

REPORTS AND DOCUMENTS

What's new in law and case law around the world?*

Biannual update on national implementation of international humanitarian law related treaties
July – December 2012

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The biannual update on national legislation and case law is an important tool in promoting the exchange of information on national measures for the implementation of international humanitarian law (IHL). The ICRC was entrusted with this task in a resolution adopted by the 26th International Conference of the Red Cross and Red Crescent in 1995.

The laws and case law presented below were either adopted by States or delivered by domestic tribunals in the second half of 2012 (July–December) or collected by the Advisory Service during that period. They cover a variety of topics linked to IHL such as status of protected persons, torture, and protection of cultural

ICRC Advisory Service

The ICRC's Advisory Service on International Humanitarian Law aims to provide a systematic and proactive response to efforts to enhance the national implementation of international humanitarian law (IHL). Working worldwide, through a network of legal advisers, its four priorities are: (i) to encourage and support adherence to IHL-related treaties; (ii) to assist States by providing them with the technical expertise required to incorporate international humanitarian law into their domestic legal frameworks; (iii) to collect and facilitate the exchange of information on national implementation measures; and (iv) to support the work of committees on IHL and other bodies established to facilitate the IHL implementation process.

* This selection of national legislation and case law has been prepared by Jana Panakova, Legal Attachée of the ICRC Advisory Service on International Humanitarian Law.

property during an armed conflict or jurisdiction of military tribunals. The full texts of these laws and case law can be found in the ICRC's database on national implementation at: <http://www.icrc.org/ihl-nat>.

To further its work on implementation of IHL, the ICRC organised a number of workshops and national and regional events in the period under review. Of particular interest was for example the *12th Annual Regional Seminar on International Humanitarian Law* in Pretoria in August 2012, organised by the ICRC Delegation in Pretoria with support from the Advisory Service and co-hosted by South Africa's Department of International Relations and Cooperation. The Seminar brought together representatives of Ministries of Foreign Affairs, Defence, and Justice, as well as Parliamentarians from eighteen countries including Kenya, Uganda, Zimbabwe, Madagascar or South Sudan. For the first time the Seminar was opened to the members of the African Union Commission on International Law, who participated as observers. The aim of the Seminar was to share the experience of the participating countries with regard to the functioning of the National IHL Committees and ratification and implementation of weapons treaties, notably the Convention on Cluster Munitions, Arms Trade Treaty and African Nuclear-Weapon-Free Zone Treaty.

Another way in which the Advisory Service facilitates the domestic implementation of IHL is through support of the National IHL Committees or similar bodies – inter-ministerial or inter-institutional bodies which advise the governments of their respective countries on all matters related to IHL. Such Committees *inter alia* promote ratification of or accession to IHL treaties, make proposals for harmonisation of the domestic legislation with provisions of these treaties and participate in the formulation of the state's position regarding IHL-related matters. There were 101 National IHL Committees across the world by the end of 2012. It is worth noting that in December 2012, Egypt's post-revolution Government decided to re-establish the National IHL Committee previously created in 2000.

Universal participation in IHL treaties is a first vital step toward the respect of life and human dignity in situations of armed conflict, and is therefore a priority for the ICRC. In the period under review, nine of the twenty-eight main IHL and other related international conventions and protocols¹ were ratified or acceded to by various States. In particular, there has been notable accession to the *Convention on Cluster Munitions* (CCM). Five states have ratified the Convention in the second half of 2012 and at least four have adopted legislation that gives domestic effect to the Convention's provisions. In this regard it is worth noting that although the CCM was adopted rather recently, it had already seventy-seven States Party by the end of 2012, showing the true interest of States in regulating and prohibiting the use of weapons that have taken a heavy toll on civilians for the past 40 years both, during fighting and after the end of military operations.

Apart from the twenty-eight IHL-related international conventions and protocols mentioned above, the Advisory Service also follows ratification of

1 To view the full list of IHL-related treaties, please visit the ICRC Treaty Database: <http://www.icrc.org/ihl>.

other international treaties that may be of a relevance *inter alia* for the protection of persons during armed conflict and the prevention and repression of violations of IHL, such as the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* or *International Convention for the Protection of all Persons from Enforced Disappearance*. With regards to the latter, four states have ratified the Convention in the second half of 2012, bringing the total number of ratifications as of 31 December 2012 to 37. The Convention entered into force in December 2010.

Ratifications and Accessions

JULY – DECEMBER 2012

Conventions	States	Ratification date	Total number of ratifications
1980 Convention on Conventional Weapons	Burundi	13 July 2012	115
1980 Protocol II to the Convention on Conventional Weapons	Burundi	13 July 2012	92
1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	United Arab Emirates	19 July 2012	153
	Lao (People's Democratic Republic of)	26 September 2012	
	Nauru	26 September 2012	
1995 Protocol IV to the Convention on Conventional Weapons	Cuba	14 November 2012	101
1997 Anti-Personnel Mine Ban Convention	Poland	27 December 2012	161
1999 Hague Protocol to the Hague Convention on Cultural Property	Mali	15 November 2012	64
2000 Optional Protocol to the Convention on the Rights of Child	Indonesia	24 September 2012	150
	Nigeria	25 September 2012	
	Swaziland	24 September 2012	
2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Mauritania	3 October 2012	65
	Austria	4 December 2012	

(Cont.)

Conventions	States	Ratification date	Total number of ratifications
2003 Protocol V to the Convention on Conventional Weapons	Burundi	13 July 2012	81
	Turkmenistan	23 July 2012	
	Cuba	14 November 2012	
2005 Additional Protocol III to the Geneva Conventions	Uruguay	19 October 2012	61
2006 Convention against Enforced Disappearances	Colombia	11 July 2012	37
	Peru	26 September 2012	
	Mauritania Samoa	3 October 2012 27 November 2012	
2008 Convention on Cluster Munitions	Hungary	3 July 2012	77
	Cameroon	12 July 2012	
	Switzerland	17 July 2012	
	Peru	26 September 2012	
	Australia	8 October 2012	

National implementation of international humanitarian law

A. Legislation

Australia

Criminal Code Amendment (Cluster Munitions Prohibition) Act 2012

On 21 August 2012, Australia's Senate passed the *Criminal Code Amendment (Cluster Munitions Prohibition) Act*. The Act amends the *Criminal Code Act of 1995*, ensuring consistency between Australian law and the *Convention on Cluster Munitions* (hereinafter CCM) by creating offences and penalties in relation to cluster munitions and explosive bomblets. The substantive provisions of the Act commence on the day the CCM comes into force for Australia – on the first day of the sixth month after Australia deposits its instrument of ratification. Australia ratified the CCM on 8 October 2012.

The definitions of cluster munition and explosive bomblets provided for in the Act correspond to those stipulated in the CCM. The Act prohibits the direct use, development, production, acquiring, stockpiling, retention and transfer of cluster munition. Additionally, the same penalty (10 years of imprisonment) applies to those who assist, encourage or induce another person to do any of the proscribed acts presuming that the latter person carries out the act and the former one intended the act to be carried out.

The Act further provides for four situations – ‘defences’ – whereby specific circumstances allow for exceptions to the stipulated prohibitions. Firstly, the Minister of Defence can authorise specified members of the Australian Defence Force (hereinafter ADF) or other Australian public officials to acquire or retain specified cluster munitions for the purpose of either development of or training in cluster munition detection, clearance or destruction; for development of cluster munition counter-measures; or for their destruction. Secondly, cluster munitions may be transferred for the same purpose to another State Party to the CCM. Thirdly, Australians who are members of the ADF would not commit an offence under the present Act if they act in the course of military cooperation with a country not party to the CCM; their conduct is not connected with the Commonwealth committing any of the acts prohibited by the present law (e.g. use, production, stockpiling or transfer of cluster munition); and it does not consist of expressly requesting the use of cluster munitions where the choice of munition used is within Australia’s effective control. And lastly, the Act allows for the stockpiling, retention or transfer of a cluster munition by a member of the armed forces or by a person connected with these armed forces of a country that is not Party to the CCM and it is done in the course of military cooperation with the ADF and in connection with the use of a base, an aircraft or a ship on the Australian territory by the said foreign armed forces.

Colombia

Legislative Act 1 of 2012 which establishes legal instruments of the transitional justice within the framework of article 22 of the Constitution and other provisions, 31 July 2012

The Legislative Act 1/2012, or so-called *Legal Framework for Peace*, amends the Constitution of Colombia by inserting two transitory articles 66 and 67. The former article writes transitional justice into the Constitution with the expressed aim to end the non-international armed conflict, secure lasting peace and security for the people of Colombia, while guaranteeing the right of victims to truth, justice and reparations.

The Act introduces the concept of ‘transitional justice instruments’ and instructs Congress to adopt a statutory law in this regard. A law shall equally establish a Truth Commission, the mandate of which may include formulation of the recommendations for the application of the transitional justice instruments. Inherent in the transitional justice mechanisms are also criteria for prioritization of penal prosecution, which shall be determined by the Attorney General.

The Act further instructs Congress to determine the selection criteria that would allow to focus the efforts on the criminal investigation of those most responsible for war crimes, genocide and crimes against humanity; and to authorise a conditional waiver of criminal prosecution in all cases that have not been selected.

The gravity and representativeness of a case shall be taken into account when drafting the criteria for selection. Through a statutory law, Congress shall further determine in which cases the convicted individual is eligible for a suspension of the sentence or for an alternative sentence.

Such a differentiated treatment shall only be available in the framework of a peace agreement and shall apply to ‘illegal armed groups that have taken part in the non-international armed conflict’ on one hand and to the state agents in relation to their participation in the same conflict on the other. ‘Illegal armed groups that have not taken part in the non-international armed conflict’ are excluded from the application of the transitional justice instruments; and so are members of illegal armed groups that have recidivated after their demobilisation. Further conditions include handing over weapons, contributing to the clarification of the truth, providing reparation to the victims, releasing hostages and unlawfully recruited minors.

The new provisional article 67 foresees a statutory law that would determine which crimes are to be considered ‘political crimes’ for the purpose of future participation in politics. It explicitly excludes from future participation in politics those who were convicted and sentenced for either genocide or crimes against humanity.

The deadline for Congress to adopt the laws that will give effect to the Legislative Act 1/2012 is four years.

Legislative Act No. 2 of 2012 that amends articles 116, 152 and 221 of the Constitution of Colombia

On 27 December 2012, the President of the Republic of Colombia signed into law Legislative Act No. 2 of 2012 that modifies the Colombian Constitution by expanding the scope of country’s military criminal jurisdiction.

The Act establishes a ‘Court of Criminal Guarantees’ (*Tribunal de Garantías Penales*) that will monitor any investigation or prosecution of a member of the Public Force (*La Fuerza Pública*; includes both armed and police forces). The Court shall also settle any jurisdictional conflicts that may arise between the ordinary jurisdiction and the military one.

In Article 3, the Act equips courts-martial, military and police courts with an exclusive jurisdiction over offences committed by members of the Public Force in active service and in relation to this service, as well as an exclusive jurisdiction to prosecute violations of international humanitarian law (with the exceptions listed below) committed by members of the same force. Crimes against humanity, genocide, enforced disappearances, extrajudicial executions, sexual violence, torture and forced displacement are however explicitly excluded from the subject-matter jurisdiction of the military judiciary.

The Act further stipulates that in cases where the acts of the members of the Public Force are committed in relation to an armed conflict, the investigating and prosecuting authorities shall apply exclusively international humanitarian law

(IHL). Here the Act foresees a statutory law that would harmonise the Colombian penal law with the rules of IHL and interpret the latter.

Law No. 1592 of 2012 which introduces amendments to Law No. 975 of 2005 by enacting provisions for the reintegration of members of armed groups outside the law, which shall effectively contribute to the achievement of national peace, as well as other provisions for humanitarian agreements and other provisions

Law No. 1592, adopted on 3 December 2012, amends the Law No. 975 of 2005 on the demobilisation of illegal armed groups, otherwise known as the *Justice and Peace Law*. Among other modifications it also harmonises the latter with *Law No. 1448 on the provision of attention, assistance and integral reparation to the victims of the internal armed conflict and other provisions* that was adopted in 2011.

The Law broadens the definition of victims in the *Justice and Peace Law* by including family members of the direct victims that have suffered damage as a result of crimes committed by the 'illegal armed groups'. It equally provides for differential approach and special protection of particularly vulnerable groups, notably women, children, elderly, indigenous communities, farmers, social leaders, Unions members, victims of forced displacement, disabled people or members of racial and ethnical minorities.

Furthermore, according to Law 1592, the aim of the justice and peace process should not only be to establish the truth about the facts under investigation, but also to identify 'patterns of macro-criminality' in the actions of 'illegal armed groups' and to 'reveal the contexts, causes and the reasons for it'.

Another significant change is the inclusion of a notion of *priorización de casos* (prioritisation of cases). The Law mandates the Office of the Attorney General to determine the prioritization criteria for the exercise of criminal action, aiming at clarifying the macro-criminality pattern in the actions of the illegal armed groups, while concentrating research efforts on those bearing the greatest responsibility for the said actions.

The Law further provides grounds for termination of or withdrawal from the justice and peace process; for the exclusion from the list of the candidates for the justice and peace process; as well as for revocation of alternative sanctions and legal benefits, e.g. when it is revealed that the beneficiary did not acknowledge all the crimes committed or did not hand to the authorities all the property acquired either by him/her or by the illegal armed group.

Lastly, the Law 1592 attributes primacy to the justice and peace system over the ordinary justice system, stipulating that 'in cases of conflict or collision between jurisdictions of Higher Judicial District Courts having jurisdiction over the cases referred to in the present Law and any other judicial authority, jurisdiction of the Justice and Peace judiciary will always prevail'.

Guatemala

Cluster Munitions and Explosive Bomblets Act 2012, Decree No. 22/2012

On 7 September 2012, the Congress of the Republic of Guatemala adopted an act implementing the *Convention on Cluster Munitions* that the country ratified in November 2010. The Act largely follows the language of the Convention, prohibiting the use, development, production, acquisition, stockpiling, retention and transfer, whether direct or indirect, of cluster munitions and explosive bomblets. It equally proscribes the manufacture, import, export, possession and carrying of cluster munitions, as well as acting as an intermediary in any of those activities. Those held accountable for any of the above listed offences could be sentenced to 12–18 years of imprisonment. To 10–15 years would be sentenced those who assist, encourage or induce a person to participate in any of the above listed acts.

The Act foresees three types of situations where the otherwise proscribed conduct would not constitute a punishable offence: when the acquisition, possession or retention of cluster munitions is authorised by the Ministry of Defence for the purpose of the development of or training in cluster munition detection, clearance or destruction; when the possession, retention or transfer of cluster munitions is necessary for their deactivation or destruction or for the purpose of a criminal proceeding; and when Guatemala participates in a common operation with countries not parties to the CCM.

Section 10 of the Act provides for assistance to the existing victims of the use of cluster munitions by obliging the Ministry of Public Health and Social Assistance to design a plan that would secure victims' protection.

Lastly, the *Cluster Munitions and Explosive Bomblets Act 2012* also amends the Guatemala's *Arms and Ammunition Act of 2009* by including a more comprehensive definition of what constitutes a chemical weapon.

Nauru

Geneva Conventions Act 2012

On 6 November 2012, the Parliament of the Republic of Nauru passed an act that gives effect to the *1949 Geneva Conventions* and their *1977* and *2005 Additional Protocols*. The Act was drafted on the basis of the ICRC Model Law for the implementation of the Geneva Conventions.² The Act criminalises breaches against the Conventions, provides protection against the misuse of protected emblems and other protected items and provides guidance as to the legal proceeding against protected prisoners of war and protected internees.

2 For the text of the *Geneva Conventions and Additional Protocols Model Law*, please visit: http://www.icrc.org/eng/assets/files/other/model_law_gc-ap-i-ii-iii.pdf

New Zealand

Geneva Conventions (Third Protocol – Red Crystal Emblem) Amendment Act 2012

On 11 December 2012, New Zealand amended the *Geneva Conventions Act* of 1958 by introducing an additional distinctive emblem of the Red Crystal and thus implementing the 2005 Additional Protocol III to the Geneva Conventions.

Cultural Property (Protection in Armed Conflict) Act 2012

On 11 December 2012, the Royal Assent was given to the *Cultural Property Act* that gives effect to the 1954 *Hague Convention on the Protection of Cultural Property* and meets various obligations required before New Zealand can accede to the Convention's 1954 and 1999 *Protocols*. The Act equally amends the *New Zealand Extradition Act of 1999*, the 1981 *Flags, Emblems and Names Protection Act* and 1992 *Mutual Assistance in Criminal Matters Act*.

The definition of what constitutes 'cultural property' is identical with the definition found in the 1954 Convention. The Act criminalises largely three groups of offences: (1) serious violations of *Second Protocol to the 1954 Hague Convention* (the most serious of violations are qualified as 'grave violation offences'); (2) removal of cultural property from the occupied territory; and (3) unauthorised use of the distinctive emblem of the 1954 *Hague Convention*. None of these offences can however be prosecuted without the consent of the Attorney General. A person alleged to have committed an offence may be nonetheless arrested or a warrant for his/her arrest may be issued and executed, but no further proceedings may be taken until the consent has been obtained.

The Act further provides for responsibility of superiors for acts committed by those under their effective command and control, as well as for responsibility of directors and managers of corporate bodies for offences committed by the latter.

The jurisdiction of New Zealand courts to prosecute offences committed under this Act is not limited to the acts committed on the territory of New Zealand, but extends to the serious violations committed outside its borders by either nationals of New Zealand, persons who are subject to the *Armed Forces Discipline Act of 1971* or persons who 'have been found in New Zealand, ha[ve] not been extradited, and [are] to be charged with, or in relation to, a grave violation offence.'

Samoa

Cluster Munitions Prohibition Act 2012

On 27 April 2012, almost exactly two years after Samoa ratified the Convention on Cluster Munitions, the *Cluster Munitions Prohibition Act* came into force giving effect to the Treaty provisions. Apart from prohibiting the conduct proscribed

by the CCM, the Act goes considerably beyond the scope of the Convention by *inter alia* prohibiting investment of funds in the development or production of cluster munitions. For an investment to be considered a breach of the Act, it is sufficient that the person had knowledge that the funds were to be used for the said purpose. The law defines funds as ‘assets of every kind, whether tangible or intangible, moveable or immovable, however acquired; and . . . legal documents or instruments in any form evidencing title to, or an interest in, assets of any kind.’

Interestingly, the Act provides for corporate liability for the use, development or transfer of cluster munitions, as well as for other proscribed acts. In Section 8, it stipulates that ‘if an offence was committed by a corporation, the following, as well as the corporation, shall be deemed to be guilty of the offence’. The Act then goes on to provide for individual criminal liability of the director, manager, secretary or another officer in a comparable position unless they prove that the offence was committed without their consent and that they ‘exercised all such diligence to prevent the commission of the offence as ought to have been exercised, having regards to the nature of his or her functions in that capacity, and to all the circumstances.’

Lastly, the Act binds the Minister of Foreign Affairs of Samoa to publicly specify the number of cluster munitions that he/she authorised for the purpose of development of or training in cluster munition detection, clearance or destruction.

Sierra Leone

Sierra Leone Geneva Conventions and Additional Protocols Act 2012

On 21 August 2012, the Parliament of Sierra Leone adopted an act that gives domestic effect to the 1949 *Geneva Conventions* and their 1977 *Additional Protocols*. The Act was drafted on the basis of the ICRC Model Law for the implementation of the Geneva Conventions.³

The Act guarantees the repression of violations of international humanitarian law by creating offences and penalties for grave breaches as defined in the Geneva Conventions, as well as for other violations of the Conventions and their Additional Protocols. With regards to grave breaches, the Act covers not only offences committed by citizens of Sierra Leone or those committed on its territory, but extends its application to persons of ‘whatever nationality’ committing said offences ‘within or outside [of] Sierra Leone.’ Section 2(5) the Act further highlights the universal jurisdiction of the courts in Sierra Leone to prosecute violations of international humanitarian law: ‘[w]here a person commits an offence under this section outside Sierra Leone that person may be tried and punished as if the offence was committed in Sierra Leone.’

In section 4, which largely follows the language of Article 28 of the *Rome Statute of the International Criminal Court*, the legislators provide for the

³ *Ibid.*

responsibility of military commanders and other superiors for the offences committed by those under their effective command and control.

The Act further follows the structure of the ICRC Geneva Conventions Model Act and deals with the legal proceeding with respect to protected persons and prevention of the abuse of the Emblem of the Red Cross and of other signs and signals protected by the Conventions.

Sierra Leone Red Cross Society Act 2012

The new *Red Cross Society Act* passed by the Parliament and signed into law by the President of Sierra Leone on 3 December 2012 replaces the legislation dating from 1962. Fifty years after the Sierra Leone Red Cross Society was created, the new legislation provides a much needed update of the description of the Society's role and activities and further protects the Red Cross emblem against misuse. Furthermore, the Act enhances the Sierra Leone Red Cross Society's financial independence through exempting it from taxes and obliging the Government to support the National Society through subventions.

South Africa

Implementation of the Geneva Conventions Act 2012

On 11 July 2012, the President of the Republic of South Africa assented to the Implementation of the Geneva Conventions Act of 2012, which gives domestic force to the *1949 Geneva Conventions* and their *1977 Additional Protocols*. The Act was drafted on the basis of the ICRC Model Law for the implementation of the Geneva Conventions.⁴ South Africa is not a Party to the 2005 Additional Protocol III to the Geneva Conventions and the present Act does not make any reference in this regard.

The Act effectively enacts the Conventions and Protocols into law. It aims to ensure compliance with the Conventions and prevent and punish breaches of their provisions. Within this aim it creates offences for grave breaches of the Conventions and Protocols, as well as for failure to comply with their other provisions.

The Act foresees a responsibility of superior officers, whether military or civilian, for the offences committed by their subordinates. It equally provides for prosecution of those responsible for violating the Conventions, wherever the alleged violations may have taken place: 'Any court in the Republic may try a person for any offence under this Act in the same manner as if the offence had been committed in the area of jurisdiction of that court, notwithstanding that the act or omission to which the charge related was committed outside the Republic.' The Act thus introduces, for the first time in South Africa, the principle of unlimited universal jurisdiction.

4 *Ibid.*

The Act also guarantees protection of emblems, flags, insignia and other material protected under the Geneva Conventions and Additional Protocols and creates relevant offences and penalties. Apart from individual criminal responsibility of directors and managers of a corporate body, the Act equally foresees corporate liability for the use or display of a protected sign or emblem without the consent of the Minister of Defence.

Lastly, the Act makes an explicit reference to the *Implementation of the Rome Statute of the International Criminal Court Act of 2002*, ensuring that the former will by no means be interpreted as ‘limiting, amending, repealing or otherwise altering any provision’ of the latter Act, nor as ‘exempting any person from any duty or obligation’ imposed by that Act or as prohibiting any person from complying with any of its provisions.

South Sudan

Geneva Conventions Act 2012

On 16 July 2012, the National Legislative Assembly of South Sudan passed a law giving effect to the Geneva Conventions and their Additional Protocols. The Act was drafted on the basis of the ICRC Model Law for the implementation of the Geneva Conventions.⁵

The Act creates offences and penalties for grave breaches of the Conventions and Additional Protocols, as well as for other violations of the said treaties. With regards to grave breaches, the Act equips the courts in South Sudan with universal jurisdiction to try ‘any person, of whatever nationality, who [committed, aided, abetted or procured other person to commit grave breaches] in the Republic of South Sudan or elsewhere.’

The Act further deals with the legal proceedings in respect of protected persons and proscribes the use or display of Red Cross, Red Crescent emblems and other items protected by the Conventions and their Additional Protocols without the consent of the Minister of Justice.

Switzerland

Federal Law on War Material Amendment Act 2012

On 16 March 2012, the Swiss Federal Assembly passed an amendment to its *Federal Law on War Material* adopted in 1996, thus giving effect to the Convention on Cluster Munitions that Switzerland ratified on 17 July 2012. The amendment inserts into Chapter 2 of the Law Article 8a which deals specifically with cluster munitions, prohibiting their development, manufacture, import, export, transit, stockpiling, handing over, acquisition or acquisition as an intermediary. The Act equally penalises facilitation or incitement to commit any of the prohibited acts. Retention,

⁵ *Ibid.*

acquisition or transfer of cluster munitions is nonetheless permitted if authorised for the purpose of developing and training personnel in techniques of detection, clearance and destruction of cluster munitions.

Apart from implementing the CMC, the *Federal Law on War Material Amendment Act 2012* also introduces a ban on direct and indirect financing of prohibited war material. The notion of 'prohibited war material' refers not only to cluster munitions but equally covers chemical, biological and nuclear weapons, as well as anti-personnel landmines. The Act defines the direct financing as *the 'direct extension of credits, loans and donations or comparable financial benefits to cover or advance the costs of the development, manufacturing or the acquisition of prohibited war material.'* Indirect financing is referred to as *'participation in the companies that develop, manufacture or acquire prohibited war material or a purchase of bonds or other investment products issues by these companies'.* However, *such conduct will be considered a violation of the Law only if the intention of the person is to 'bypass the prohibition on direct financing'.*

Uganda

The Prevention and Prohibition of Torture Act 2012

On 27 July 2012, the President of the Republic of Uganda assented to the Prevention and Prohibition of Torture Act that gives effect to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* that Uganda ratified in 1987.

The Act defines torture as 'any act or omission, by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity for such purposes as (a) obtaining information or a confession from the person or any other person; (b) punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or (c) intimidating or coercing the person or any other person to do, or to refrain from doing, any act.' While the definition is drafted on the basis of the Convention against Torture, the Act widens the definition of torture to include 'omission', as well as to the acts committed by private individuals.

In line with the Convention against Torture, the Act excludes exceptional circumstances, such as the existence of an armed conflict, to serve as a defence to a charge of torture. The Act equally excludes defence of superior orders, prevents punishment of persons who disobey orders to undertake actions amounting to torture and enacts responsibility of superior officers over acts of torture committed by their subordinates.

The Act criminalises not only infliction of torture, but also aiding or abetting, procuring, financing, soliciting, inciting, recommending, encouraging or rendering support to a person, while knowing or having reason to believe that the support will be used for commission of torture. Moreover, the Act creates a separate

offence for those who act as accessories ‘after the fact to the offence of torture’. An accessory is a person who ‘receives or assists another who is, to his or her knowledge, guilty of an offence under this Act, in order to enable him to escape punishment’, but explicitly excludes a wife and a husband of a person guilty of torture.

The Act further prevents admissibility of evidence obtained by means of torture, prohibits the use of information obtained by torture and excludes granting of amnesty to a person accused of committing torture. It equally includes the principle of *non-refoulement* and foresees protection of victims, witnesses and persons reporting torture.

Apart from the jurisdiction based on the principle of territoriality and active and passive personality, the Prevention and Prohibition of Torture Act extends the jurisdiction of the Ugandan courts over acts of torture committed by ‘any person who is for the time being present in Uganda or in any territory under the control or jurisdiction of Uganda.’ A consent of the Director of Public Prosecutions is however required for the prosecution of non-citizens.

B. Case Law

Finland

Case against François Bazaramba, Supreme Court, 22 October 2012

On 22 October 2012, Finland’s Supreme Court rejected an appeal by the defence of Francois Bazaramba, a Rwandan-born pastor who had been convicted of involvement in the 1994 genocide. Mr. Bazaramba came to Finland as a refugee in 2003. Finland rejected a request for his extradition submitted by the Rwandan Government on the grounds that it was unlikely that Rwanda would be able to guarantee a fair trial for the suspected *génocidaire*. This decision triggered the jurisdiction of Finnish courts, as the Finnish penal code provides for a provision *aut dedere aut judicare* for all crimes with a maximum sentence of over six years. The court’s jurisdiction was also based on a principle of universal jurisdiction for international crimes, provided for in the country’s penal code.

On 11 June 2010, the District Court of Itä-Uusimaa handed down the first universal jurisdiction-based judgement in Finland, finding Francois Bazaramba guilty of genocide through killing, as well as through inflicting on Tutsis conditions of life calculated to bring about their physical destruction.⁶ The Court sentenced Mr. Bazaramba to life imprisonment. Both parties appealed the judgement. In September 2011 the Helsinki Court of Appeals sent a 14-member team of judges, prosecutors, clerks and interpreters to Rwanda to visit the crime scene and

6 See Press Release of the District Court of ITÄ- UUSIMAA, 11 June 2010, ‘Judgement in a criminal case of genocide, *Prosecutor v. Francois Bazaramba* (R 09/404)’, available at: http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Finland/Bazaramba_Press_Release_EN.pdf.

hear witnesses. Moreover, in the light of the large number of witnesses living outside Finland, the Court also held some court sessions in Rwanda, Tanzania and Zambia.

On 30 March 2012 the Helsinki Court of Appeals upheld Bazaramba's conviction. His defence subsequently sought a leave to appeal the decision in front of the Finland's Supreme Court. On 22 October 2012, the Supreme Court refused to grant the appeal, rendering the ruling of the Helsinki Court of Appeal final.

Switzerland

Case A. v. Office of the Attorney General of Switzerland, Federal Criminal Court, 25 July 2012

On 25 July 2012, the Swiss Federal Criminal Court delivered its decision in the case against the former Algerian Minister of Defence Khaled Nezzar, denying the existence of an immunity *ratione materiae* for war crimes allegedly committed during the Algerian Civil War that would preclude the Federal Prosecutor from proceeding with his investigation against the Mr. Nezzar.

Mr. Nezzar was appointed as Minister of Defence of Algeria in 1990. A year later, he was among the generals who decided to depose then-President Chadli Bendjedid, marking the beginning of the Algerian Civil War (1992–2000). Between 1992 and 1994, Nezzar was a member of the High Council of State – a provisional governing body that exercised the powers attributed by the Constitution to the President. In 2011, when Mr. Nezzar was travelling through Switzerland, a Swiss non-governmental organisation Track Impunity Always (TRIAL) and two refugees of Algerian origin filed a criminal complaint with the Swiss authorities, accusing him of war crimes and torture committed during the Algerian Civil War. The legal counsel of Mr. Nezzar argued, among other points,⁷ that his client enjoys immunity for acts committed between 1992 and 1994 owing to his position of the Minister of Defence and a member of the *Haut Comité d'État* (hereinafter 'HCE'). He equally challenged the exercise of criminal jurisdiction by Swiss authorities due to the lack of a link between the accused and Switzerland. With regard to the latter argument, the Federal Criminal Court acknowledged that the presence of the accused on Swiss territory is indeed an essential condition for conducting criminal proceedings in Switzerland for acts committed abroad. The Court however argued against an overly strict interpretation of the condition, which would 'in practice amount to allowing the offender to decide whether or not the prosecution shall proceed.' The Court held that the condition must be met at the time of the opening of the criminal proceedings and the fact that the accused leaves Switzerland is not enough to hinder such proceedings.

7 The other arguments of the Defence included violation of the principle of non-retroactivity of criminal law; non-existence of a required strict link between the accused and Switzerland, as well as an absence of a refusal of an extradition request by the State concerned (i.e. Algeria). See *Case A. v. Office of the Attorney General of Switzerland*, Federal Criminal Court, 25 July 2012, 'Presentation of Facts', para. G, available at: http://www.trial-ch.org/fileadmin/user_upload/documents/affaires/algeria/BB.2011.140.pdf.

As concerns the accused's defence of immunity from jurisdiction, the Court agreed that while serving as Algeria's Defence Minister and a member of the HCE, Khaled Nezzar benefitted from immunity *ratione personae* covering both his official acts and acts committed in his personal capacity. This immunity is however of a temporary nature and is thus, in the Court's view, 'extinct'.⁸ With regard to the immunity *ratione materiae*, the Court acknowledged that residual immunity prevails even after leaving the office and protects an individual from prosecution for official acts performed whilst in the office. This immunity however does not cover acts committed by the former official before or after leaving the office, nor does it cover criminal offences committed in his/her private capacity during the period whilst in office.

The Court recognized an explicit trend at the international level to restrict the immunity of (former) Heads of State for crimes contrary to rules of *jus cogens*, such as genocide, crimes against humanity and torture. Considering whether immunity *ratione materiae* covers all acts committed by the accused during his office and supersedes the need to ascertain his possible responsibility with respect to the alleged grave violations of human rights, the Court concluded that '[i]t would be contradictory and futile to, on one hand, affirm the intention to combat against these grave violations of the most fundamental human values and, on the other, to accept a wide interpretation of the rules governing functional immunity, which would benefit former State officials with the concrete result to hinder, *ab initio*, any investigation. In such case, it would be difficult to admit that conduct contrary to fundamental values of the international legal order can be protected by rules of that very same order.'⁹ The Court consequently rejected the existence of immunity *ratione materiae* as a defence against violations of peremptory norms of international law and thus cleared the way to continue the prosecution of Khaled Nezzar for war crimes.

United Kingdom

Case Ndiku Mutua et al. v. the Foreign and Commonwealth Office, the High Court of Justice, 5 October 2012

On 5 October 2012 the Hon. Justice McCombe of the High Court of Justice held that a fair trial against the British Government is possible even 50 years after the alleged torture and other ill-treatment of the claimants during the Mau Mau insurgency in Kenya. The emergency lasted between 1952 and 1960 and involved Kikuyu-dominated anti-colonial group called Mau Mau and elements of the British Army. The claimants in the present case are five individuals that have been allegedly detained and subjected to severe torture in the hands of the Colonial

⁸ *Ibid.*, para 5.4.2.

⁹ See unofficial translation from French provided by the Swiss non-governmental association TRIAL (Track Impunity Always), para 5.4.3, available at: http://www.asser.nl/upload/documents/20130221T040104-Nezzar_Judgm_Eng_translation%2025-07-2012.pdf.

Administration's security forces. They submit that British military officers exercised 'full command and control over the entire security apparatus within the colony and were thus in a position to prevent . . . tortious conduct by those under their command and control.'¹⁰ The defendant's principal argument was that too much time had elapsed; that the majority of those on the defendant's side who might have given oral evidence are now dead, and that fair trial is thus no longer possible.

Hon. Justice McCombe considered in length the availability of documents and witnesses. He concluded that, thanks to a large amount of relevant documentation (including official minutes and memoranda of the UK War Council and minutes of the Chief Secretary's Complaints Coordinating Committee set up in 1954 to monitor and manage serious complaints made against the security forces and local administrators in Kenya), a fair trial remained possible.

Moreover, Justice McCombe noted with dissatisfaction that the defendant had failed to adequately take into account the number of potential witnesses at lower levels of government and the army, who are still alive and might be able to supplement its case. Lastly, Justice McCombe underlined the fact that the burden of proof lies upon the claimants and thus serves as an important safeguard for the defendant.

Case Secretary of State for Foreign and Commonwealth Affairs v. Yunus Rahmutullah, the Supreme Court, 31 October 2012

On 31 October 2012 the Supreme Court of the United Kingdom unanimously dismissed the appeal of the Secretary of State for Foreign and Commonwealth Affairs, and by a majority of five votes to two, it equally dismissed the cross-appeal of Mr. Rahmutullah. The latter appellant is a Pakistani citizen who was transferred to the United States forces after being detained by the British forces in February 2004 in an area of Iraq under United States' control. Contrary to a Memorandum of Understanding entitled '*An Arrangement for the Transfer of Prisoners of War, Civilian Internees and Civilian Detainees*' signed in 2003 between United States, the United Kingdom and Australia, the United States forces transferred Mr. Rahmutullah to the detention facility in Bagram, Afghanistan without the knowledge of the United Kingdom authorities.

An application had been made on behalf of Mr. Rahmatullah for a writ of *habeas corpus* requiring his release. On 14 December 2011, the Court of Appeal issued a writ of *habeas corpus* requiring the United Kingdom to seek the return of Mr. Rahmatullah or demonstrate why it was not possible to secure that outcome. The Secretary of State appealed this decision. In response to the request by the British authorities, the United States responded on 8 February 2012, asserting the legality of Mr. Rahmatullah's detention and suggesting that a request

10 See *Ndiku Mutua et al. v. the Foreign and Commonwealth Office*, Case No. [2012] EWHC 2678 (QB), 5 October 2012, para. 21, available at: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/mutua-fco-judgment-05102012.pdf>.

for repatriation has already been submitted by the Government of Pakistan to the United States Government.

On 23 February 2012, a second judgement in the case was delivered by the United Kingdom Court of Appeal, concluding that the United States' letter was a sufficient response to the writ of *habeas corpus* as it demonstrated that the United Kingdom could not secure the release of Mr. Rahmatullah. Mr. Rahmatullah cross-appealed the decision.

The judgement of the Supreme Court discussed *inter alia* the applicability of Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (hereinafter 'GC IV') to the situation of Mr. Rahmatullah. The Court notably discusses whether he would qualify as a 'protected person' under Article 4 of GC IV. The Court adopted the interpretation of the article by Jack L. Goldsmith III, United States Assistant Attorney General, who suggested that the phrase 'territory of a belligerent state' does not refer to a territory of any state that participates in the armed conflict covered by the Geneva Conventions, but to the 'home territory of the party to the conflict in whose hands the citizen of the neutral state finds himself.'¹¹ The Court concurred with this interpretation: 'To adopt the first interpretation would run entirely counter to the purpose of the [C]onvention ... Why should nationals of a neutral state who happen to be in a country where a conflict is taking place be denied protection under the [C]onvention simply because their country enjoys normal diplomatic relations with the state into whose hands they fall? That would arbitrarily – and for no comprehensible reason – remove from the protection of the [C]onvention an entire swathe of person who would be entirely deserving of and who naturally ought to be entitled to that protection.'¹²

The Court however rejected Mr. Goldsmith's interpretation of the phrase 'find themselves' as suggesting that protection of Article 4 of GC IV is limited to those whose presence on the territory of the belligerent state is incidental (thus excluding Mr. Rahmatullah who according to the United States' authorities travelled to Iraq for the express purpose of engaging the United States in hostilities): 'to make happenstance or coincidence a prerequisite of protection seems to ... introduce a wholly artificial and unwarranted restriction on its availability under the [C]onvention.'¹³

The Court consequently concluded that Mr. Rahmatullah indeed qualified as a 'protected person' under GC IV. As a result, not only was his transfer from the occupied territory of Iraq a *prima facie* breach of Article 49 of the GC IV (relating to deportations, transfers and evacuations), but his continued internment by the United States forces long after the close of hostilities also violated Article 133 of GC IV (regulating internment modalities after the close of hostilities). As a Power responsible for the transfer of the protected person under Article 45 of GC IV, the United Kingdom Government was 'under a clear obligation, on becoming aware

11 See *Case Secretary of State for Foreign and Commonwealth Affairs v. Yunus Rahmatullah*, the Supreme Court, 31 October 2012, para. 30, available at: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2012_0142_Judgment.pdf.

12 *Ibid.*, para. 32.

13 *Ibid.*, para. 34.

of any failure on the part of the United States to comply with any provisions of [GC IV], to correct the situation or to request the return of Mr. Rahmatullah.¹⁴ Elsewhere in the judgement, the Court reiterated that '[t]he illegality [of Mr. Rahmatullah detention]' rests not on whether the United States was in breach of [GC IV] but on the proposition that, conscious of those apparent violations, the United Kingdom was bound to take the steps required by Article 45 of [GC IV].¹⁵

United States

Case Salim Ahmed Hamdan v. United States of America on Petition for Review from the United States Court of Military Commissions Review, United States Court of Appeals for the District of Columbia Circuit, 16 October 2012

In the case against Salim Hamdan, the driver of Osama in Laden captured in Afghanistan in 2001, the United States Court of Appeals decided on whether the United States Government has authority to prosecute Mr. Hamdan for 'material support of terrorism'.

Firstly, the Court considered whether such prosecution is possible on the basis of the 2006 Military Commissions Act (hereinafter 'MCA'). MCA defines the material support of terrorism as a war crime and the Act served as a basis for Hamdan's conviction by a military commission. The Court of Appeal however held that the MCA does not authorize retroactive prosecution for conduct committed before enactment of the Act, unless the conduct was already prohibited under existing legislation as a war crime triable by a military commission.¹⁶ The Court then went on to consider whether the prosecution for material support of terrorism is possible on the basis of the law applicable at the time Mr. Hamdan was a member of Al Qaeda. The only statute that did apply at the time was 10 USC § 821, which authorised the use of military commissions to try violations of the 'law of war'.

The Court found this to mean 'international law of war' and admitted that indeed 'international law does establish at least some forms of terrorism, including intentional targeting of civilian populations, as a war crime'.¹⁷ However, the Court noted that neither the Geneva Conventions, nor the Rome Statute of the International Criminal Court or statutes of other international criminal tribunals make a reference to the concept of 'material support for terrorism'.

14 *Ibid.*, para. 38.

15 *Ibid.*, para. 53.

16 See *Case Salim Ahmed Hamdan v. United States of America on Petition for Review from the United States Court of Military Commissions Review*, United States Court of Appeals for the District of Columbia Circuit, 16 October 2012, pp. 5 and 18, available at: <http://www.lawfareblog.com/wp-content/uploads/2012/10/Hamdan-D.C.-Circuit.pdf>.

17 *Ibid.*, p. 22.

The Court thus concluded that ‘material support for terrorism’ was not an international-law war crime under 10 USC § 821 at the time Mr. Hamdan engaged in the relevant conduct. It consequently reversed the judgement of the Court of Military Commissions Review and ‘direct[ed] that Hamdan’s conviction for material support of terrorism be vacated.’¹⁸

¹⁸ *Ibid.*, p. 28.