

## REPORTS AND DOCUMENTS

# National implementation of international humanitarian law

## Biannual update on national legislation and case law January – June 2007

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### A. Legislation

#### Argentina

*Law No. 26.247 on the implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*<sup>1</sup> was adopted on 25 April 2007.

The Law sets out the obligations established by the Convention; it forbids the production, acquisition, stockpiling, retaining or use of the chemical substances defined in the Convention's List 1. It provides that any individual or corporate body can, for purposes not prohibited by the Convention, develop, produce, acquire in any form, retain, transfer and use, import and export any toxic chemicals or substances and their precursors. Subject to the control, supervision and inspection of an Inter-Ministerial Commission for the Prohibition of Chemical Weapons, the chemical substances defined in List 1 may, however, be produced or transferred to another State Party for research, medical, pharmaceutical or protective purposes. The Law also allows for inspections to be carried out by the Organization for the Prohibition of Chemical Weapons. Finally, the Law provides for administrative and criminal sanctions in case of violation of its provisions.

1 Ley No. 26.247, sobre la implementación de la Convención sobre la prohibición del desarrollo, la producción, el almacenamiento y el empleo de armas químicas y sobre su destrucción. Published on 22 May 2007.

## Comoros

*Law No. 07-002/AU relating to cooperation with the International Criminal Court* was adopted by the Assembly of the Union of Comoros on 13 January 2007.

The Law deals with issues such as arrest, surrender and all other forms of cooperation with the International Criminal Court provided for in article 93 of the ICC Statute. This Law provides for a detailed procedure to be followed by the Comorian authorities in cases where they receive a request for the arrest of suspects and their surrender to the ICC. In addition, it grants the judicial authorities the competence to interrogate any person, including witnesses and experts, on behalf of the ICC. The Law provides that the execution of the ICC's sentences, whether through the imposition of penalties, confiscation and forfeiture of property and assets or other measures of reparation, shall be authorized by the Moroni Magistrates' Court (*Tribunal Correctionnel*). Lastly, the Law authorizes the execution in the Comoros of sentences of imprisonment delivered by the ICC.

## Estonia

The *Act on protection of war graves* was adopted on 10 January 2007 and entered into force on 20 January 2007.<sup>2</sup>

In furtherance of article 30 of the Fourth Geneva Convention of 1949 and article 34 of Protocol I of 1977 additional to the Geneva Conventions, the Act sets out the regulations and procedures to guarantee respect for, protection and dignified treatment of the remains of persons who died during or as a consequence of acts of war during the Estonian War of Independence. In accordance with the new Law, the Ministry of Defence, with the advice of a War Graves Committee, shall be responsible for keeping a list of war graves, deciding upon the reburial of human remains or their transportation to cemeteries, as well as for organizing the exhumation and identification of human remains from a gravesite.

## Mexico

The *Law on the use and protection of the red cross and red crescent emblems* was adopted on 19 December 2006 and entered into force on 24 March 2007.<sup>3</sup>

The Law defines the rules applicable to the use and the protection of the red cross, red crescent and any other distinctive emblem under an international agreement to which Mexico is a State Party. Subject to the authorization of the Secretary of National Defence and in accordance with the Geneva Conventions of 1949, the medical and religious personnel of the armed forces, hospital ships and other vessels providing medical services, medical transport companies operating by land, sea and air, civilian hospitals, hospital zones and localities, as well as the Mexican Red Cross and other voluntary aid societies, are entitled to use the

<sup>2</sup> Protection of War Graves Act. Published in the Riigi Teataja I 2007, 4, 21 on 19 January 2007.

<sup>3</sup> Published in the Diario Oficial de la Federación, Tomo DCXLII, No. 16 on 23 March 2007.

emblem as a protective device in the event of armed conflict. The International Committee of the Red Cross and the International Red Cross and Red Crescent Federation do not require such authorization. The Law also provides that the components of the International Movement of the Red Cross and Red Crescent, including the Mexican Red Cross, are entitled to use the emblem as an indicative device. Finally, the Law outlines that any unauthorized use of the emblem is subject to administrative sanctions.

## Panama

*Law No. 14 establishing a new Criminal Code* was adopted by the National Assembly on 5 April 2007.<sup>4</sup> The new Criminal Code contains a chapter incorporating crimes against humanity, genocide and war crimes as offences in domestic law.

The Code defines a number of offences against persons, goods and cultural property protected under international humanitarian law, with reference *inter alia* to the provisions of the 1949 Geneva Conventions and their 1977 Additional Protocols, the 1998 Rome Statute of the International Criminal Court, the 1972 Convention on Biological and Toxin Weapons, the 1980 Convention on Certain Conventional Weapons and the 1993 Convention on Chemical Weapons. In its definitions of the above offences, the Code does not establish a distinction between international and non-international armed conflicts. Additionally, the Criminal Code provides that domestic courts shall enjoy jurisdiction to try the specified international crimes based on the principle of universal jurisdiction and that such crimes shall not be subject to any statute of limitations. It also recognizes the criminal liability of commanders and of other superiors and precludes the granting of an amnesty or pardon in relation to such offences.

## Senegal

*Law No. 2007-02 amending the Criminal Code*<sup>5</sup> and *Law No. 2007-05 amending the Code of Criminal Procedure relating to the implementation of the Rome Statute instituting the International Criminal Court*<sup>6</sup> were adopted on 12 February 2007 and entered into force on 11 March 2007.

Law No. 2007-02 incorporates as offences in domestic law the crimes of genocide, crimes against humanity and war crimes, as well as the offences against the administration of justice of the ICC. The Law follows the same wording as the Rome Statute in order to “reaffirm the *ius cogens* character of those rules”.

4 Ley No. 14 que adopta el Código Penal. Published on 22 May 2007. It will enter into force on 19 May 2008.

5 Loi No. 2007-02 modifiant le Code pénal. Published in the Official Gazette on 10 March 2007, pp. 2377-2378.

6 Loi No. 2007-05 modifiant le Code de Procédure pénale relative à la mise en oeuvre du Traité de Rome instituant la Cour pénale internationale. Published in the Official Gazette on 10 March 2007, pp. 2384-2386.

Additionally, the Law declares that any person can be tried for any act or omission, which, at the time when it was committed, was a crime according to the general principles of law recognized by the community of nations.

In regard to the core crimes of the Rome Statute as defined in the Criminal Code pursuant to Law No. 2007-02, Law No. 2007-05 allows for the trial of suspects based on the principle of universal jurisdiction and provides that such offences shall not be subject to any statute of limitations. The Law establishes the legal basis for compliance with requests received from the ICC for the arrest and surrender of suspects and for other assistance in criminal matters, such as the transmission of different types of evidence and information to the Court or the protection of victims and witnesses. Finally, the Law establishes that requests for cooperation shall be received by the Ministry of Justice and executed by the General Prosecutor attached to the Court of Appeals of Dakar.

## United States

On 14 February, the President of the United States issued *Executive Order Trial of Alien Unlawful Enemy Combatants by Military Commission*.<sup>7</sup>

The new Executive Order authorizes the establishment of military commissions to try persons named as possible “alien unlawful enemy combatants”. The new order performs a technical step required under the Military Commissions Act of 17 October 2006.<sup>8</sup>

## B. National Committees on International Humanitarian Law

### France

On 5 March 2007, the National Assembly and the Senate adopted *Law No. 2007-292 relating to the French National Consultative Commission for Human Rights*.<sup>9</sup>

The new Law replaces Decree No. 84-72 of 30 January 1984 (as amended) and confirms the Commission’s mandate as a consultative body to the Government in matters relating to human rights, international humanitarian law and humanitarian action. The Law provides that the Commission shall assist the Prime Minister and concerned Ministries by providing advisory opinions and recommendations and shall be composed of representatives of international and non-governmental organisations specializing in the field of human rights and

7 Available online at <<http://www.whitehouse.gov/news/releases/2007/02/20070214-5.html>> (visited on 30 September 2007).

8 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (17 October 2006), enacting Chapter 47A of title 10 of the United States Code (also known as Senate Bill 3930).

9 Loi N° 2007-292 relative à la Commission nationale consultative des droits de l’homme, published in the Official Journal No. 55 of 6 March 2007, p. 4215.

humanitarian law, national experts, members of Parliament and other relevant State bodies, such as the Economic and Social Council.

The modalities of operation of the Commission under the new Law were subsequently outlined in Decree No. 2007-1137 relating to the Composition and Operation of the National Consultative Commission for Human Rights, adopted by the Prime Minister on 26 July 2007<sup>10</sup>.

## Honduras

The Honduran Commission on International Humanitarian Law was set up by *Decree No. 31,283*, adopted on 8 March 2007.<sup>11</sup>

The Commission is chaired by the Ministry of Foreign Affairs and is composed of representatives of the Ministries of Interior and Justice, Public Security, Defence, Education, Health, the Office of the Presidency, as well as of different academic institutions and the Honduran Red Cross. Representatives of the legislative and the judiciary authorities, as well as of civil society and interested international organizations may also be invited to take part in the work of the Commission. The Decree provides that the ICRC shall be invited to support and advise the Commission in the performance of its mandate. The main roles of the Commission include dissemination and promotion of IHL, evaluation of domestic law and practice with respect to IHL, and the preparation of recommendations to national authorities in this field.

## Saudi Arabia

The National Commission on International Humanitarian Law of the Kingdom of Saudi Arabia was set up by *Decree No. 144* adopted by the Saudi Arabian Council of Ministers on 14 May 2007.<sup>12</sup>

The Commission, which is placed under the auspices of the Saudi Red Crescent Society, enjoys permanent status and is composed of representatives of the Ministries of Foreign Affairs, Defence and Aviation, Interior, Justice, Culture and Information, Economy and Planning, Education and Higher Education, as well as the Saudi Red Crescent Society and the Human Rights Committee under the Consultative Council. The Commission is responsible for the domestic implementation and dissemination of IHL treaties to which Saudi Arabia is a State party.

10 Décret N° 2007-1137 du 26 juillet 2007 relatif à la composition et au fonctionnement de la Commission nationale consultative des droits de l'homme, published in the Official Journal of 27 July 2007.

11 Decree N° 005/2007, published in La Gaceta, República de Honduras – Tegucigalpa, M.D.C. 20 de Abril del 2007, N° 31,283, pp.17–18.

12 Decree N° 144 of the Saudi Council of Ministers on the Creation of the National Commission on International Humanitarian Law of 27-04-1428 (AH).

## C. Case law

### The Netherlands

On 9 May 2007, the Court of Appeals in The Hague found a Dutch businessman guilty of the offence of complicity in the commission of war crimes committed by the Iraqi regime in Iran and in Northern Iraq in the mid- and late eighties.<sup>13</sup>

The defendant was accused of having supplied to Saddam Hussein's regime chemical substances which subsequently served in the manufacturing of chemical weapons used during the armed conflict between Iraq and Iran, as well as against the Kurdish population in Northern Iraq. The court of first instance had found the defendant guilty of complicity in war crimes and sentenced him to 15 years in prison. However, the court had found him not guilty of complicity in genocide.

The Appeals Court upheld the verdict of the Court of first instance and acquitted the defendant on the charge of being an accessory to the crime of genocide, concluding that there was not enough evidence that the defendant had known of the genocidal intentions of the perpetrators at the time he supplied the chemical substances. However, the Appeals Court upheld the guilty verdict on the charge of complicity in multiple violations of the laws and customs of war (war crimes), considering that the defendant knew, or at least had constructive knowledge, that the substances he delivered were precursors for the production of chemical weapons which would be used on the battlefield. The Appeals Court increased the defendant's prison sentence to 17 years.

### United States

On 20 February 2007, the United States Court of Appeals for the District of Columbia rendered a decision in which it reviewed whether federal courts have jurisdiction over petitions for writs of habeas corpus filed by non-US citizens detained at Guantánámo Bay naval base after the enactment of the Military Commissions Act (MCA) and, in the negative, whether the MCA was unconstitutional in suspending the writ.<sup>14</sup>

In its ruling, the Court, after reviewing the recent US case law relating to the habeas corpus petitions filed by Guantánámo Bay detainees and recounting the provisions of the MCA, concluded that the MCA strips the courts of the ability to hear petitions for habeas corpus filed by Guantánámo Bay detainees. The Court further reviewed whether the MCA, in depriving the courts of jurisdiction over the detainees' habeas petitions, violated the Suspension Clause under the US Constitution, which holds that the writ of habeas corpus shall not be suspended

<sup>13</sup> *Case against Frans van Anraat*, Gerechtshof's-Gravenhage, N° 22-00050906-2, decided 09 May 2007.

<sup>14</sup> United States Court of Appeals for the District of Columbia Circuit, *Lakhdar Boumediene, Detainee, Camp Delta, et al. v. George W. Bush, President of the United States et al.*, No. 05-5062; *Khaled A. F. Al Odah v. United States of America, et al.*, No. 05-5064; 20 February 2007.

safe in cases of rebellion or invasion, or when the public safety so requires. The Counsel for the detainees argued that there was a Federal common law right to the writ of habeas corpus extending to aliens captured and detained beyond the territory of the United States. Citing the Supreme Court's decision in *Johnson v. Eisentrager*, the Court did not concur and opined that Cuba exercises sovereignty over Guantánamo Bay despite the indefinite lease concluded between the US and Cuba in 1903 and authorising the US to operate Guantánamo Bay. Consequently, the Court of Appeal held that it had no jurisdiction in the case and vacated the District Court decisions below it.<sup>15</sup>

On 2 May 2007, the United States District Court for the Southern District of New York issued a decision dismissing the class action brought against a former Director of Israel's General Security Service in connection with his alleged role in the bombing of an apartment building in Gaza City on 22 July 2002.<sup>16</sup> Fifteen people had been killed in the attack and 150 others injured. The defendant was alleged to have committed war crimes, crimes against humanity, cruel, inhuman and degrading treatment and punishment, and extrajudicial killings.

The case was filed by the plaintiffs on behalf of the Palestinian victims killed or injured in the bombing on the basis of the Alien Tort Statute and the Torture Victim Act. In dismissing the claim, the District Court found that the defendant benefited from the immunity extended under the Foreign Sovereign Immunities Act (FSIA) to agents of a foreign State acting in their official capacity. The Court concluded that nothing in the complaint permitted an inference that the defendant's action had been personal or private in nature and referred to Israel's representation to the Court that the defendant had acted "in the course of his official duties and in the furtherance of official policies of the State". The Court also stated that, even had the FSIA not been applicable, it would have dismissed the claim on the basis of the "political question doctrine" according to which complaints involving foreign policy questions in a volatile context may be non-justiciable. In this case, the Court noted that the action was brought by the plaintiffs "against a foreign official for implementing the anti-terrorist policy of a strategic United States ally in a region where diplomacy is vital". The US Government submitted a statement of interest in the case in which, while arguing

15 On 5 March 2007, a Petition was filed before the Supreme Court of the United States on behalf of detainees at Guantánamo Bay requesting the Court to issue a writ of certiorari to review the lower court decisions dismissing the claims in the *Boumediene v. Bush* and *Al Odah v. United States* cases. On 02 April 2007, the Supreme Court ruled that it would not be hearing the cases of Guantánamo Bay detainees for the time being and denied the motion to hear the case. Three justices dissented and two others issued a statement emphasising that the "decision does not constitute an expression of any opinion on the merits" and holding that the detainees should first exhaust the legal steps available to them under the DTA – notably the right of detainees to challenge in the Court of Appeals the decisions of the Combatant Status Review Tribunals – before the Court could consider ruling on constitutional questions. On 29 June 2007, the U.S. Supreme Court granted a writ of certiorari to *Boumediene* and his co-defendants, indicating that it would hear their challenge to the Court of Appeals' decision when the Supreme Court's next Term begins (in October 2007).

16 *Ra'ed Mohamad Ibrahim Matar, et al. v. Avraham Dichter, former Director of Israel's General Security Service*, United States District Court Southern District of New York, 05 Civ. 10270 (WHP), 2 May 2007.

that the defendant should be immune for his official acts on grounds of sovereign immunity, it expressed its serious objections to the attack.

On 11 June 2007, the United States Fourth Circuit Court of Appeals rendered a decision in which it held that a citizen of Qatar, arrested in the United States in connection with the 11 December 2001 attacks and declared an “enemy combatant” by the US President, could not be held in indefinite military detention on the basis of the Military Commissions Act of 2006 (MCA).<sup>17</sup> In July 2004, counsel for the accused had filed a petition for a writ of habeas corpus, challenging the accused’s detention as an “enemy combatant”. In August 2006, following the dismissal of the petition in the District Court, the matter was brought to appeal. The Government contended that the US President had both statutory and inherent constitutional authority to subject a person to indefinite military detention as an “enemy combatant” without criminal process and that the Military Commissions Act of 2006 (MCA) denied the Court’s jurisdiction over the Defendant’s petition and appeal. The defendant argued that the MCA did not deny his right to habeas corpus and that the denial of jurisdiction would violate his right to due process and other constitutional guarantees.

In its decision of 11 June, the Appeals panel found that the court had jurisdiction over the case and that the MCA could not be construed as stripping a lawful resident alien of his right of habeas corpus. Responding to the US Government’s other contentions, the Court held that the Authorization for Use of Military Force (AUMF)<sup>18</sup> does not authorize the President to order the seizure and indefinite detention of an individual as an “enemy combatant”. It also concluded that the President could not be considered to enjoy an “inherent constitutional authority” to subject persons legally residing in the US and protected by the US Constitution to indefinite military detention without the benefit of criminal process. Finally, the Court noted that, even under the Patriot Act, which provides the President with broad authority to handle “terrorist aliens”, only short-term detention by civilian authorities prior to deportation or criminal prosecution is permitted.

Consequently, the Court of Appeals overturned the decision of the District Court and remanded the case to the District Court with instructions for it to issue a writ of habeas corpus directing the Secretary of Defence to release the Appellant from military custody within a “reasonable period of time”. However, the Court concluded that the Government could transfer the accused to civilian authorities for prosecution on criminal charges, to initiate deportation proceedings, to hold him as a material witness in connection with grand jury proceedings, or to detain him for a limited period of time pursuant to the Patriot Act.

17 *Ali Saleh Kahlah Al-Marri and Mark A. Berman v. Commander S.L. Wright, USN Commander, Consolidated Naval Brig*, United States Court of Appeals for the Fourth Circuit, N° 06-7427, decided 11 June 2007.

18 *Authorization for the Use of Military Forces*, Pub. L. No. 107-40, 115 Stat. 224 (2001).