

REPORTS AND DOCUMENTS

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

Biannual update on national implementation of international humanitarian law* July–December 2013



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). In addition to a compilation of domestic laws and case law, the biannual update includes other relevant information related to regional events organized by the ICRC, to the development of national IHL committees and to accession and ratification of IHL and other related international instruments.

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;¹ (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 Julian Jaccard, legal intern at the ICRC Advisory Service on International Humanitarian Law.

Relevant ICRC regional events

To further its work on implementation of IHL, the ICRC Advisory Service organized a number of national and regional events in the period under review. Of particular interest was the 2nd Continental Conference of National Committees on International Humanitarian Law of the Americas, co-organized with Costa Rica's Ministry of Foreign Affairs and national IHL committee, between 10 and 12 September in San José, Costa Rica. The Conference brought together governmental officials and members of seventeen national IHL committees (Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Dominican Republic, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru and Uruguay), representatives of three European national IHL committees (Germany, Spain and Switzerland), and officials from international and regional organizations including the Organization of American States, the Inter-American Court of Human Rights and UNESCO. The aim of the Conference was to follow up on the recommendations adopted at the 1st Continental Conference, including the establishment of a coordination mechanism between existing national IHL committees in Latin America and the Caribbean. Topics discussed included the regulation of the use of force in law enforcement operations and the legal needs of families of missing persons. The outcome of the Conference was the adoption of new recommendations encouraging the establishment of national IHL committees in countries where none currently exist.

Update on national IHL committees

Another way in which the Advisory Service facilitates the domestic implementation of IHL is through direct support of 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 the harmonization of domestic legislation with the provisions of these treaties, and participate in the formulation of the State's position regarding matters related to IHL. There were 103 national IHL committees across the world by the end of 2013.

In particular, on 12 July 2013, the Liberia International Humanitarian Law Committee was established as a result of an administrative agreement concluded in August 2012 between the Ministry of Justice and the Ministry of Foreign Affairs. The main function of this national committee is to further the implementation and promote the knowledge of IHL at the national level. It represents a commitment to securing the essential guarantees laid down for the victims of armed conflict, demonstrating Liberia's involvement in taking steps towards

1 In order to assist States, the ICRC Advisory Service proposes a multiplicity of tools, including thematic fact sheets, ratification kits and model laws, all available at the unit's web page, available at: www.icrc.org/en/war-and-law/ihl-domestic-law.

fulfilling its fundamental obligation to respect and ensure respect for IHL. One of the mandates of the IHL committee is to promote ratification of and adherence to IHL and other related international conventions and protocols, and the amendment of national legislation to comply with these, and to contribute to the dissemination of IHL.

The committee is composed of fifteen State institutions, including the Ministries of Foreign Affairs, Defence, Justice, Information, Education and Finance, the National Police, the Law Reform Commission, the Governance Commission, the Independent National Commission on Human Rights, the Liberia National Commission on Small Arms, the Foundation for Democracy in Liberia, the Consortium of Civil Society Organizations of Liberia, the Liberia Red Cross Society and the ICRC, as an observer. It is chaired by the Ministry of Foreign Affairs and the Ministry of Justice, and by the Law Reform Commission.

Update on the accession and ratification of IHL and other related international instruments

Universal participation in IHL treaties is a first vital step toward the respect of life and human dignity in situations of armed conflict, and therefore is a priority for the ICRC. In the period under review, fourteen IHL and other related international conventions and protocols were ratified or acceded to by various States.² In particular, there has been notable accession to the Arms Trade Treaty (ATT). Indeed, nine States have ratified the ATT in the second half of 2013. According to its Article 22, the treaty will enter into force ninety days following the date of the deposit of the fiftieth instrument of ratification.

The Advisory Service also follows ratification of 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 and the International Convention for the Protection of all Persons from Enforced Disappearance (CPPED).

The following table outlines the total number of ratifications, as of June 2013, of relevant IHL treaties and other related international instruments.

National implementation of international humanitarian law

The laws and case law presented below were either adopted by States or delivered by domestic tribunals in the second half of 2013, or collected by the ICRC Advisory Service during that period. They cover a variety of topics linked to IHL, such as the status of protected persons, and criminal and disciplinary repression of IHL violations.

2 To view the full list of IHL-related treaties, please visit the ICRC Treaty Database. ICRC, *Treaties and States Parties to Such Treaties*, available at: www.icrc.org/ihl.

**Ratifications and accessions
July–December 2013**

Conventions	States	Ratification/ accession date	Number of parties
1954 First Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict	New Zealand	17 October 2013	103
1977 Additional Protocol I to the Geneva Conventions – Declaration Article 90	Saint Vincent and the Grenadines	04 November 2013	74
1980 Convention on Conventional Weapons	Zambia	25 September 2013	117
1980 Protocol I to the Convention on Conventional Weapons	Zambia	25 September 2013	112
1980 Protocol II to the Convention on Conventional Weapons	Zambia	25 September 2013	93
1980 Protocol III to the Convention on Conventional Weapons	Zambia	25 September 2013	108
1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction	Syrian Arab Republic	14 September 2013	190
1996 Amended Protocol II to the Convention on Conventional Weapons	Zambia	25 September 2013	100
1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict	Cambodia New Zealand Morocco	17 September 2013 23 October 2013 05 December 2013	67
2001 Amendment to the Convention on Conventional Weapons	Zambia Bangladesh	25 September 2013 26 September 2013	79

2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Burundi	18 October 2013	70
2003 Additional Protocol V to the Convention on Conventional Weapons (explosive remnants of war)	Zambia	25 September 2013	84
2005 Additional Protocol III to the Geneva Conventions	Bangladesh	26 September 2013	
	New Zealand	23 October 2013	66
	Kenya	28 October 2013	
2006 Convention against Enforced Disappearances	Lithuania	14 August 2013	41
	Lesotho	6 December 2013	
2008 Convention on Cluster Munitions	Saint Kitts and Nevis	13 September 2013	84
2013 Arms Trade Treaty	Iceland	2 July 2013	9
	Guyana	4 July 2013	
	Antigua and Barbuda	12 August 2013	
	Nigeria	12 August 2013	
	Costa Rica	25 September 2013	
	Mexico	25 September 2013	
	Trinidad and Tobago	25 September 2013	
	Grenada	21 October 2013	
	Mali	3 December 2013	

This compilation is not meant to be exhaustive; it represents a selection of the most relevant developments relating to IHL implementation. The full texts of these laws and case law can be found in the ICRC's Database on National Implementation of IHL.³

A. Legislation

The following section presents, in alphabetical order by country, the domestic legislation adopted during the period under review (July–December 2013). Countries covered are Colombia, France, Libya, South Africa, Switzerland and Tunisia.

Colombia

Decree Creating a Departmental Working Group on Prevention, Assistance and Attention for Victims of Enforced Disappearance

On 27 November 2013, the governor of the Nariño Department adopted a decree creating a working group to address the situation of missing persons and their families' needs in this Department. The governor created this working group as a response to humanitarian needs and to comply with Colombian international obligations, including those resulting from the 1949 Geneva Conventions, the 1977 Additional Protocols to the Geneva Conventions, the 1994 Inter-American Convention on the Forced Disappearance of Persons and the 2006 CPPED.

According to Article 1 of the Decree, the working group will be a permanent body covering the Nariño Department, in charge of preventing people from going missing, and assisting and protecting missing persons and their families. In particular, the working group is expected to support the departmental government in reaching its duties towards missing persons; to make relevant recommendations; to promote and support the adoption of internal regulations; to publicize and disseminate the rights of missing persons and their families; and to be in charge of monitoring and analysing the disappearance phenomenon within the Department.

The working group is composed of different local authorities and representatives of civil society. The ICRC was recognized as a permanent invitee to this working group. This is the first body of this kind to be created in Colombia.

France

Law No. 2013-711 introducing various steps to adapt French justice system to European Union Law and to France's international commitments

On 5 August 2013, in the process of aligning its legislation with EU standards, the French parliament adopted a law to implement both the 2005 Additional Protocol to the Geneva

3 ICRC, *IHL: National Implementation Database*, available at: <https://www.icrc.org/ihl-nat>.

Conventions, and relating to the Adoption of an Additional Distinctive Emblem, and the 2006 CPPED (Chapters VIII and X of Law No. 2013-711, respectively).

Chapter VIII amends the Penal Code by introducing new provisions to repress those who, publicly and without having the right, use the emblem or one of the distinctive signs protected by the 1949 Geneva Conventions and their Additional Protocols.

Chapter X also amends the Penal Code, introducing the crime of enforced disappearance to the conducts punished as other crimes against humanity (Articles 212-1 to 212-3 of the Penal Code). This section incorporates a new Chapter to the French Penal Code, defining the crime of enforced disappearance as it is defined by the CPPED⁴ and providing a penalty of life imprisonment for offenders. This new Chapter also addresses command responsibility for enforced disappearance.

Libya

Law No. 29 on Transitional Justice

On 2 December 2013 the Libyan General National Congress adopted a law to address severe and systematic violations of human rights perpetrated since the beginning of the Gaddafi regime (1 September 1969). Violations committed by the “17 February Movement” during the 2011 revolution are also included. The aim of the Law is to reveal the truth about past human rights violations; to tackle State and individual responsibility; to reform remaining institutions from the Gaddafi regime; and to repair the victims of these violations.

A Fact-finding and Reconciliation Commission is established by the Law in order to investigate every severe and systematic human rights violation brought to its knowledge; to reveal the truth about circumstances relating to these violations (what, who and how); to address issues referring to internally displaced and missing persons; and to propose reparation measures for victims. According to Article 16 of Law No. 29, the Fact-finding and Reconciliation Commission is enabled to “order individuals, search locations, seize and seal documents” and “may seek the assistance of police officers” to pursue its functions. Investigations are intended to address individual responsibility and to make recommendations on how to proceed regarding specific files.

Law No. 31 on the Martyrs of Abu Salim Massacre

On 18 December 2013 the Libyan General National Congress adopted a law relating to the events that took place in the Abu Salim prison on 29 June 1996. This law is designed to provide justice and reparations for this event.

4 Under Article 2 of the CPPED, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

According to Article 1 of the Law, the “Abu Salim Prison Massacre represents a crime against humanity” which requires that a “comprehensive and transparent inquiry” be initiated. As for reparations, Article 2 establishes different measures. Families of those victims who were governmental officials at the time of the events are entitled to receive payment equal to the amount of all salaries not received since 29 June 1996. For those victims who were not public servants, a fixed special pension will be granted to the relatives.

Moreover, the Law establishes a Special Committee in charge of fact-finding activities, identification of “martyrs” and the establishment of a detailed database with all the victims’ personal data. Data collection is intended to help resolve issues with the victims’ civil status. The Special Committee is expected to work together with other authorities, including non-official bodies, in order to gather and process all the required data.

South Africa

Act No. 13 of 2013: Prevention and Combating of Torture of Persons Act

On 29 July 2013 the Parliament of the Republic of South Africa adopted an Act to give effect to the Republic’s international obligations in terms of the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which was ratified by South Africa on 10 December 1998. The legislation provides for the offence of torture and other associated acts, and is intended to prevent the torture of persons within or across the borders of the Republic.

According to Section 4, any person who commits, attempts to commit or incites, instigates, commands or procures any person to commit the act is guilty of the offence of torture. Persons found guilty of the offence may be sentenced to imprisonment, including life imprisonment. The Act recognizes criminal individual responsibility regardless of the fact that the accused is or may have been a head of State, a member of government or an elected representative or government official. In addition, no exceptional circumstances may be invoked as a justification to committing acts of torture.

The legislation provides for extra-territorial jurisdiction over acts of torture if committed by a citizen or resident, or if the acts have been committed against a citizen or resident. Jurisdiction may be exercised even in the absence of any link between the act committed and South Africa, as long as the accused is in the territory of the Republic.

Switzerland

Federal Law on Private Security Services Provided Abroad

On 27 September 2013, the Swiss Federal Assembly adopted a law to regulate private security companies and to require them to respect human rights and IHL.

Companies targeted are those based in Switzerland providing security services abroad; those providing services in Switzerland to private security companies working abroad; and those companies managed from Switzerland providing security services abroad. This law also applies to any individual working for these societies – in Switzerland or abroad – and to Swiss federal authorities employing them.

Under Article 4 of the Law, private security services include activities relating to the protection of persons in complex environments; riot control; management of detainee camps or prisons; operational and/or logistical support to armed forces; the use and maintenance of weapons systems; training of armed forces or security personnel; and deployment of intelligence and counterintelligence.

According to Article 7, all private security companies which fall within the scope of the Law have to respect the 2010 International Code of Conduct for Private Security Providers.⁵ Moreover, Articles 8 and 9 provide for specific prohibitions relating to the provision of security services. In particular, Article 8 prohibits the provision of these services for the purpose of direct participation in hostilities abroad. Article 9 of the Law prohibits providing security services when it is likely that they would contribute to the commission of serious violations of human rights.

The Law creates an authority to register new companies and to control existing ones in order to assess whether or not they are acting or willing to act in compliance with its rules.

Tunisia

Organic Law Establishing and Organizing Transitional Justice

On 15 December 2013, the Tunisian National Constituent Assembly adopted a law establishing a range of mechanisms to deal with past human rights violations committed since 1 July 1955. Its purpose is to seek the truth about these violations, address accountability and pursue national reconciliation and non-recurrence. By “violation”, the Law means any serious infringement of a human right, committed by the State or any group of individuals acting in its name as well as by other organized groups.

Accountability is to be addressed by judicial and administrative commissions according to the domestic law in force. Specialized chambers composed by non-politicized judges are established to deal with any case referred by the Truth and Dignity Commission – also created by this law – relating to election fraud, financial corruption and/or misuse of public funds.

The Truth and Dignity Commission’s main purpose is to document serious violations and to gather all data referring to victims. Its duty is to establish State responsibility and refer any case leading to proven individual criminal responsibility to the Public Prosecution Office. Reparations are also the

5 International Code of Conduct for Private Security Service Providers, 9 November 2010, available at: http://www.icoc-ppsp.org/Home_Page.html.

Commission's task, as well as drafting recommendations regarding any relevant institutional reform. The Commission is also in charge of establishing a Committee for Vetting Public Servants and Institutional Reform.

B. Case law

The following section lists, in alphabetical order by country, relevant domestic jurisprudence related to IHL and released during the period under review (July–December 2013). Countries covered are Bangladesh, Colombia, Germany, Israel, the Netherlands and South Africa.

Bangladesh

The Chief Prosecutor v. Abdul Quader Molla, Criminal Appeal Nos. 24–25 of 2013, Appellate Division of the Supreme Court

Keywords: Bangladesh Liberation War, crimes against humanity.

On 17 September 2013, the Appellate Division of the Bangladesh Supreme Court overturned the lower court judgment and sentenced Abdul Quader Molla to death for crimes committed during the country's Liberation War in 1971. Following the 17 February 2013 amendments to the International Crimes (Tribunal) Act,⁶ which allowed the appeal of sentencing orders, the government of Bangladesh appealed the International Crimes Tribunal-2 (ICT-2) judgment, wherein the accused was sentenced to life imprisonment. The government of Bangladesh demanded that the Appellate Division of the Supreme Court sentence Mr Molla to death, the highest sentence envisaged by International Crimes (Tribunal) Act.

Mr Molla was accused of having “actively aided, abetted, facilitated and substantially assisted, contributed and provided moral support and encouragement in committing appalling atrocities in 1971 in the territory of Bangladesh”. According to the prosecution, he organized the Al-Badar Bahini formation, a paramilitary pro-Pakistani body which allegedly participated in serious human rights violations prior to Bangladeshi independence.

The Appellate Division affirmed the judgment of the ICT-2, finding Molla guilty of committing murder and rape as a part of a systematic or organized attack against the civilian population for his participation in the 1971 Liberation War. Considering the gravity of the conduct and the high profile of the accused, the Appellate Division modified the sentence imposed by the ICT-2 and condemned him to death by hanging.

6 For further information regarding this law, please consult “What's New in Law and Case Law Around the World? Biannual Update on National Implementation of International Humanitarian Law, January–June 2013”, available at: www.icrc.org/eng/assets/files/review/2013/irrc-891-892-national-implementation.pdf.

Colombia

Decision No. C-579/13, Constitutional Court

Keywords: Legal Framework for Peace, transitional justice.

On 28 August 2013, the Colombian Constitutional Court released a decision in which it declared that constitutional amendments made by Legislative Act No. 1 of 2012 were in accord with the Colombian Constitution.

Legislative Act No. 1 of 2012, also called the Legal Framework for Peace, amended the Colombian Constitution by inserting two transitory Articles (66 and 67) which included transitional justice as an economic, social and cultural right.⁷ Article 66 established the possibility of the Prosecutor giving priority to investigating those persons bearing the greatest responsibility and waiving criminal prosecution for cases not prioritized. This Article was brought to the Colombian Constitutional Court to establish whether this provision was in accord with the Constitution. It was argued that prioritizing or waiving certain investigations was against the State's duty to thoroughly investigate and repress all human rights violations.

The Court indeed recognized that the State obligation to respect and to ensure respect for human rights implied the duty of investigating, trying and repressing all violations, without any sort of distinction or priority. However, the Court also stated that, according to international human rights law and IHL, this obligation could be limited as long as serious violations were properly addressed. Moreover, for the Court, the waiver and prioritization were justified by the purpose of preventing future violations and seeking a stable and long-lasting peace. However, it also concluded that, when prioritizing, the Prosecutor should bear in mind the gravity of the violations and give priority to criminal conduct such as extrajudicial killings, torture, enforced disappearance, sexual violence, forced displacement and the recruitment of child soldiers.

Decision No. C-740/13, Constitutional Court

Keywords: military criminal jurisdiction.

On 23 October 2013, the Colombian Constitutional Court ruled that Legislative Act No. 2 of 2012 was unconstitutional.⁸

7 For further information regarding this law, please consult "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", available at: www.icrc.org/eng/assets/files/review/2013/irrc-890-national-implementation.pdf.

8 For further information regarding this law, please consult "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", available at: www.icrc.org/eng/assets/files/review/2013/irrc-890-national-implementation.pdf.

This Act purported to amend the Colombian Constitution to expand the scope of the country's military criminal jurisdiction to violations of IHL committed by public forces, explicitly excluding enforced disappearances, extrajudicial executions, sexual violence, torture and forced displacement. Before this amendment, all IHL violations were investigated by the Office of the Prosecutor. Plaintiffs claimed that procedural breaches during the Parliament debate made the law unconstitutional.

After reviewing the legislative procedure followed within the Parliament, the Court ruled that this Legislative Act was not in accord with the Colombian Constitution and overturned the modification introduced by the Act.

Germany

“Varvarin bridge” case, Federal Constitutional Court

Keywords: tort claims, State responsibility, war crimes, former Yugoslavia armed conflict.

On 4 September 2013, the German Federal Constitutional Court dismissed the claims lodged by the victims of the Varvarin bridge bombing.

On 30 May 1999, following NATO's decision to attack the Federal Republic of Yugoslavia, a bridge in the Serbian town of Varvarin was struck by NATO fighter planes, causing death to ten persons and injuries to thirty, all of them civilians. The German armed forces were not directly implicated in the conduct of the operation. Victims from the attack claimed compensation from Germany, arguing that by allowing NATO forces to target the bridge, Germany had violated its international obligations and domestic law.

Claims were rejected by both the courts of first and second instance. On 2 November 2006, the Federal Supreme Court affirmed previous rulings stating that the relevant international and domestic provisions do not grant individually enforceable rights; compensation resulting from these tort claims concerned exclusively the State of nationality of the claimants (in this case Serbia); there was no relevant obligation under customary international law; and there was no right to compensation under the German domestic liability law which could cover these facts.

The applicants appealed this decision but the Federal Constitutional Court did not overturn it. However, it took the occasion to criticize some of the lower courts' rulings. Indeed, it found that the lower courts granted too large a margin of appreciation to the German authorities regarding the application of the IHL principle of proportionality, and placed the burden of proof on the applicants with regard to the authorities' knowledge of the facts. Still, the Court did not modify the previous jurisprudence on this issue, confirming that the ordinary regime of State responsibility does not cover damages caused by war.

“Kunduz incident” case, Regional Court of Bonn

Keywords: Afghanistan, principles of distinction and precaution, tort claims.

On 11 December 2013, the Regional Court of Bonn dismissed the compensation claims filed by the victims of the “Kunduz incident”.

On 4 September 2009, Colonel Georg Klein, German commander of the International Security Assistance Force, launched an air strike near Kunduz, Afghanistan. This attack targeted two fuel tanker trucks which had been hijacked by Taliban fighters, and resulted in the killing of approximately ninety persons. Preliminary investigations were conducted by a parliamentary investigatory commission and by the General Federal Prosecutor. On 16 April 2010, the Federal Prosecutor dismissed the case, arguing that Mr Klein did not incur individual criminal responsibility. On August 2010 the German government agreed to make an *ex gratia* payment to the victims’ families but did not admit its alleged responsibility regarding the Kunduz incident. However, two survivors of the attack sued the German government in order to obtain compensation for damages suffered.

The Regional Court of Bonn dismissed these claims on the basis that Mr Klein did not participate in official misconduct or in a breach of IHL. According to the Court, he did respect the principle of distinction when defining fuel tankers as military objectives. Indeed, as specified by internal intelligence, the tankers were going to be used in an attack against an Afghan police station in Kunduz. Moreover, the Court stated that Mr Klein took all possible precautions when asking on seven occasions whether the persons standing around the tankers were civilians or not. Finally, the Regional Court of Bonn followed the recent ruling of the Federal Constitutional Court on claims for damages relating to IHL violations.

Israel

Yoav Hess et al v. Chief of Staff, HCJ 4146/11, Supreme Court

Keywords: white phosphorus, means and methods of warfare.

On 9 July 2013, the Israeli Supreme Court sitting as the High Court of Justice dismissed the claims lodged by Yoav Hess and others relating to the use of white phosphorus by the Israel Defense Forces (IDF) during the 2008 and 2009 Cast Lead operation.

Arguing that the use of white phosphorus as a weapon has indiscriminate effects on the civilian population both in a direct and an indirect way, the plaintiff asked the Court to order the IDF to limit the use of this chemical in populated areas and to prohibit the use of weapons containing it when there are alternative weapons available which pose fewer risks to the civilian population and offer similar military advantages. Although it normally refrains from intervening in the IDF’s choice of

means and methods of warfare, the Court did analyse these claims because an IHL violation had allegedly been committed. The State of Israel proved that IDF policy prohibited the use of white phosphorus in populated areas and that it was used solely for smokescreen purposes. Bearing in mind the extremely limited cases when, according to the IDF policy, white phosphorus could be used, the Court dismissed Mr Hess's claims. Nonetheless, it also recommended that the IDF conduct an extensive examination of its use and to search for other alternatives. It also left the door open for future claims if the current IDF policy should change.

The Netherlands

The State of Netherlands v. Hasan Nuhanovic, 12/03324, Supreme Court

Keywords: State responsibility, former Yugoslavia armed conflict, dual attribution.

On 6 September 2013, the Supreme Court of the Netherlands confirmed the ruling of the Court of Appeal which found the Netherlands responsible for the death of three Bosnian Muslims killed during the Srebrenica massacre.

At the time of its intervention in the former Yugoslavia, the Dutch Battalion of United Nations (UN) peacekeepers (Dutchbat) was assigned to protect the “safe area” of the eastern Bosnian enclave of Srebrenica. On 11 July 1995, after the Bosnian Serb armed forces took control of the “safe area”, thousands of Bosnian Muslims sought refuge at the UN compound. On 13 July, while outside the compound men were being killed and abused, the Dutchbat command decided to expel from the compound three Bosnian Muslims, including a UN interpreter. They were subsequently killed in the Srebrenica massacre. The families of these three victims sued the Netherlands for its alleged responsibility for the events.

On 10 September 2008 the District Court of The Hague dismissed the claims, considering that Dutchbat was operating under a UN mandate in Bosnia and did not have operational command and control of the area, which was in the hands of the UN. However, on 5 July 2011, in an unprecedented ruling, the Court of Appeal overturned this decision, recognizing that in this case, there was dual responsibility between the UN and Dutchbat which implied a shared effective control over the same wrongful conduct. Therefore, the Dutch government was found responsible for what happened to the three Bosnian Muslims. The Supreme Court affirmed this ruling and added that, because of Dutch effective control of the compound, extraterritorial human rights obligations resulting from the European Convention on Human Rights were fully binding at the time.

South Africa

National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre, 485/2012, Supreme Court of Appeal

Keywords: universal jurisdiction, implementation of the International Criminal Court Statute.

On 27 November 2013, in an unprecedented ruling, the Supreme Court of Appeal of South Africa dismissed the appeal lodged by the National Commissioner of the South African Police Services (SAPS) relating to the investigation of alleged crimes against humanity committed in Zimbabwe.

On 19 June 2009, the SAPS decided not to investigate complaints made by the Southern African Human Rights Litigation Centre (SAHRLC) regarding alleged widespread torture committed by Zimbabwean nationals against opponents of the ruling party in Zimbabwe. On 8 May 2012, as a result of a complaint lodged by the SAHRLC, the North Gauteng High Court ordered the SAPS to review the decision, but SAPS instead appealed the High Court's order.

On the basis of South African International Criminal Court Act 27 of 2002, the Supreme Court of Appeal affirmed the lower court decision. It considered that perpetrators of human rights violations cannot go unpunished; that torture as a crime against humanity is an offence with a universal nature; that States party to the Rome Statute have to take domestic measures to suppress these universal crimes; and that crimes against humanity committed extraterritorially could be investigated by the South African authorities whenever there are factors connecting the case to the jurisdiction. In this case, revealing that perpetrators might, at some stage, have been present in the South African territory and that investigations can be deployed in a manner not affecting Zimbabwe's sovereignty, the Supreme Court of Appeal affirmed the order given by the lower court to the SAPS.