

REPORTS AND DOCUMENTS

National implementation of international humanitarian law

Biannual update on national legislation and case law July–December 2010

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A. Legislation

France

Law No. 2010-819 on the elimination of cluster munitions, 20 July 2010

On 21 July 2010, Law No. 2010-819 of 20 July 2010 on the elimination of cluster munitions entered into force.¹ The law implements the Convention on Cluster Munitions of 30 May 2008 by incorporating into French legislation the prohibition on the development, manufacture, production, acquisition, stockpiling, conservation, supply, sale, import, export, trade, brokering, transfer, and use of cluster munitions and the bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft. Any person may still, however, participate in a defence or security operation, or in a multinational military operation, or within an international organization, with states not parties to the convention that might be engaged in activities prohibited by the convention. The law also provides that cluster munitions should be destroyed not later than eight years from entry into force of the Convention. A person guilty of offences under this law may be punished by imprisonment of ten years and fined.

Law No. 2010-930 adapting criminal law to the Statute of the International Criminal Court, 9 August 2010

Law No. 2010-930 adapting criminal law to the Statute of the International Criminal Court was adopted on 9 August 2010 and entered into force on 10 August

2010.² The new law mainly integrates the essential elements of the Rome Statute of 17 July 1998 into French law, without fully implementing all the provisions of the treaty.

The law amends the Penal Code by criminalizing direct and public incitement to commit genocide, broadening the definition of crimes against humanity to include certain acts listed in Article 7 of the Rome Statute. It also establishes the principle of command responsibility – opening the possibility of challenging the criminal liability of superior military and civilian personnel because of their passive complicity in relation to war crimes and crimes against humanity committed by a subordinate. France has also introduced into its legislation the definition and criminalization of war crimes under Article 8 of the Rome Statute.

On the other hand, the law sets the statute of limitations for war crimes to thirty years, reserving imprescriptibility only to crimes against humanity. It also amends the Code of Criminal Procedure by granting French courts jurisdiction to prosecute and try cases against a person who resides in the territory of France and who has committed abroad a crime within the jurisdiction of the International Criminal Court, if the conduct is punishable under the laws of the state where the crime is committed or where such state is party to the Rome Statute, or where such person is a national of a state party to the convention, and when no international or national jurisdiction require the surrender and extradition of the person concerned.

Israel

Military Order 1651, Order Regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651) 5770-2009, 1 November 2009

On 1 November 2009, the military authorities published a new military order, Order Regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651) 5770-2009 (MO 1651), consolidating twenty military orders that had hitherto formed the bulk of the security related military legislation applicable in the West Bank. The new consolidated order came into force on 2 May 2010. It contains 335 sections covering a broad range of issues pertaining to criminal as well as administrative law. Issues of substantial and procedural criminal law that are covered by MO 1651 include law enforcement procedures (e.g. concerning arrest, detention, and seizure and forfeiture of property), pre-trial criminal procedures, judicial procedures before military courts, rules concerning criminal liability, and the definition of acts constituting offences. Issues of administrative law addressed in MO 1651 include administrative detention, control orders and assigned residence, deportation of infiltrators, and other administrative authorities such as those relating to restrictions of movement and to the designation of closed military areas.

1 LOI N° 2010-819 du 20 juillet 2010 tendant à l'élimination des armes à sous-munitions, published in Official Journal No. 166 of 21 July 2010, p. 13245.

2 LOI N° 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale, published in Official Journal No. 183 of 10 August 2010.

Kosovo

Law No. 03/L – 179, Law on Red Cross of Republic of Kosovo, 10 June 2010

On 10 June 2010, the Assembly of Republic of Kosovo adopted Law No. 03/L – 179 on Red Cross of Republic of Kosovo. The law regulates the status, functions, and financial sources of the Red Cross of Kosovo. It recognizes the Red Cross of Kosovo as the only national society in the Republic of Kosovo, acting as an auxiliary to the government on humanitarian issues based on the fundamental principles of the International Red Cross and Red Crescent Movement. It outlines activities to be carried out by the national society in times of peace and armed conflict, according to the Geneva Conventions and their Additional Protocols, the Statutes of the International Red Cross and Red Crescent Movement, and the Statutes of the Red Cross of Kosovo.

Law No. 03/L – 180, Law on the Use and Protection of the Emblem of the Red Cross and other Distinctive Emblems and Signals, 10 June 2010

The Republic of Kosovo also adopted Law No. 03/L – 180 on 10 June 2010, which regulates the use and protection of the red cross, red crescent, and red crystal emblems, as well as the distinctive signals for identifying medical transports and units during armed conflict and in times of peace. The law defines the authorized usage of the emblems as protective and indicative devices. It provides penalties to be applied in the event of misuse, including perfidious use, in accordance with national legislation. It bestows upon the Ministry of Health and the Ministry of Kosovo Security Force the authority to oversee the application of the law and the issuance of instructions and other rules.

Peru

Code of Military Justice, Legislative Decree No. 1094, 1 September 2010

A new Code of Military Justice was enacted on 1 September 2010 in Peru.³ Book II, Title II of the Code provides for crimes against state of emergency and international humanitarian law. It lays down rules on persons protected under international humanitarian law. It also adopts the principle of command responsibility holding responsible commanders and superiors for violations committed by their subordinates, and the non-applicability of the defence of merely following superior orders. It also provides universal jurisdiction for war crimes and crimes against state of emergency as defined under the title.

Specific crimes that are committed in times of armed conflict include crimes against protected persons and their illegal confinement, prohibited methods

3 Código Penal Militar Policial, Decreto Legislativo No. 1094, 01 de setiembre de 2010.

of warfare such as targeting civilians and civilian objects, disproportionate attacks, using protected persons as shields, starvation of civilian population, declarations that no quarter shall be given and perfidious attacks, prohibited means of warfare such as the use of poisoned weapons, biological and chemical weapons, and bullets that expand or flatten easily in the body.

The Code also contains a number of controversial provisions such as the statutory limitations and amnesty for war crimes and defences that are broader than those permitted by customary international law. Finally, the Code provides for death penalty in exceptional cases.

Switzerland

Federal law amending federal statutes in view of the implementation of the Rome Statute of the International Criminal Court, 18 June 2010

On 18 June 2010, the Federal Assembly of the Swiss Confederation adopted the Federal law amending the federal statutes in view of the implementation of the Rome Statute of the International Criminal Court.⁴ The new law amends the Penal Code, the Military Penal Code, the Code of Criminal Procedure of 5 October 2007, the Act of 20 March 1981 on Mutual Assistance on International Crimes, and the Military Criminal Procedure of 20 March 1979, in order to implement the Rome Statute and provide for universal jurisdiction over genocide, crimes against humanity, and war crimes.

The law provides for penalties for war crimes, including, among others, grave breaches of the Geneva Conventions, attacks against civilians and civilian objects, misadministration of medical treatment, sexual violations and outrages upon personal dignity, recruitment and use of child soldiers, prohibited methods of war, use of prohibited weapons, breaking the armistice, and delay in the repatriation of prisoners of war.

It also provides Switzerland the duty to try a suspect before national courts in those cases of crimes committed abroad, regardless of the nationality of the perpetrator or the victim, when the suspect is found in Switzerland, and is neither extradited to another state nor surrendered to an international criminal court whose jurisdiction is recognized by Switzerland.

Uganda

Act 11, The International Criminal Court Act, 25 May 2010

The International Criminal Court (ICC) Act was enacted into law on 25 May 2010, and entered into force on 25 June 2010. The law gives effect to the Rome Statute

⁴ Loi fédérale portant modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale du 18 juin 2010.

of the ICC, primarily by incorporating into national legislation the crimes of genocide, crimes against humanity, and war crimes. It also criminalizes acts and omissions against the administration of justice by the ICC. It likewise enables national courts to exercise jurisdiction over such crimes.

General principles of criminal law inscribed in the Rome Statute are made applicable along with the principles of Ugandan criminal law. These principles include those that relate to the responsibility of commanders and other superiors over crimes committed by their subordinates, and excludes any statutes of limitation.

The ICC Act allows Uganda to co-operate with the ICC, in terms of investigation and prosecution of persons accused of such crimes, their arrest and surrender to the ICC, and enforcement of sentences. In addition, it provides for various forms of requests for assistance to the ICC and enables the ICC to conduct proceedings in Uganda.

United States of America

Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009

On 24 May 2010, Public Law 111-172, or the Lord's Resistance Army (LRA) Disarmament and Northern Uganda Recovery Act of 2009, was enacted into law. The act seeks to support stabilization and lasting peace in northern Uganda through development of a regional strategy supporting multilateral efforts in successfully protecting civilians and eliminating the threat posed by the LRA. It also authorizes funds for humanitarian relief and reconstruction, reconciliation, and transitional justice.

Under Section 2 of the Act, Congress has qualified the situation in northern Uganda for over two decades as an armed conflict, which has led to internal displacement of two million Ugandans, mutilation, abduction, forcing of individuals into sexual servitude, and forcing an estimated number of over 66,000 children to fight as part of the rebel force.

The law provides the requirement of a strategy to support the disarmament of the LRA, and earmarks US\$ 20 million for humanitarian assistance for areas outside Uganda affected by the LRA and assistance for reconciliation and transitional justice in northern Uganda.

B. National Committees on International Humanitarian Law

Nigeria

On 23 July 2010, the National International Humanitarian Law (IHL) Committee of Nigeria was inaugurated by the Attorney-General of the Federation and the Minister of Justice. Chaired by the Solicitor-General of the Federation and the

Permanent Secretary in the Federal Ministry of Justice, the Committee is composed of representatives from the ministries of Justice, Foreign Affairs, Interior, Finance, Tourism, Culture and National Orientation, Defence, Health, Education, and Women Affairs and Social Development, as well as from the Defence Headquarters, the National Human Rights Commission, the National Commission for Refugees, the Office of the Secretary to the Government of the Federation, academia, and the Nigerian Red Cross Society.

Uganda

On 29–30 September 2010, an inaugural meeting reconstituting the Ugandan International Humanitarian Law (IHL) National Committee was held, following the 29 May 2009 Resolutions on IHL in the country and the 9 March 2010 work plan on the resolutions. Chaired by the Office of the Prime Minister, the group constitutes representatives from the Uganda Red Cross Society and the government, including from the parliament, the Ministry of Defence, the Ministry of Internal Affairs, the Ministry of Gender, Labour and Social Development, the Justice, Law and Order Sector, the Ministry of Justice and Constitutional Affairs, the Ministry of Finance, and the Uganda People's Defence Force. Aside from prioritizing the status and functions of the Committee, the group also works on pending IHL legislations in Uganda.

C. Selected case law

Chile

Prosecutor v. J. M. Contreras Sepúlveda, et al., Chile Supreme Court, 8 July 2010, Rol N° 2596-09

On 8 July 2010, the Chilean Supreme Court affirmed the decision of the Court of Appeals of Santiago in sentencing Mr. Juan Manuel Guillermo Contreras Sepulveda and others for the murder of Mr. Carlos Prats Gonzales and his wife in Argentina on 30 September 1974. It was established that members of the national intelligence service headed by Mr. Contreras engaged in a project with joint criminal purpose of committing crimes against people considered enemies of the Chilean military regime, subsequently resulting in the killing of Mr. Prats.

Although the defendants were convicted of the common crime of murder, the court ruled that the defendants cannot avail themselves of amnesty, nor prescription, as these would violate the 1949 Geneva Conventions. The court explained that, when Chile ratified these treaties, it imposed upon itself a duty not to use measures to protect the wrongs committed by perpetrators while taking into account the principle that international agreements be performed in good faith. It ruled that Law Decree No. 2191 granting amnesty is an act of self-exoneration

from criminal responsibility in violation of Article 148 of the Fourth Geneva Convention.⁵

Colombia

Prosecutor v. Ramírez Ortega et al., *Tribunal Superior de Antioquía*, 10 May 2010

On 10 May 2010, the Antioquia High Court upheld the sentence of thirty-three years' imprisonment against Mr. Ramírez Ortega and two other members of the military for the murder of Mr. Gabriel Valencia Ocampo, on 5 October 2005 in Argelia. They were charged with 'murder of a protected person', an offence under international humanitarian law found in the Colombian Penal Code.

Mr. Ocampo, a farmer, was reported killed in the fighting between troops of the Fourth Brigade and the Fuerzas Armadas Revolucionarias de Colombia. The investigation conducted by a human rights and international humanitarian law prosecutor found that, a day before his death, Mr. Ocampo was detained by a military patrol. He managed to escape and sought help from the police. The patrol members insisted to the police that Mr. Ocampo was a soldier deserter. Without any verification, the police handed him over to the accused.

Croatia

Prosecutor v. Branimir Glavas, *Supreme Court of Croatia*, I Kž 84/10-8, 30 July 2010

The Supreme Court of Croatia, on 30 July 2010, affirmed the conviction of Mr. Branimir Glavas and his co-accused for war crimes committed during the Serbo-Croatian war, but reduced their sentences.

On 8 May 2009, the District Court of Zagreb convicted the accused for the criminal offences of war crimes against civilians in violation of Article 120(1) of the Basic Criminal Code of the Republic of Croatia. Within the period of July to December 1991, while Mr. Glavas was the Secretary of the Municipal Secretariat for National Defence in the town of Osijek, he failed to prevent the torture of the civilian population, inhumane treatment and causing injuries to bodily integrity of civilians, the application of unlawful detentions, and violations of the rules of international humanitarian law by a special military unit, of which he acted as the effective and formal commander, the unit being established, equipped, and armed by his office. He was also found to have ordered the killings of civilians, their

5 Article 148 of the Fourth Geneva Convention provides that no 'High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article'.

inhumane treatment, and unlawful confinement. Mr. Glavas was sentenced to ten years' imprisonment.

On appeal by both prosecution and defence, the Supreme Court reduced the sentence of Mr. Glavas to eight years. It held that it was legally correct for the accused to be sentenced only for one count of the criminal act of war crimes against civilians and not two, as earlier pronounced by the District Court of Zagreb. It ruled that the number of victims of war crimes does not influence the number of criminal acts that a perpetrator makes. Thus, there were no legal grounds for the verdict of Mr. Glavas to be divided into two separate criminal acts of war crimes against civilians.

Montenegro

Dubrovnik torture case, Montenegrin Court of Appeals, December 6, 2010

On 6 December 2010, the Court of Appeals in Montenegro quashed the decision of the Higher Court in Podgorica which had sentenced six members of the former Yugoslavia People's Army (JNA) to imprisonment ranging from eighteen months to four years for ordering and committing torture against 169 prisoners of war and civilians between October 1991 and August 1992 during an attack on the Adriatic city of Dubrovnik.

The court ordered the retrial of Mr. Mladjen Govedarica, Mr. Zlatko Tarle, Mr. Boro Gligic, Mr. Spiro Lucic, Mr. Ivo Menzalin (at large), and Mr. Ivo Gojnic at the High Court of Podgorica after an appeal based on the grounds that the case was political and that there was not enough evidence.

The atrocities took place in the Morinj detention centre. Some 160 people held in the Morinj camp had testified against the accused.

Norway

Prosecutor v. Mirsad Repak, Supreme Court, 3 December 2010

On 3 December 2010, the Norwegian Supreme Court reversed the conviction of Mr. Mirsad Repak for war crimes and crimes against humanity allegedly committed in the former Yugoslavia in 1992.

The District Court in Oslo had earlier sentenced Mr. Repak, a Bosnian and Norwegian national, to five years in prison on eleven counts of unlawful detention of civilians, falling under Section 103(h) of the Norwegian Criminal Code adopted in March 2008. He had been a member of the militia group Croatian Defence Forces (HOS) that operated a prison camp in Dretelj, Bosnia and Herzegovina. He was ordered to pay US\$ 57,000 for compensation and damages to eight plaintiffs. In April 2010, an appeals court reduced the sentence by six months' imprisonment.

Norway's Supreme Court cancelled the sentence outright, ruling that Norway's war crimes law, which came into force in 2008, could not be applied

retroactively to Repak's 1992 actions as it would violate the Norwegian Constitution. It held that the case should instead proceed on the basis of the law in effect at the time of the commission of the offence.

Serbia

Prosecutor v. Željko Đukić, War Crimes Department of the Higher Court in Belgrade, 22 September 2010

The trial chamber of the Belgrade War Crimes Department of the Higher Court sentenced Mr. Željko Đukić to twenty years' imprisonment for his involvement in a war crime against civilian population that took place in Podujevo, Kosovo-Metohija, on 28 March 1999.

The court found that Mr. Đukić was part of a group known as the Scorpions, involved in a shooting campaign against a group of nineteen women and children, taking the lives of fourteen civilians including seven children. There were five other children who were heavily wounded, yet survived the attack.

Mr. Đukić was placed under detention on 19 October 2007. This date has been considered as the beginning of his prison term for the crime of which he was convicted.

Prosecutor v. Branko Grujic and Branko Popovic, Belgrade Higher Court's War Crimes Department, 22 November, 2010

On 22 November 2010, the trial chamber for Belgrade Higher Court's War Crimes Department sentenced the former Zvornik mayor Branko Grujic to six years in prison and the former Zvornik local defence chief Branko Popovich to fifteen years in prison for the imprisonment, inhumane treatment, and death of around 700 Muslims in their hometown during the 1992–1995 Bosnian Civil War, and for the forcible displacement of over 1,600 civilians in the Zvornik area in 1992.

The indictment alleges that Mr. Grujic and Mr. Popovic, acting in a pre-meditated and synchronized manner, undertook a number of activities within their official competence aimed at the forcible separation of 1,624 Muslim civilians, who were either unlawfully taken hostage and mass murdered, or forcibly displaced.

The court said that the hostages were kept in inhumane conditions in a small room where twenty people suffocated. The bodies of 352 victims were later exhumed and identified. Mr. Grujic was sentenced for having knowledge of the crimes and failing to act to prevent them.

Prosecutor v. Ilija Jurišić, Appeals Court of Belgrade, 11 October 2010

On 11 October 2010, the Belgrade Appeals Court overturned a war crimes conviction and a twelve-year prison sentence for the former Bosnian security officer Mr. Ilija Jurišić. The court ordered a retrial and released Mr. Jurišić from detention, ruling that the previous proceedings provided insufficient evidence.

Mr. Jurišić was accused of co-ordinating an attack against a convoy consisting of members of the 92nd Motorized Brigade with the Yugoslavia National Army on 15 May 1992, at the time when he was a senior officer on duty in the operative headquarters of the Centre of Security Services in Tuzla. In September 2009, he was found guilty by the War Crimes Chamber of the District Court of Belgrade of violating Article 148 of the Socialist Federal Republic of Yugoslavia (SFRY) Criminal Act for using illicit means of warfare. As the former head of the Operational Group of the Tulza-based Public Security Centre, Mr. Jurišić allegedly ordered open fire on a JNA convoy of soldiers, which was in the process of peacefully withdrawing from Tulza, killing at least fifty-one and wounding fifty soldiers. Mr. Jurišić has been in custody since he was arrested in Belgrade in 2007.

United States of America

Mahmoad Abdah, et al. v. Barack H. Obama, et al., *United States District Court for the District of Columbia, Civil Action No. 04-1254 (HHK)*, 26 May 2010

The United States District Court for the District of Columbia granted the petition for a writ of *habeas corpus* of Mr. Mohammed Mohammed Hassan Odaini for the government's failure to demonstrate the lawfulness of his detention in the US Naval Base in Guantanamo Bay.

Mr. Odaini, a Yemeni national, was seized on 27 March 2002, along with several other men, in a raid on a guesthouse in Pakistan alleged to be a recruitment house for the Taliban or Al Qaeda. The US government based its authority to detain him on the Authorization for Use of Military Force (AUMF), which authorizes the President

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.⁶

The court said that the evidence, which included testimonies of those arrested with the petitioner and two classified reports by government agents finding that he is not part of Al Qaeda and that keeping him has no interrogation value, had been consistent in establishing that he was a mere student who had been invited to the house that night for dinner.

The evidence presented by the respondent was not enough to justify the petitioner's detention. This evidence included: his presence in the house with residents detainable pursuant to the AUMF; a Pakistani medical visa instead of a

⁶ Pub. L. No. 107-40, 115 Stat. 224 (2001).

student visa making him appear suspicious; a sole testimony from a co-arrested that the petitioner arrived weeks earlier in the house, contrary to the assertion of the petitioner and all others arrested with them; and evidence showing that members of Al Qaeda used Jama'at Al Tabligh, where the petitioner was a religious student, as cover for their true activities and purpose.

Using the preponderance of evidence standard and the principle of law that places the burden of proof on the detaining authority to prove lawful detention, Mr. Odaini's motion was granted and he was ordered released.

Hussain Salem Mohammad Almerfedi v. Barack Obama, et al., *United States District Court for the District of Columbia, Civil Action No. 05-1645 (PLF), 8 July 2010*

The petition for writ of *habeas corpus* of Mr. Hussain Salem Mohammad Almerfedi, detained in the US Naval Base in Guantanamo Bay since 2002, was granted by the United States District Court for the District of Columbia, upon concluding that the government failed to meet its burden of showing by preponderance of evidence that his detention was lawful.

The government had alleged that the petitioner acted as an Al Qaeda facilitator helping fighters infiltrate Afghanistan while staying at an Al Qaeda guesthouse in Iran, and that he actively associated with an Islamic organization called Jama'at al Tablighi (JT), which, aside from performing missionary activities, provided logistical support and operational coverage to terrorist organizations and foreign fighters fleeing Afghanistan.

These assertions were held to have no evidentiary basis. First the government relied on six reports based on statements made by another Guantanamo detainee who refers to a man named Hussain Al-Adeni, without the court being certain, absent further corroboration, that this other detainee refers to the petitioner. Second, the first four reports were inherently unreliable as they were hearsay evidence, coming from an unnamed group of detainees, for which the original source cannot be pinpointed. Third, although the last two reports relied on information that the detainee learned directly from the petitioner, their content did not describe the petitioner as facilitator, and even alleged that the petitioner was in a Tehran guesthouse in 2002 and 2003 when the petitioner had actually been arrested as early as January 2002. There was also no evidence to support the claim that the petitioner acted as a facilitator, or that, while staying in the JT centre, he actually provided financial or other support to terrorist groups. Thus, the court decided in the petitioner's favour.

Mohammed Al-Adahi and Miriam Ali Abdullah Al-Haj v. Barack Obama, et al., *United States Court of Appeals for the District of Columbia Circuit, No. 09-5333, Consolidated with 09-5339, 13 July 2010*

The United States Court of Appeals reversed the lower Court's decision and remanded the detainee with instructions to the District Court of Columbia to deny

the Guantanamo Bay Naval Base detainee Mr. Mohammed Al-Adahi's petition for writ of *habeas corpus*.

In the summer of 2001, this Yemeni petitioner took a six-month leave of absence from his job to move to Afghanistan, and stayed in Kandahar at the home of his brother-in-law, a close associate of Mr. Osama bin Laden, whom the petitioner had personally met twice. From Kandahar, he moved into a guesthouse used for Al Qaeda recruitment; attended Al Qaeda's Al Farouq training camp; travelled between Kabul, Khost, and Kandahar while American forces were launching attacks in Afghanistan; and, after sustaining injuries requiring hospitalization, crossed the Pakistani border on a bus carrying wounded Arab and Pakistani fighters. After being captured by the Pakistani authorities in late 2001, he was determined to be part of Al Qaeda by a Combatant Status Review Tribunal in 2004. In 2005, he had filed a petition for *habeas corpus*, which was later granted.

According to the Court, the lower Court that granted the petition committed a mistake in its evaluation of evidence by not considering conditional probability analysis, which means that, even if each individual piece of fact is not in itself sufficient to justify detention, one fact makes the occurrence of another more likely. Taking all these facts together, it then becomes clear that Mr. Al-Adahi was – at the very least (using the preponderance of evidence standard) – more likely than not to be a member of Al Qaeda. As such, he was justifiably detained under the Authorization for Use of Military Force.