

# National implementation of international humanitarian law

## Biannual update on national legislation and case law July–December 2004

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### A. Legislation

#### Argentina

*Decree 1430/2004*<sup>1</sup> creating the National Information Bureau was adopted on October 19, 2004 and published on October 21, 2004. The Decree entered into force on October 29, 2004, eight days after its publication.

According to the Decree, the Legal Department of the Ministry of Foreign Relations, International Trade and Worship of the Argentine Republic will act as National Information Bureau upon the outbreak of an armed conflict, as foreseen under article 122 of the Third Geneva Convention of 1949 relative to the Treatment of Prisoners of War.

The Ministry will propose measures, actions and reforms to comply with its obligations under article 122 of the Third Convention and may gather any useful information from official bodies, in order to accomplish its duties.

#### Benin

The *Law No. 2004-06 on the use and protection of the emblem and name of the Red Cross and Red Crescent in the Republic of Benin*<sup>2</sup> was adopted by the National Assembly on 11 May 2004.

This Law lays down the terms and conditions governing the use of, and the rules of protection for, the emblem and name of the Red Cross and Red Crescent in peacetime and in times of armed conflict. It restricts the use of the emblem and name to the National Red Cross Society of Benin, the International Committee of the Red Cross, the International Federation of Red Cross and

Red Crescent Societies and the recognized National Societies of other countries, incorporates the principles and definitions laid down by the Geneva Conventions, and provides for sanctions in the event of violation of the rules it sets. In times of armed conflict, the Minister of Defence authorizes the protective use of the emblem.

## Bosnia and Herzegovina

The *Law on the Red Cross Society of Bosnia and Herzegovina*<sup>3</sup> was adopted on 21 October 2004 and published on 2 November 2004. The Law entered into force on 10 November 2004, the eighth day following the date of publication.

This Law establishes the Red Cross Society of Bosnia and Herzegovina and regulates its legal status, structure, competence and other related matters, and allows for the use by the National Society of the Red Cross emblem.

The National Society has legal personality and is the only National Red Cross Society in Bosnia and Herzegovina. The Ministry for Human Rights and Refugees of Bosnia and Herzegovina is entrusted with supervising the work of the National Society.

This Law abolishes the Law on the Status and Authorities of the Red Cross of the Republic of Bosnia and Herzegovina.<sup>4</sup>

The *Law on Missing Persons of Bosnia and Herzegovina* was adopted on 21 October 2004 and published on 9 November 2004.<sup>5</sup> The Law entered into force on 17 November, the eighth day after its publication.

Its purpose is to revise the definition of a missing person, to improve the process of tracing of missing persons, the exchange of information, the keeping of central records and the realization of social and other rights of family members, as well as to address other issues related to missing persons in Bosnia and Herzegovina.

The Law furthermore establishes the *Institute for Missing Persons of Bosnia and Herzegovina*, which is assigned the task of tracing missing persons in and from Bosnia and Herzegovina. The Law also creates the *Central Records of Missing Persons*, stipulating that the latter shall include all records of missing persons kept at local and entity levels by associations of families of missing persons, by other associations of citizens and by the Tracing Agencies of the Red Cross Society of Bosnia and Herzegovina, in accordance with their respective mandates.

1 Decreto 1430/2004: Asignanse a la Dirección General de Consejería Legal del mencionado Ministerio las funciones de Oficina Nacional de Información en caso de producirse un conflicto armado, de acuerdo con lo previsto en el artículo 122 del Convenio Relativo al Trato Debido a los Prisioneros de Guerra, suscripto en Ginebra, Confederación Suiza, el 12 de agosto de 1949.

2 Loi no. 2004-06 Portant usage et protection en république de Bénin de l'emblème et du nom de la Croix-Rouge et de Croissant-Rouge, adopté par l'Assemblée Nationale le 11 mai 2004.

3 Law of 21 October 2004, published in the Official Gazette of Bosnia and Herzegovina, No. 49/04 on 2 November 2004.

4 Official Gazette of RBiH no. 21/92 i 13/94.

5 Official Gazette of RBiH no. 50 of 9 November 2004.

The Ministry for Human Rights and Refugees of Bosnia and Herzegovina supervises the implementation of this Law.

The *Law on Changes to the Criminal Code of BiH*, implementing Article 9 of the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, was adopted on 30 September 2004 and published in the Official Gazette on 29 December 2004<sup>6</sup> and entered into force on 6 January 2005.

The Law introduces a new Article 193a into the Criminal Code entitled “Prohibited Weapons and other Combat Means”, which prohibits all use, production, stockpiling or transfer of any weapons prohibited by international law.

## Cambodia

The *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Cambodia* was promulgated on 27 October 2004.<sup>7</sup> The Law amends the 2001 Cambodian Khmer Rouge Extraordinary Chambers’ Law in order to bring it into conformity with the Agreement signed between the Kingdom of Cambodia and the United Nations on 6 June 2003.<sup>8</sup>

Under the new Law, the Extraordinary Chambers (hereafter “the Chambers”) are to be established in the courts of Cambodia. The Chambers will have temporal jurisdiction over crimes committed from 17 April 1975 to 6 January 1979, and their personal jurisdiction will be limited to “senior leaders of Democratic Kampuchea” and those who were “most responsible” for the crimes and serious violations falling within the jurisdiction of the Chambers.

The subject matter jurisdiction of the Chambers covers:

- crimes under international law (including genocide, crimes against humanity and grave breaches of the Geneva Conventions, as well as the destruction of cultural property as defined by the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and offences against internationally protected persons under the 1961 Vienna Convention on Diplomatic Relations), and
- crimes under Cambodian law (including murder, torture and religious persecution as defined under the 1956 Cambodian Penal Code). The sentences of the Extraordinary Chambers are limited to life imprisonment.

The Law also defines the composition of the Extraordinary Chambers to include a Trial and Supreme Court Chamber. It provides for a two-tiered system

6 Official Gazette no. 61/04 of 29 December 2004.

7 NS/RKM/1004/006.

8 Resolution AG A/RES/228 B of 6 June 2003. The Law approving the Agreement between the United Nations and the Royal government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Cambodia (hereinafter *the Agreement*) was promulgated on 19 October 2004 (NS/RKM/1004/004) <<http://www.cambodia.gov.kh/krt/english/image%20.doc.htm>>.

ensuring a majority of Cambodian judges over international judges in the composition of the Chambers, while requiring an affirmative vote of at least one international judge before any decision or sentence may be taken.<sup>9</sup>

## Japan

Following the enactment in June 2003 of the basic laws defining the scope of Japan's emergency legislation, the Japanese Diet further adopted in June 2004 seven individual acts related to contingency response and approved Japan's accession to relevant international treaties, including the two 1977 Additional Protocols to the Geneva Conventions of 12 August 1949.

Japan deposited its instruments of accession to the two 1977 Additional Protocols on 31 August 2004 and, on the same date, made a Declaration of Recognition of the Competence of the International Fact-Finding Commission, based on Article 90 of Additional Protocol I. These instruments were published in the Official Gazette on 3 September 2004. The two Additional Protocols entered into force for Japan on 28 February 2005, six months after the deposit of the instruments of accession.

The new implementing laws<sup>10</sup> also cover a range of subjects transposing Japan's international obligations under the Geneva Conventions and their Additional Protocols into domestic law. The new legislation relates in particular to the treatment of prisoners of war, strengthens the protection of the Red Cross and Red Crescent emblems and introduces a new criminal law on the repression of certain grave breaches of the Geneva Conventions and their first Additional Protocol.

## Niger

The *Law No. 2004-044 implementing the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*<sup>11</sup> was adopted on 8 June 2004 and promulgated by the President of the Republic on the same day. It was published on 15 June 2004.

The Law implements Article 9 of the Ottawa Convention of 3 December 1997<sup>12</sup> and foresees prison sentences and fines in the event of violation of the Act ratifying that Convention.

9 By the end of the year 2004, the Secretary General of the United Nations and the Royal Government of Cambodia had appealed for funds and are awaiting sufficient Pledges to commence the establishment of the Extraordinary Chambers.

10 Law concerning the Protection of the Civilian Population, adopted on 14 June 2004, published on 18 June 2004 and entered into force on 17 September 2004; Law concerning the Treatment of Prisoners of War, adopted on 14 June 2004, published on 18 June 2004 and entered into force on 28 February 2005; Law concerning the Punishment of Grave Breaches of IHL, adopted on 14 June 2004, published on 18 June 2004 and entered into force on 28 February 2005.

11 Loi no. 2004-044 du 8 juin 2004 Portant mise en œuvre de la Convention sur l'interdiction de l'emploi, du stockage, de la production et du transfert des mines antipersonnel et sur leur destruction.

12 Ratified by the Republic of Niger by Act no. 99-01 of 24 January 1999.

## Peru

*Decree No. 957, adopting the new Criminal Procedure Code*<sup>13</sup>, was adopted on 22 July 2004, and published on 29 July 2004. According to Section 1 of the Code's Final Provisions, the Code will enter into force in successive phases in the different judicial districts following an official schedule to be approved by Decree.

The Criminal Procedure Code comprises 566 articles. Book 7 entitled "*International Judicial Cooperation*" contains Section VII on "Cooperation with the International Criminal Court", which covers in particular "Arrest and surrender of persons and provisional arrest", "Other forms of cooperation" and "Enforcement of sentences". Section VII of Book 7 will enter into force on 1 February 2006, and will allow Peru to cooperate with the ICC in accordance with Part 9 of the Rome Statute.

## Portugal

*The Law adapting Portuguese criminal legislation to the Statute of the International Criminal Court, defining Conduct constituting Crimes against International Humanitarian Law*<sup>14</sup> was adopted on 22 July 2004 and published on the same day. The Law provides for its entry into force 30 days after its publication, except for Article 3, revoking certain articles of the Criminal Code, which entered into force on 14 September 2004.

The first four articles of the Law revoke and modify certain articles of the Criminal Code. Article 2 notably modifies Article 246 of the Criminal Code, which now reads that anyone found guilty of a crime specified by the Law shall be barred for a period of 2 to 10 years from electing the President of the Republic, members of the Legislative Assembly or of a local authority, members of the European Parliament, as well as from being elected or sworn in to such offices.

The appendix defines the crimes inserted in the Criminal Code: the crime of genocide; crimes against humanity; war crimes against persons; war crimes through the use of prohibited methods and means of warfare; war crimes against property protected by distinctive signs or emblems; improper use of distinctive signs or emblems; war crimes against property and war crimes against other rights. It also lists as other crimes incitement to war and recruitment of mercenaries.

The provisions of the law also apply to crimes committed outside the territory of Portugal, when the perpetrator is found in Portugal and cannot be extradited or when it has been decided not to hand him over to the International Criminal Court.

Military commanders and other superiors who are or should be aware of these crimes being committed by forces under their effective command or responsibility and control, and who fail to react or prevent or bring these crimes

13 Decreto legislativo no. 957 - Código Procesal Penal, El Peruano Diario Oficial, no. 8804, 29 de Julio de 2004.

14 Lei no. 31/2004 de 22 de Julho Adapta a legislação penal portuguesa ao Estatuto do Tribunal Penal Internacional, tipificando as condutas que constituem crimes de violação do direito internacional humanitário - 17 alteração ao Código Penal.

to the attention of competent authorities, will be punished under this Law with the same penalty as the actual perpetrator(s). No statute of limitations will apply to the crimes under the Law.

This Law will apply simultaneously with the Code of Military Justice, when military interests or other interests of the Portuguese State are at stake.

## Rwanda

*Organic Law No. 16/2004 establishing the Organisation, Competence and Functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the Crime of Genocide and other Crimes against Humanity, committed between October 1, 1990 and December 31, 1994* was adopted and published on 19 June 2004 and entered into force on the same day.<sup>15</sup>

The Law comprises four Titles, concerning the applicability of the Law (Title 1), the setting up, organisation and competence of the Gacaca courts and their relationship with other institutions (Title 2), the prosecution of offences and proceedings (Title 3) and miscellaneous, transitional and final provisions (Title 4).

The persons or their accomplices to be prosecuted are described in the Law's Article 51, which classifies the accused persons into three categories. The first category includes persons who were planners, organisers, imitators, supervisors and ringleaders of the genocide or crimes against humanity, as well as persons in various political or religious offices who took part in these acts or encouraged others to commit them. Category 1 also includes those who committed acts of torture against others even though these acts did not result in death, those who committed acts of rape or acts of torture against sexual organs and those who committed dehumanizing acts on dead bodies. The second category is made up of those persons who killed or committed acts or serious attacks against others causing death, those persons who injured or committed serious attacks against others with the intent to kill them but without having attained this objective, and persons who committed or aided to commit other offences against others without the intent to kill them. The third category of perpetrators subject to prosecution concerns persons who only committed offences against property, unless the author of the offence and the victim have agreed on an amicable settlement. Persons falling under category 1 are to be tried before the ordinary courts, while persons falling under category 2 and 3 are to be tried before the Gacaca courts.

## B. National Committees on International Humanitarian Law

### Costa Rica

*The Decree creating a National Commission for International Humanitarian Law* was adopted on 21 May 2004 and published on 4 November 2004. It entered into force on the day of its publication.

<sup>15</sup> Journal Officiel numéro spécial 19/06/2004.

The Commission is to be composed of representatives of various ministries, the legislative and the judiciary authorities, as well as of universities and of the Costa Rica Red Cross.

It is mandated to assist the government with the implementation of existing legislation in the field of international humanitarian law and the development of draft laws and decrees enabling Costa Rica to fulfil its obligations under international humanitarian law.

The Commission will promote the dissemination of international humanitarian law, take part in meetings, seminars and conferences and encourage academic circles to include that law into education programmes. It will also suggest activities aimed at promoting the implementation of and respect for international humanitarian law.

The Commission is incorporated in the Ministry of Foreign Affairs. The Ministry will fulfil the roles of the Presidency and Secretariat. The Commission may consult the International Committee of the Red Cross in matters related to international humanitarian law.

## Senegal

*Decree No. 2004-657 relating to the Creation, the Organisation and the Functions of the High Commission for Human Rights and the Promotion of Peace* was adopted on 2 June 2004.

The Commission has competence in relation to human rights and international humanitarian law. It is attached to the Presidency of the Republic and its main responsibilities are to receive and conduct investigations into complaints made by corporate bodies, persons and organisations working in the field of human rights and international humanitarian law; to promote the reception, integration and implementation into domestic law of international treaties relating to human rights law or international humanitarian law and to contribute to the dissemination of these bodies of law.

In order to fulfil its tasks, the Commission is composed of a human rights' office, a unit for the follow-up of international law, and a unit for the documentation and promotion of human rights law and international humanitarian law.

The Commission has its own budget and is headed by a high commissioner enjoying the rank of minister.

## Serbia and Montenegro

The *Commission for International Humanitarian Law of Serbia and Montenegro*<sup>16</sup> was established by Decision of the Council of Ministers of Serbia and Montenegro on 9 September 2004, which was published in the Official Gazette No. 43/2004 the following day and came into force the eighth day after publication.

16 Odluka o obrazovanju Komisije za međunarodno humanitarno pravo, ("Službeni List SCG", br. 43/2004).

Its mandate is to follow the development and implementation of international humanitarian law and to propose measures for its national implementation, to promote dissemination and training, as well as to cooperate with the ICRC and other bodies. It is required to submit reports to the Council of Ministers.

The Commission's membership reflects the federal structures of Serbia and Montenegro. It includes representatives of the Federal Ministries of Foreign Affairs and Defence of Serbia and Montenegro, the Ministries of the Interior and Justice of Serbia and the Ministries of the Interior and Justice of Montenegro. It also includes a representative of the Serbia and Montenegro Red Cross Society and of the International Law Association, plus three experts in their personal capacity. Other government bodies or other organizations such as the ICRC can be consulted when needed.

This governmental Commission will complement the International Humanitarian Law Commission of the Serbia and Montenegro Red Cross Society. The latter, which was created by the Yugoslav Red Cross Society and dates back to 1970, has played an important role in the development of IHL at the national and international levels.

## C. Case Law

### Armenia

On 13 August 2004, the Constitutional Court of Armenia<sup>17</sup> ruled on the issue of the compatibility of the provisions of the 1998 Statute of the International Criminal Court with the Constitution of the Republic of Armenia.

The Court considered that most provisions of the Rome Statute were in conformity with the Constitution, with the exception of paragraph 10 of the Preamble and Article 1 of the Statute, which provide that the jurisdiction of the ICC shall be complementary to national criminal jurisdictions.

The Court decided that Chapter 9 of the Armenian Constitution, which includes provisions organizing the system of the judiciary of the Republic of Armenia, does not provide for the possibility to complement the domestic system of criminal jurisdictions with an international judicial body, be it through an international treaty.

The Constitutional Court concluded that an amendment to the Constitution, acknowledging the obligations provided for under the Rome Statute or recognizing the jurisdiction of the International Criminal Court as a body complementing the system of national courts, would be required before accession to the Statute.

<sup>17</sup> Decision of the Constitutional Court of Armenia on the issue of compatibility of the provisions, stipulated by the Statute of the International Criminal Court, signed in Rome on 17 July 1998 with the Constitution of the Republic of Armenia, Yerevan, 13 August 2004.

## United States

On November 8, 2004, the United States District Court of Columbia issued a decision regarding the rights of persons detained at the US Naval Base in Guantánamo Bay, and the legality of the use of military commissions to try them.<sup>18</sup>

The case involved a Yemeni national detained in Guantánamo as an “enemy combatant” and designated by the United States’ President as eligible for trial by military commission under Military Order<sup>19</sup> dated November 13, 2001. The detainee was charged with “conspiracy to attacking civilians and civilian objects, to commit murder and destruction of property by an unprivileged belligerent, and to commit acts of terrorism”.

The Military Defence Counsel assigned to represent the detainee before the Military Commission filed a lawsuit in the US District Court of Columbia, challenging the legitimacy of military commissions under both national and international law. In so doing, the lawyers for the Defence based their argumentation on the US Supreme Court Decision in the Hamdi case of June 28, 2004<sup>20</sup>, in which the Supreme Court ruled that detainees have the right to challenge their detention in a process provided for by the detaining authority and to use the federal courts to file a challenge to either the conclusions of that process, or the inadequacy of that process.

In its ruling of 8 November 2004, the District Court of Columbia referred to Article 5 of the Third Geneva Convention as implemented by US Army Regulation, (which requires a “competent tribunal” to determine entitlement to prisoner-of-war — POW — status) and to Article 102 of the Third Geneva Convention (which states that POWs may only be tried by the same mechanisms that the detaining authority uses to try its own military personnel — in this case, court martial under the US Uniform Code of Military Justice).

The court ruled that military commissions, which differ in important respects from courts martial under the US Uniform Code, constituted a violation of the detainee’s rights, so long as he had not had his claim to POW status rejected by a competent tribunal. The determinations by the US President or by a Combatant Status Review Tribunal that the detainee is not a POW were also insufficient to satisfy the requirements of the Third Geneva Convention.

18 United States District Court for the District of Columbia, Civil Action no. 04-1519 (JR), 8 November 2004.

19 Military Order of November 13, 2001, Federal Register, November 16, 2001 (Volume 66, Number 222), Presidential Documents, pp. 57831-57836.

20 Supreme Court, *Hamdi et al. v. Rumsfeld, Secretary of Defence, et. al.*, no. 03-6696, 28 June 2004, see also “National Implementation of International Humanitarian Law – biannual update on national legislation and case law, January–June 2004”, *International Review of the Red Cross*, no. 855, p. 705.

The Court also rejected the US Government's claim that the Geneva Conventions do not apply to the conflict against al Qaeda and held that the detention had occurred in the context of the international armed conflict between the US and Afghanistan.