially important in times of an economic downturn, the report concluded. There are three reasons why the current economic crisis calls for clear rules: 1) “human rights are most at risk in times of crisis, and economic crises pose a particular risk to economic and social rights”; 2) “the same types of governance gaps and failures that produced the current economic crisis also constitute . . . the permissive environment for corporate wrongdoing in relation to human rights”; and 3) the “‘protect, respect and remedy’ framework identifies specific ways to achieve these objectives.”

According to the report, “[t]he framework rests on three pillars: the State duty to protect against human rights abuses by third parties, including businesses, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing the rights of others; and greater access by victims to effective remedies, judicial and non-judicial.”

The report noted that the new policy framework has received positive feedback and encouragement from governments, businesses, and NGOs.

## **Security Council Resolution 1874 on Non-proliferation - Democratic People's Republic of Korea (June 12, 2009)**

[Click here](#) for document (approximately 6 pages)

The United Nations Security Council expressed its “gravest concern” at North Korea’s nuclear test conducted on May 25, 2009, in violation of resolution 1718 (2006). The Security Council also noted that this activity created a new “challenge . . . to the Treaty on Non-Proliferation of Nuclear Weapons . . . and to international efforts aimed at strengthening the global regime of non-proliferation.” Furthermore, North Korea’s defiance posed a clear danger “to peace and stability in the region and beyond.”

As a result, acting pursuant to Chapter VII, Article 41 of the United Nations Charter, the Security Council demanded that North Korea cease 1) “any further nuclear test or any launch using ballistic missile technology”, 2) “suspend all activities related to its ballistic missile programme and in this context re-establish its pre-existing commitments to a moratorium on missile launches”, 3) “immediately comply fully with its obligations under relevant Security Council resolutions”, 4) “immediately retract its announcement of withdrawal from the NPT”, and 5) “return at an early date to the NPT and International Atomic Energy Agency (IAEA) safeguards.”

The unanimous imposition of further sanctions against North Korea, which included the authorization to inspect North Korean vessels, is meant to freeze military development in the country.

## **Judicial and Similar Proceedings**

### **Opuz v. Turkey (Eur. Ct. H.R. June 9, 2009)**

[Click here](#) for document (approximately 53 pages)

The European Court of Human Rights (Court) found a domestic violence case, which led to the death of the applicant's mother, admissible, and held that Turkey, by failing to protect the victims from domestic violence, violated Articles 2 (protection of life), 3 (prohibition of torture inhuman or degrading treatment or punishment), and 14 (guarantee of nondiscrimination under the law) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).

The incidents of domestic violence, which ended in the tragic shooting of the applicant's mother in 2001, began in the spring of 1995. In a six-plus year span, numerous acts of violence against the applicant and her mother, most of which eventually were reported to local authorities and courts, took place. Both the applicant and her mother instituted several proceedings against the applicant's husband; however all were later dropped due to violence and threats of violence.

Turkey asked the Court to dismiss the case on the basis that the statute of limitations (six months) had run. The Court refused, agreeing with the applicant that the acts of violence took place over a span of years and could not be separated. Upon declaring the application admissible, the Court turned to the allegations against Turkey.

The Court based its analysis on numerous NGO reports and statistics regarding domestic violence in Turkey, noting that the undisputed reports all pointed to a state of impunity, where women suffering in violent relationships were not protected by the government. The Court also consulted other human rights bodies and treaties, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to determine what duties, if any, a state owed to its citizens. Referring to the Committee on the Elimination of All Forms of Discrimination Against Women, which found that “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men,” the Court concluded that “gender-based violence triggers duties in States.”

Once the Court determined that Turkey was obliged to protect those suffering at the hands of their partners, the Court went on to analyze whether Turkey fulfilled its obligations. Here the Court noted the existence of a domestic law that authorized courts to issue protective orders. However, the mere existence of this type of protection, the Court went on to hold, was insufficient in the present case.

The Court ordered that Turkey pay the applicant pecuniary and non-pecuniary damages.

### **Case T-498/04 on Dumping (E.C.J. June 17, 2009)**

[Click here](#) for document (approximately 24 pages)

The European Court of Justice annulled the application of Article 1 of Council Regulation (EC) No 1683/2004 as it applied to the applicant and ordered that the Council pay the applicant's costs. The Regulation in question imposed a definitive anti-dumping duty on imports of glyphosate originating in the People's Republic of China.

The applicant, a Chinese chemical producer of glyphosate, instituted proceedings against the Council alleging 1) infringement of Article 2(7)(c) of the Council Regulation; 2) failure to fulfill obligations under Paragraph 6 of Annex II to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; and 3) breach of the principle of the protection of legitimate expectations.

At the center of this dispute is Article 1 of Council Regulation (EC) No 1683/2004, a law meant to protect "against dumped imports from countries not members of the European Community." In general, under the Regulation, the so-called non-market economy countries (NMEC) are treated less favorably than market economy countries (MEC) by the EC. Under the Regulation, the price of products imported by NMEC companies for purposes of dumping are not determined from the current market value of similar goods, but instead are based on the "constructed value in the market economy third country". The Regulation allows some companies categorized as NMEC companies (and all WTO-country companies) to dispute the unequal treatment by commencing a claim, wherein they must prove that the company's: 1) economic decisions are made pursuant to market realities "without significant State interference" and "costs of major inputs substantially reflect market values; 2) accounting records are transparent and independently audited; 3) production costs and financial standing is not distorted by prior existence of non-market economy; and 4) bankruptcy and property protection is guaranteed. Finally, the prevalent exchange rate must be "carried out at the market rate."

The applicant submitted to the Commission a claim pursuant to the Regulation asking that its categorization as a NMEC company be reconsidered. However, after reviewing the information provided by the applicant in support of its claim, the Commission decided that the company had not met the requirements under the Regulation, specifically that there was evidence that the state had control over the company both as a shareholder and otherwise. The applicant appealed this determination.

The Court, relying on the language of the Regulation, noted that state control was not the appropriate test when determining whether a company is a NMEC company. Instead, the Court reasoned, the Regulation specifically requires "significant State interference," a threshold the Council did not meet. As a result, the Court found that the applicant was exempt from unequal treatment under the Regulation.

The Court dismissed the WTO related allegations as unsubstantiated.

### **Prosecutor v. "Duch" – Decision on Request for Release (E.C.C.C. June 15, 2009)**

[Click here](#) for document (approximately 15 pages)

The Extraordinary Chambers in the Courts of Cambodia (ECCC) denied the defendant Kaing Guek Eav's ("Duch") request for release, holding that there was an existing risk of flight, a continued need "to preserve public order," and real threat to the security of the accused.

As we previously reported, Duch is charged with crimes against humanity, grave breaches of the Geneva Conventions, and several offences of homicide and torture under Cambodian criminal law. Duch was indicted by the ECCC for alleged offences committed while he was chief of the notorious S-21 camp, "where numerous Cambodians were unlawfully detained, subjected to inhumane conditions and forced labour, tortured and executed in the late 1970s."

The decision notes that the defendant's detention, which began in 1999 when Duch was taken into custody by the Cambodian military before being transferred to the ECCC in 2007, was in violation of the defendant's right to a fair trial under both Cambodian and international law. As a result, the ECCC declared that Duch was entitled to a remedy under international and Cambodian law "for the time spent in detention under the authority of the Military Court and the violation of his right." In case of conviction, the Tribunal stated, the defendant's remedy will be taken into account in calculating his term of imprisonment; and in case of acquittal the defendant will be able

to seek a remedy under domestic law.

The Tribunal relied on the jurisprudence on this issue of both the International Criminal Tribunal for Former Yugoslavia and the International Criminal Court.

### **Prosecutor v. Kalimanzira (I.C.T.R. June 22, 2009)**

[Click here](#) for judgment (approximately 176 pages); [click here](#) for summary of the judgment (approximately 14 pages)

The International Criminal Tribunal for Rwanda Trial Chamber III convicted former acting Minister of the Interior, Callixte Kalimanzira, of genocide and direct and public incitement to commit genocide, and sentenced him to thirty years imprisonment.

There was a dispute regarding Kalimanzira's *de facto* and *de jure* political activities and affiliations, where the defendant argued that he was not the authority behind the acts of genocide, arguments the Chamber found to contradict the evidence against the accused:

The Chamber finds that Kalimanzira exercised a certain *de jure* authority while he was the officer in charge of the Ministry of the Interior, but his authority was limited to day-to-day affairs. To the extent that he held some *de jure* authority over prefectural, communal, and other local officials, it follows that he would have also held a certain level of *de facto* power over them. With respect to his influence in Butare *préfecture* in particular, it is not disputed that Kalimanzira was well-liked, even loved, and highly respected. Kalimanzira's high standing and good reputation, not to mention the incrementally important governmental positions he held throughout his career, would undeniably imply an increased level of reverence from and influence over the population of Butare *préfecture*.

The Chamber considered Kalimanzira's esteem among the people and his rise to power, which was both admired and seen as a model by many, as an aggravating factor. The Chamber did note, however, that the defendant's "actions did not evidence any particular zeal or sadism. He did not personally kill anyone and only remained at the sites for a brief period." Furthermore, "Kalimanzira voluntarily surrendered to the Tribunal, and lived openly prior to his arrest. For much of his life prior to the genocide, Kalimanzira was engaged in the public service of his country." The Chamber considered these to be mitigating circumstances.

### **United States Department of State Response to Radovan Karadžić's Allegation of an Immunity Agreement between him and Richard Holbrooke (June 25, 2009) and other documents**

[Click here](#) for US Department of State press release (approximately 1 page); [click here](#) for the Invitation by the ICTY Trial Chamber to the United States to submit information pursuant to Rules 54 and 70 of the Rules of Procedure and Evidence of the ICTY (approximately 3 pages); [click here](#) for United States Response to the Invitation (approximately 2 pages); [click here](#) for Order pursuant to Rules 54 and 70 (approximately 4 pages); [click here](#) for the Decision on the Accused's Second Motion for Inspection and Disclosure: Immunity Issue

The United States Department of State, Bureau of Public Affairs, issued a statement concerning Radovan Karadžić's claim that an agreement, promising him immunity for any crimes allegedly committed during the war in former Yugoslavia in exchange for his disappearance from public life, existed. The statement negates the existence of any such agreement and declares that "no such offer was made."

While the statement concedes that Karadžić signed a statement, "the text of which was negotiated in Belgrade on July 18, 1996, by Ambassador Holbrooke and a team of United States government officials with senior Serbian officials at a meeting where Dr. Karadžić was not present. In this statement, Dr. Karadžić pledged to leave office and withdraw from public life. There was no 'quid pro quo.'"

On December 17, 2008 the Trial Chamber issued a decision on Radovan Karadžić's second motion requesting the inspection and disclosure of certain documents relating to an alleged immunity agreement between Karadžić and Holbrooke. The Trial Chamber held that the documents requested, including the alleged immunity agreement, "could shed light on the behavior of the Accused after the fact, and, if so, would be items which may

be taken into consideration in the determination of any eventual sentence.” For this reason the Chamber ordered the Prosecution to disclose to Karadžić any written agreement and related notes in its possession that were made during the meeting between Karadžić and Holbrooke.

On March 5, 2009, the Trial Chamber granted Karadžić’s motion requesting “that the Trial Chamber order that the provisions of Rule 70 should apply to any information, including that provided orally during the interview of Ambassador Goldberg, provided by the United States of America in response to [Karadžić’s] request”. According to the decision to grant the motion, Karadžić had “provide[d] a letter dated 11 December 2008 to the Government of the United States of America, specifying the nature and scope of the Accused’s request, namely, to interview Ambassador Goldberg and to be provided with certain materials concerning the alleged meetings held on 18-19 July 1996 between Richard Holbrooke, Slobodan Milošević, and others.”

Rule 70 of the Rules of Procedure and Evidence of the Tribunal “creates an incentive for co-operation by States, organisations, and individuals, by allowing them to share sensitive information with the Tribunal ‘on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer and of the information’s sources will be protected.” Rule 70, paragraphs (B) to (E) apply to documents in the possession of the Prosecutor, and paragraph (F) authorizes the Trial Chamber “to order that the same provisions apply *mutatis mutandis* to specific information in the possession of the Defence.” Referring to a US response to the Chamber’s initial Invitation to submit information pursuant to Rule 54 and 70, the Chamber was “satisfied that [United States] ha[d] consented to provide any information responsive to the Accused’s request, so long as there is an order from the Chamber that applies Rule 70 to that information.”

Karadžić, who is facing charges of genocide, complicity in genocide, extermination, murder, wilful killing, and other crimes, has repeatedly demanded that the purported agreement promising him immunity from prosecution be disclosed.

## Briefly Noted

### **Russia Vetoes Extension of United Nations Mission in Georgia (June 15, 2009)**

[Click here](#) for document (approximately 1 page)

Taking advantage of its veto power at the United Nations Security Council, Russia voted against the extension of the United Nations Mission in Georgia (UNOMIG). This veto effectively ends the 16-year mission in the region on June 30th.

According to the United Nations press release, “[t]he UNOMIG’s area of responsibility in Abkhazia consists of a security zone, where no military presence is permitted; a restricted weapons zone, where no heavy weapons can be introduced; and the Kodori Valley. It has no jurisdiction in nearby South Ossetia, the scene of fighting last August which pitted Georgia against separatists and their Russian allies.”

### **Harold H. Koh Confirmed by the United States Senate as Legal Adviser to the Secretary of State (June 25, 2009)**

[Click here](#) for document (approximately 1 page)

On June 25, 2009, Harold H. Koh, Dean of the Yale Law School, was confirmed by the US Senate for the position of Legal Adviser to the Secretary of State by a vote of 62-35.

### **United Nations Announces Independent Probe into former Pakistani Prime Minister Benazir Bhutto Killing (June 19, 2009)**

[Click here](#) for document (approximately 1 page)

According to a United Nations press release, an “independent commission tasked with looking into the facts and circumstances surrounding the 2007 assassination of former Pakistani Prime Minister Benazir Bhutto will begin its work on 1 July.”

The press release states that the Commission, which has a six month mandate, will be headed by Ambassador Heraldo Muñoz of Chile. The final report will be submitted to the Secretary General, who will in turn forward it to the United Nations Security Council.

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*Author: Djurdja Lazic*

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