

REPORTS AND DOCUMENTS

National implementation of international humanitarian law

Biannual update on national legislation and case law July–December 2009

.....

A. Legislation

Austria

Federal Law on the Prohibition of Cluster Munitions, 2009

The Federal Law on the Prohibition of Cluster Munitions implementing the international Convention on Cluster Munitions 2008 was adopted on 7 May 2009. It incorporates the definitions found in Article 2(2) of the Convention on Cluster Munitions. The law also prohibits the development, production, acquisition, use, possession, licensing, procurement, import, export and transit of cluster munitions (Article 2). Article 3, however, permits exceptions such as the use of munitions for purposes of training the army and with regard to the destruction of cluster munitions. According to Article 4, cluster munitions should be destroyed in the three years after the entry into force of the present law. With regard to cluster munitions dating from before 1955, Article 4 stipulates an obligation to register such munitions with the Ministry of the Interior, which is responsible for securing and destroying these munitions. Article 5 provides that a person guilty of offences may be punished by way of a fine or imprisonment for a maximum of 2 years.

Bosnia and Herzegovina

Amendments to the Criminal Procedure Code of Bosnia and Herzegovina, 2009

The Law on Amendment to the Criminal Procedure Code was adopted on 20 February 2009 and entered into force on 9 April 2009. The amendments provide for the compulsory detention of persons sentenced at first instance to five years' imprisonment or more, removing the ability, available under the previous Code, for trial chambers to order the temporary release of an accused following the pronouncement of a first-instance verdict.

The change is intended to enable a more efficient court procedure and prevent persons convicted of serious crimes from committing new crimes or leaving Bosnia and Herzegovina in between the first sentence and the appeal process. The new measure may not be applied retroactively.

Fiji

Geneva Conventions (Amendment) Promulgation 2009

The Promulgation was promulgated and entered into force on 9 February 2009. It amends the 2007 Geneva Conventions Promulgation to allow for the protection of the distinctive emblem of the red crystal in accordance with Additional Protocol III to the Geneva Conventions. Fiji acceded to the Additional Protocol III on 30 July 2008.

Crimes Decree (Decree No. 44 of 2009)

The Crimes Decree (Decree No. 44 of 2009) was gazetted on 5 November 2009, the date of its entry into force. This updates, amends and replaces the former Penal Code of 1945. Part 12 – “Offences Against the International Order” – purports to implement the Rome Statute of the International Criminal Court, to which Fiji became a party on 29 November 1999. It incorporates the crimes of genocide and crimes against humanity into Fijian law. It empowers the Fijian Supreme Court to try any person in Fiji who is accused of such crimes, whether or not such crimes were committed in Fiji or had any effect in Fiji. The Decree does not include war crimes, which are covered to a certain degree in the Geneva Conventions Promulgation of 2007.

Japan

Act on the Prohibition of the Production of Cluster Munitions and the Regulation of the Possession of Cluster Munitions, 2009

The Act on the Prohibition of the Production of Cluster Munitions and the Regulation of the Possession of Cluster Munitions was adopted on 10 March 2009, with the stated purpose of ensuring the adequate implementation of the

Convention on Cluster Munitions by prohibiting the production of cluster munitions and taking measures to regulate their possession. In this regard, the Act prohibits in absolute terms the manufacture of cluster munitions (Article 3). However, there are important exceptions for possession and import by “permitted possessors” (Article 4 and following). Such exceptions would require fulfilling the standards for permission for possession described in Article 7, as well as not falling under the grounds for disqualification set in Article 6. The import of cluster munitions must be subject to certification in accordance with domestic law. Possession of cluster munitions by Self-Defence Forces requires a special permit granted by the Ministry of Economy, Trade and Industry (Article 18).

Luxembourg

Law Implementing the Convention on Cluster Munitions, 2009

The Law implementing the Convention on Cluster Munitions was adopted on 4 June 2009 and published in the Official Gazette A – No. 147 of 22 June 2009. The law prohibits the development or manufacture of cluster munitions or explosive sub-ammunitions, as well as the assembly of prefabricated pieces into a complete weapon. The transformation, repair, acquisition, sale, use, detention, transport, transfer, stockpiling or retention of such weapons is also prohibited (Article 2). Article 3 additionally prohibits financing the production of cluster munitions or explosive sub-ammunitions.

Article 4 provides that a person violating any of the above provisions may be punished by way of a fine ranging from 25,000 to 1,000,000 euros, and/or imprisonment of 5–10 years. Finally, any cluster munitions seized will be confiscated and destroyed at the expense of the condemned person.

Netherlands

Implementation of the 1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property (Implementation) Act, 2009

The Implementation of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Implementation) Act was adopted on 12 June 2009. The Act prohibits, *inter alia*, importing into the Netherlands cultural property removed from the territory of a State Party in breach of the Convention, or unlawfully appropriated in the territory of a State Party. This includes the export of cultural property arising from occupation, as covered by the Convention. The 2009 Act amends the Code of Civil Procedure and the Civil Code, establishing that legal proceedings for the return of movable property may be instituted against a possessor of cultural property in breach of this Act. Finally, the Act designates authorities responsible for supervising compliance with its provisions. It also provides that

where there is reasonable suspicion that the Act has been contravened, the authorities shall take custody of the cultural property concerned in order to enable the State Party from which the cultural property originates to arrange for its return.

New Zealand

Cluster Munitions Prohibition Act, 2009

The Cluster Munitions Prohibition Act 2009 has the stated purpose of implementing New Zealand's obligations under the Convention on Cluster Munitions. In this regard, the Act prohibits the use, development, or production of cluster munitions, as well as otherwise acquiring, possessing, retaining, stockpiling or transferring such weapons. Additionally, it is prohibited to assist, encourage or induce another person to engage in any of the above activities. The Act also prohibits any person to provide or invest funds "with the intention that the funds be used, or knowing that they are to be used, in the development or production of cluster munitions" (Section 10(2)).

Further, the Act prohibits members of the Armed Forces from expressly requesting the use of cluster munitions when (i) such member is engaged in operations, exercises, or other military activities with the armed forces of a State that is not a party to the Convention; and (ii) the choice of munitions used is within the exclusive control of the Armed Forces (Section 10(3)). However, a member of the Armed Forces does not commit a prohibited act merely by engaging, in the course of his or her duties, in operations, exercises, or other military activities with the armed forces of a State that is not a party to the Convention and that has the capability to engage in conduct prohibited by Section 10(1).

Any person committing an offence against Section 10(1), (2), or (3) is liable on conviction to imprisonment for a term not exceeding 7 years, or a fine not exceeding 500,000 NZD (256,000 euros), or both.

The offence must have been committed in the territory of New Zealand, or if abroad, by a New Zealand national, a person who is ordinarily resident in New Zealand but not the citizen of any State, a member of the New Zealand Armed Forces, or a body corporate or corporation sole incorporated in New Zealand (Section 9).

Philippines

Republic Act No. 9851, Philippine Act 2009 on Crimes against International Humanitarian Law, Genocide and Other Crimes against Humanity

The Philippine Act 2009 on Crimes against International Humanitarian Law, Genocide and Other Crimes against Humanity was enacted into law on 11 December 2009, but at time of printing had not entered into force. The Act incorporates into national legislation the international crimes of genocide, crimes

against humanity and war crimes as defined by the Rome Statute of the International Criminal Court. Additionally, it includes as war crimes the unjustifiable delay in repatriation of prisoners of war or other protected persons, as well as the launching of an attack against works or installations containing dangerous forces, both of which are not included as such in the international text. Notably, serious violations under the act include intentionally directing attacks against buildings, material, medical units and transport, and personnel using the red crystal on white background (the third distinctive emblem found in Additional Protocol III to the Geneva Conventions of 1949).

As for the category “Other serious violations of the laws and customs applicable in armed conflict”, the law includes acts that would be considered an offence in both international and non-international armed conflicts. Thus starvation as a method of war and attacks against works or installations containing dangerous forces are also criminalized when committed in non-international armed conflicts.

The Act provides for the criminal liability of superiors where they permit the commission of an offence or negligently fail to prevent it. In addition, superior orders shall not relieve the subordinate of his or her own criminal responsibility. Similarly, a Head of State, a member of parliament or any government official may not avail him or herself of immunities against prosecutorial action under the Act.

The Act provides for extra-territorial jurisdiction, provided that the suspect is present in the Philippines.

Spain

Amended Organic Law 6/1985 of the Judicial Power, 2009

On 15 October 2009, the Senate adopted an amendment to Article 23.4 of the Organic Law 6/1985 on the Judiciary, which conferred on Spanish courts the ability to exercise their jurisdiction over international crimes (notably violations of the Geneva Conventions and their First Additional Protocol) which are committed without any significant link to Spain or Spanish nationals. The amendment, which entered into force on 4 November 2009, restricts the Courts’ jurisdiction to cases in which the victims are of Spanish nationality, in which Spain has a “relevant connecting link”, or where the alleged perpetrator is present in Spain, and as long as “proceedings implying an effective investigation and prosecution have not begun in another competent country or in an International Court”. A definition of “effective” is not included in the law.

Ukraine

Law Amending Various Legislative Acts of the Ukraine (Law N 1675-VI), 2009

The Law Amending Various Legislative Acts of the Ukraine (Law N 1675-VI) entered into force on 22 October 2009. This law introduces changes to Ukraine’s

Criminal Code and the Law on the Red Cross and Red Crescent Emblems in Ukraine (Register of the Parliament of Ukraine, 1999, N 36, Art. 316). The aim of this law is to implement Additional Protocol III to the Geneva Conventions concerning the acceptance of an additional distinctive emblem, which was signed by Ukraine in June 2006. This law extends existing protections in Ukrainian law for the red cross and red crescent emblems to the new emblem, the red crystal.

United Kingdom of Great Britain

Geneva Conventions and United Nations Personnel (Protocols) Act 2009

The United Kingdom Geneva Conventions and United Nations Personnel (Protocols) Act 2009 received the Royal Assent on 2 July 2009, and provides the implementing legislation for Additional Protocol III to the 1949 Geneva Conventions. The law adds the red crystal or “third Protocol emblem” to the list of emblems, signs and signals protected under the Geneva Conventions Act 1957, and extends the grave breach of perfidy to include that emblem. The Act also amends the UN Personnel Act of 1997 to enable the UK to become a party to the 2005 Optional Protocol to the 1994 Convention on the Safety of United Nations and Associated Personnel.

B. National Committees on International Humanitarian Law

Mexico

In August 2009, the International Humanitarian Law Inter-ministerial Commission was created by presidential decree. The members of the Commission are representatives of the ministries of Foreign Affairs, Defence, Interior and the Navy. The Commission is chaired by a rotating Presidency among its members and the secretariat functions are attributed to the Ministry of Foreign Affairs. The Committee is the consultative and technical body to the Government on IHL matters and is in charge of dissemination and promotion of IHL. The Committee is also in charge of evaluating national law and preparing recommendations to national authorities regarding IHL implementation and dissemination.

Switzerland

On 16 December 2009, the national IHL Interdepartmental Committee was created in Switzerland. The members of the Committee are representatives of the Ministries of Foreign Affairs, Defence, Interior, Justice and Economy. The Ministry of Foreign Affairs is the chair of the Committee and acts as the Committee’s Secretariat.

The purpose of this Committee is the exchange of information and the co-ordination of activities related to IHL at national level, with the aim of ensuring

coherence in IHL implementation and dissemination. The Committee is competent to evaluate existing national law in light of the country's obligations under IHL, and to submit recommendations to ensure and promote IHL implementation and to encourage IHL dissemination. The Committee does not have any decision-making power.

C. Case law

Bosnia and Herzegovina

Prosecutor v. Zoran Maric, Court of Bosnia and Herzegovina, Section I for War Crimes, Case X-KR-05/96-3, 29 October 2009

On 29 October 2009, following the deliberation and acceptance of a Guilty Plea Agreement concluded between the accused and the State Prosecutor's Office, the Court of Bosnia and Herzegovina (Section I for War Crimes) delivered a first instance verdict finding Zoran Maric guilty of war crimes against civilians. He was sentenced to fifteen years' imprisonment.

Zoran Maric was accused of being a member of an organized armed group, the Army of Republika Srpska, which rounded up Bosnian civilians and killed them during the armed conflict in the territory of Jajce municipality between the Army of Republika Srpska and the Army of Bosnia and Herzegovina and HVO (Croat Defence Council).

As established by the Court, on 10 September 1992 the accused acted in violation of Article 3(1)(a) and (c), common to the four Geneva Conventions of 1949, and Article 147 (on grave breaches) of the Fourth Geneva Convention related to the protection of civilian persons. In terms of Bosnian penal law, Mr Maric's offences were found to fall under the criminal offence of War Crimes against Civilians as defined in Article 173(1)(c) of the Criminal Code – "killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture, inhuman treatment)" – in conjunction with Articles 29¹ and 180 (1).²

- 1 Criminal Code of Bosnia and Herzegovina, Article 29 – Accomplices: "If several persons who, by participating in the perpetration of a criminal offence or by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offence, shall each be punished as prescribed for the criminal offence".
- 2 Criminal Code of Bosnia and Herzegovina, Article 180 – Individual Criminal Responsibility: "(1) A person who planned, instigated, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offence referred to in Article 171 (Genocide), 172 (Crimes against Humanity), 173 (War Crimes against Civilians), 174 (War Crimes against the Wounded and Sick), 175 (War Crimes against Prisoners of War), 177 (Unlawful Killing or Wounding of the Enemy), 178 (Marauding the Killed and Wounded at the Battlefield) and 179 (Violating the Laws and Practices of Warfare) of this Code, shall be personally responsible for the criminal offence. The official position of

Although the 2003 Criminal Code was adopted after the commission of the crimes, the Court found that the applicability of the Code and its system of penalties to the case did not violate the principle of legality, because the crime of which the accused was found guilty constitutes a criminal offence under the “general principles of international law”. Resorting to this source of law is possible under Article 4(a) of the Law on Amendments to the Criminal Code of Bosnia and Herzegovina (and pursuant to Articles 3 and 4 of the Code), as well as under Article 7 of the European Convention on Human Rights. This position has been confirmed by the practice of the Court of Bosnia and Herzegovina so far,³ as well as the decision of the Bosnia and Herzegovina Constitutional Court in the case against Abduladhim Maktouf.⁴

Colombia

Gian Carlo Gutiérrez Suárez, Supreme Court, Segunda instancia de Justicia y Paz, Radicado No. 32.022, 21 September 2009

The Colombian Supreme Court’s Appeals Chamber overturned a decision of the Peace and Justice Chamber of Bogota’s Superior Tribunal (*Sala de Justicia y Paz del Tribunal Superior de Bogotá*) on the confirmation of charges against Gian Carlo Gutiérrez Suárez. The Peace and Justice Chamber conducted a hearing on the crimes allegedly committed by Mr Gutiérrez Suárez, a former paramilitary, according to the proceedings established under the Justice and Peace Law (Law 975 of 2005). According to this law, former members of armed groups can benefit from reduced penalties for the crimes they have committed if they confess them to the Tribunal and collaborate with the justice system. The Court based its decision to reject the Chamber’s decision on charges, *inter alia* on the grounds that neither the Prosecutor nor the Chamber had taken the victim’s point of view into account to the proper extent.

The Court also questioned the Chamber’s decision to qualify the acts imputed to the accused only as war crimes and not also as crimes against humanity, which are provided for in Colombia’s legal framework. This issue allowed the Court to discuss requirements for war crimes in international law, as well as Colombian legislation and jurisprudence. Among other issues, the Court analysed: the existence of an armed conflict; the applicability of Article 3 common to the Geneva Conventions of 1949 as well as Additional Protocol II; and the requirement of the belligerent nexus to constitute a war crime. Finally, the Court also discussed the pertinence of truth commissions in dealing with large-scale violence.

any accused person, whether as Head of State or Government or as a responsible Government official person, shall not relieve such person of criminal responsibility nor mitigate punishment”.

3 First and Second instance verdict in the case of Dragoje Paunovic, No. X-KR-05/16, 26 May 2006.

4 Bosnia and Herzegovina Constitutional Court, *Prosecutor v. Abduladhim Maktouf*, Decision on admissibility and merits, Case No. AP 1785/06, 30 March 2007.

Kosovo

Prosecutor v. Gani Gashi, *District Court of Pristina, Case P. No. P.23/08, 3 March 2009*

This case was the first trial to be held under the auspices of the European Union Rule of Law Mission in Kosovo (EULEX). The District Court of Pristina is composed of a panel of three judges – two from the EULEX mission and one from Kosovo.

Mr Gani Gashi, a Kosovo Albanian national, was sentenced to 17 years of imprisonment by the District Court of Pristina after being found guilty of war crimes against the civilian population (in violation of the Socialist Federal Republic of Yugoslavia Criminal Code, Article 142,⁵ as read in conjunction with the Geneva Conventions of 1949 and Article 4 of Additional Protocol II).

According to the Court, Mr Gashi, in his capacity as soldier of the Kosovo Liberation Army (KLA), on 12 July 1998 wilfully murdered a civilian, attempted to murder another, and violated the bodily integrity and health of two others. The victims were all members of a single family. At the time of the event, Mr Gashi was in charge of guarding a checkpoint near Komoran/Komorane in central Kosovo, in order to stop the progression of the Serbian forces and to protect the civilian population.

The court confirmed the requirement under Article 146 of the Geneva Conventions to implement the Conventions into domestic law. As for the classification of certain acts as war crimes, the Court assumed as established and uncontested the existence of a non-international armed conflict in Kosovo between Serbian Forces and the KLA during the period material to the case. This was based particularly in findings made to this effect by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Limaj et al.* (November 2005) and *Haradinaj et al.* (April 2008), as well as by the Supreme Court of Kosovo in *Selim Krasniqi et al.* (April 2009).

5 Article 142 on war crimes against the civilian population reads: "Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty".

United States of America

United States of America v. Steven Dale Green, *United States District Court, Western District of Kentucky, Paducah Division, Case 5:06-cr-00019-TBR, 4 September 2009*

On 4 September 2009, the United States District Court of Kentucky found a former member of the United States armed forces guilty of conspiracy to commit aggravated sexual abuse, premeditated murder, felony murder, aggravated sexual abuse, use of a firearm during a crime of violence and obstruction of justice. On 12 March 2006, in Mahmudiyah, Iraq, Mr Green and four other United States Army soldiers raped and killed a 14-year-old girl living close to a checkpoint under their guard, and killed her mother, father and younger sister. The soldiers then set fire to the house and the bodies in order to conceal the evidence.

The US District Court in Paducah, Kentucky, condemned Mr Green to five consecutive life sentences, without any possibility of release on parole.