

REPORTS AND DOCUMENTS

National implementation of international humanitarian law

Biannual update on national legislation and case law January – June 2005

A. Legislation



Colombia

Decree No. 138¹ on implementing the Law on the use of the red cross and red crescent emblem and other emblems protected under the Geneva Conventions and their Additional Protocols² was adopted on 25 January 2005 and published in the official gazette on 27 January 2005. The Decree regulates the use of the emblem as a protective device by the medical and religious personnel of the armed and police forces and by civilian medical personnel when so authorized by the Ministry for Social Protection. It provides for disciplinary sanctions in cases of misuse of the emblem and requires that measures be taken by the Ministry of National Defence and the Directorate-General of the National Police to spread knowledge of the rules on the use and protection of the red cross emblem and other distinctive signs, and to incorporate those rules into policy and military doctrine.

El Salvador

Decree No. 471 on reform of the Penal Code concerning the use, development, production, acquisition, storage, conservation and transfer of anti-personnel mines³ was approved by the Legislative Assembly on 14 October 2004 and published in the official gazette on 22 November 2004. It entered into force eight days after its publication. The Decree implements Article 9 of the *Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction* of 3 December 1997 and incorporates into the Penal Code a new provision (Article 346 c) introducing prison sentences in the event of acts

prohibited under the Convention, or any help with or participation in such acts. However, an exception is provided for in the form of the authorized retention by the armed forces of a small number of anti-personnel mines for training in mine clearance, mine detection and mine-destruction techniques.

France

The *Law No. 2005-270 on the general status of servicemen*⁴ was adopted on 24 March 2005 and published in the official gazette on 26 March 2005. It entered into force on 1 July 2005. Title I of the law defines the rights and obligations of servicemen, the conditions of their service and establishes the conditions of their penal and disciplinary responsibility in doing their duty. Among the obligations of servicemen are those of completing their mission and obeying the orders of their superiors. In particular, the law prohibits acts committed in violation of the laws and customs of war and of international conventions, and establishes the responsibility of superiors for orders given in violation of such laws.

Germany

The *Law amending the Act implementing the Convention of 13 January 1993 on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction*⁵ was adopted on 11 October 2004 and published in the official gazette on 15 October 2004. Under Article 2, the Law entered into force one day after its publication. The new Law amends the Chemical Weapons Act to allow for the use by army personnel of riot-control agents in law-enforcement operations carried out in the framework of international collective security, something which until then had been restricted to operations carried out on the national territory.

Haiti

The *Decree relating to the status of the International Committee of the Red Cross*⁶ was adopted on 25 August 2004 and published in the official gazette on 11 April 2005.

- 1 Decreto número 138 de 2005 por el cual se reglamentan los artículos 5º, 6º, 14 y 18 de la Ley 875 de 2004, Diaro Oficial de 27 de enero de 2005, pp. 42-45.
- 2 Ley 875 del 2 de enero de 2004 por la cual se regula el uso del emblema de la cruz roja y de la media luna Roja y otros emblemas protegidos por los Convenios de Ginebra del 12 de agosto de 1949 y sus Protocolos Adicionales. See National implementation of international humanitarian law — Biannual update on national legislation and case law, January — June 2004, *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, p. 694.
- 3 Decreto número 471 — Reforma al Código penal, Diario oficial del 22 de noviembre de 2004, p. 13.
- 4 Loi N° 2005-270 du 24 mars 2005 portant statut général des militaires, publié au Journal Officiel N° 72 du 26 mars 2005, p. 5098.
- 5 Erstes Gesetz zur Änderung des Ausführungsgesetzes zum Chemiewaffenübereinkommen (1 CWÜAGÄndG) vom 11. Oktober 2004, Bundesgesetzblatt Jahrgang 2004 Teil I Nr. 54, ausgegeben zu Bonn am 15. Oktober 2004, p. 2575.
- 6 *Décret relatif au Comité International de la Croix-Rouge*, publié au Journal Officiel (“Le Moniteur”) N° 28 du 11 avril 2005.

The Decree recognizes the ICRC's special status and confers upon the organization and its expatriate personnel the same privileges and immunities as in the case of the United Nations under the *Convention of 13 February 1946 on the privileges and immunities of the United Nations*.⁷

Honduras

The *Law on the Protection of the red cross and red crescent emblem*⁸ was confirmed by Presidential Decree No. 199-2004 of 31 September 2004⁹ and approved by the National Congress on 17 December 2004. The law entered into force on the same day. It repeals Legislative Decree No. 31 of 19 January 1971 containing the *Law for the protection of the emblem and the name of the Honduran Red Cross*. The objectives of the new legislation are to protect the red cross and red crescent emblem and its name, and to establish controls and sanctions to guarantee proper use of the emblem in accordance with the provisions of the 1949 Geneva Conventions and their 1977 Additional Protocols. The act defines the protective and the indicative use of the emblem and identifies the national authorities of Honduras as responsible for monitoring application of the Law. It also provides for penalties in the case of commercial misuse of the emblem and refers to the Penal Code and to the Military Code to determine sanctions and penalties applicable in cases of abuse of the emblem committed in times of armed conflict.

Peru

The *Law No. 28413 on forced disappearances during the period from 1980 to 2000*¹⁰ was adopted on 24 November 2004 and published in the official gazette on 11 December 2004. The law settles the legal situation of missing persons, establishes applicable rules and procedures, and creates a register of persons unaccounted for. The objective is to provide the families (and other persons having a legitimate interest in the matter) with the measures needed for the protection of their rights.

Ukraine

Decree No. 400 by the Minister of Defence of Ukraine "on the approval of regulations on the use of international humanitarian law in the Ukrainian armed forces"¹¹ was adopted on 11 September 2004. Paragraph 2 of the Decree stipulates that the head of the General Staff of Ukraine's armed forces must ensure

7 Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15, 13 February 1946.

8 Ley de protección del emblema de la cruz roja y de la media luna roja, la Gaceta — Diario oficial del 2 de marzo del 2005, número 30.636, p. A. 2.

9 Published in the Official Journal of 2 March 2005.

10 Ley número 28413 que regula la ausencia por desaparición forzada durante el período 1980-2000, El Peruano del 11 de diciembre de 2004, p. 282115.

11 Decree of the Minister of Defence of Ukraine No. 400, Kiev, "Azimut-Ukraine" Publishing House, 2004, p. 144.

that IHL is incorporated into armed forces operational training and ensure compliance with its provisions by servicemen and armed forces civilian staff. The Regulations set out IHL's main principles. They also outline the rules applicable during the preparation for and the conduct of military operations, as well as the IHL standards to be included in military education and operational training.

B. National committees on international humanitarian law

Burkina Faso

*Decree No. 2005-100 regarding the creation, mandate, composition and organization of the Interdepartmental Committee for Human Rights and International Humanitarian Law*¹² was adopted on 23 February 2005. The Committee is an advisory body entrusted with supporting the government in matters related to human rights and IHL and serving as a framework for dialogue on the promotion and protection of and respect for human rights and IHL. Its mandate is to facilitate coordination of the activities by different ministries in this field; to study policies and strategies proposed by the government; to provide technical support for drafting reports to be submitted by the government to various entities; to study any litigation involving the State; to help initiate training in the field of human rights and IHL in formal and non-formal education; and to spread knowledge of human rights and IHL within State structures, including the armed forces.

The Committee is chaired by the General Secretary of the Ministry of Human Rights and is composed of representatives of various ministries with the rank of general secretary. The Burkinabé Red Cross Society also participates in the work of the Committee when this concerns issues related to IHL. The Committee may also call for the assistance of other relevant organizations in civil society. The Decree provides for the establishment of a permanent technical secretariat and states that the expenses of the Committee will be covered by the budget of the Ministry of Human Rights.

United Arab Emirates

*Ministerial Council Resolution No. 32 of 2004 regarding the establishment of the National United Arab Emirates Commission for International Humanitarian Law*¹³ was adopted on 1 November 2004. The Commission has the task of strengthening implementation of IHL; reviewing legislation relevant to IHL; strengthening cooperation and exchanging expertise with unions, associations and other organizations concerned with IHL; proposing training programmes and organizing seminars; and undertaking any tasks assigned to it by the Council of Ministers or any other specialized State authority.

12 Décret N° 2005-100/PRES/PM/MPDH portant création, attributions, composition et fonctionnement du comité interministériel des droits humains et du droit international humanitaire.

13 Prime Ministerial Resolution No. 32 of 2004 regarding the establishment of the National United Arab Emirates Commission for International Humanitarian Law.

The Commission is chaired by the Deputy Prime Minister and is composed of representatives of different ministries. It must convene whenever the need arises, upon the initiative of its chairman. The Red Crescent Society of the United Arab Emirates plays the role of the Commission's General Secretariat.

C. Case law

Belgium

On 23 March 2005, Belgium's Administrative Jurisdiction and Procedure Court (*Cour d'arbitrage*)¹⁴ ruled on the issue of the compatibility between certain provisions of the *Law relating to serious violations of international humanitarian law* of 5 August 2003¹⁵ and Articles 10 and 11 of the Federal Constitution (principles of equality and non-discrimination) and, finally, Article 6 of the European Convention on Human Rights and Fundamental Freedoms (right to fair trial). The provisions of the Belgian law of 2003 being challenged in the above-mentioned case confer on the Federal Prosecutor exclusive authority to initiate a criminal investigation, thereby making it impossible for the victims themselves to initiate proceedings and precluding a "*constitution de partie civile*" for that purpose. Nor does the law provide the possibility of appeal against the Prosecutor's decision if he decides not to prosecute.

The court decided that it was not unreasonable for the Prosecutor to enjoy an exclusive prerogative to decide on the admissibility of a case before Belgian courts in situations where the needs of justice, or Belgium's international obligations, require that the claim should be brought before an international court or tribunal, or before the national and independent courts of another State enjoying jurisdiction over the case.

However, the court ruled that in other situations, the decision not to prosecute could not rest solely with the Federal Prosecutor and should be taken by an independent and impartial judge. The court consequently ordered that an amendment be made to the existing law, by 31 March 2006, in order to ensure that in such situations the decision not to prosecute would be taken under the authority of an independent and impartial judge.

On 13 April 2005, Belgium's Administrative Jurisdiction and Procedure Court (*Cour d'arbitrage*)¹⁶ ruled on the provisions of the *Law relating to serious violations of international humanitarian law* of 5 August 2003.¹⁷ Belgium's

14 Cour d'Arbitrage, Arrêt N° 62/2005 of 23 March 2005, available on <www.arbitrage.be> (visited on 8 September 2005).

15 Loi relative aux violations graves du droit international humanitaire, published in *Moniteur Belge* on 7 August 2003, Ed. 2, N° 286, pp. 40506-40515. This 2003 law repealed the 1993 Law on the repression of serious violations of international humanitarian law (as last amended on 23 April 2003). See National implementation of international humanitarian law — biannual update on national legislation and case law, January-June 2003, *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, p. 654.

16 *Cour d'arbitrage*, Arrêt N° 65/2005, 13 April 2005, available on <www.arbitrage.be> (visited on 8 September 2005).

17 *Op. cit.* (note 15).

Supreme Court, the *Cour de Cassation*, asked preliminary questions¹⁸ to the Administrative Jurisdiction and Procedure Court on the compatibility of certain provisions of the law with the principles of equality and non-discrimination as enshrined in Articles 10 and 11 of the Federal Constitution.

The questions raised pertained to the transitional regime applicable between the *Law of 1993 on the repression of serious violations of international humanitarian law* (as last amended on 23 April 2003) and the new Law of 5 August 2003 (which revised and strengthened the requirements under which Belgian courts may assert jurisdiction). According to the transitional regime, in cases in which Belgian courts are not competent under the new law, they should decline jurisdiction, unless:

— at least one claimant is a Belgian citizen when public proceedings commence, or

— at least one alleged perpetrator had his principal residence in Belgium at the time of entry into force of the new Law.¹⁹

The requirement that at least one claimant be a Belgian citizen excludes *a priori* persons having refugee status in Belgium. Since the petitioners in the present case were refugees, the Administrative Jurisdiction and Procedure Court was asked to determine whether or not this exclusion amounted to a case of discrimination.

The Administrative Jurisdiction and Procedure Court ruled that the exclusion of refugees from the transitional regime introduced by the law of 5 August 2003 was in contravention of the *Convention relating to the status of refugees of 28 July 1951*, which provides that refugees should enjoy the same treatment as nationals in matters pertaining to access to the courts.²⁰ The Court concluded that the law of 5 August 2003 violated the principles of equality and non-discrimination. Consequently, the *Cour de Cassation*, in assessing the jurisdiction of Belgian courts under the law's transitional regime, could not rule out jurisdiction in regard to cases brought by persons enjoying refugee status at the time that public proceedings are initiated.

Canada

On 28 June 2005, the *Supreme Court of Canada*²¹ confirmed a deportation order for a Rwandan Hutu politician who had become a permanent resident in Canada. The deportation order was issued pursuant to the *Immigration Act* of 1985.²² It was based on a speech made by that individual in Rwanda in 1992 and which was deemed an incitement to commit murder, genocide and hatred, and therefore to constitute a crime against humanity.

18 *Cour de Cassation*, 5 May 2005, available on <www.cass.be> (visited on 8 September 2005).

19 Article 29, paragraph 3 of the *Law relating to serious violations of international humanitarian law*, 5 August 2003, *op. cit.* (note 7).

20 Article 16.2 of the Convention relating to the Status of Refugees, 28 July 1951.

21 *Mugesera v. Canada* (Minister of Citizenship and Immigration), 28 June 2005, SCC 40, available at <<http://www.lexum.umontreal.ca/csc-scc/en/rec/html/2005scc040.wpd.html>> (visited on 8 September 2005).

22 *Immigration Act*, RSC 1985, c. I-2. (now replaced by the *Immigration and Refugee Protection Act*, SC 2001, c. 27).

The *Immigration Act* provides for the non-admission to Canada of two categories of persons: first, persons suspected on the basis of “the balance of probabilities” of being the perpetrators of a crime such as incitement to genocide, murder or hatred; second, persons about whom there are “reasonable grounds to believe” that they have committed a crime against humanity outside of Canada. The Supreme Court had to rule on the legality of the deportation order on this basis.

As to the allegation of incitement to genocide, the court ruled that it was not necessary to establish a direct causal link between the speech and the acts of murder or other violence, and that incitement was punishable by virtue of the criminal act alone irrespective of the result. The court concluded that an incitement to genocide had been committed and that the individual who had made the speech was therefore not eligible for residence in Canada under the *Immigration Act*.²³

The court then went on to assess whether the speech itself had constituted a crime against humanity. At the time relevant to this appeal, crimes against humanity were defined in and proscribed by sections 7(3.76) and 7(3.77) of Canada’s *Criminal Code*,²⁴ based on the definitions laid down by the International Military Tribunal in Nuremberg. The court observed that a hate speech, particularly when it advocates egregious acts of violence, may constitute a crime against humanity, specifically that of persecution. After a thorough examination of the elements of the crime, the court decided that a crime against humanity had been committed and that the individual who made the speech was therefore not eligible for residence in Canada under the *Immigration Act*.²⁵

Russian Federation

On 25 May 2005, the Circuit Military Court for the region of the Northern Caucasus confirmed its judgement of acquittal in regard to several members of the special forces of the Russian Federation. The Russian servicemen were standing trial for the second time²⁶ on charges of murder and destruction of civilian property committed in January 2002 against four civilians captured on suspicion of having links with terrorist organizations. The jury, confirming the prior decision of the Circuit Military Court in the case, found that the accused had acted on orders from their superiors and that military discipline had compelled them to commit their actions. They were consequently acquitted by the court.

23 27(1)(a.1)(ii) and 27(1)(a.3)(ii) of the *Immigration Act*.

24 Sections 7(3.76) and 7(3.77) of the *Criminal Code* have since been repealed. Crimes against humanity are now defined under sections 4 and 6 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c. 24.

25 ss. 27(1)(g) and 19(1)(j) of the *Immigration Act*.

26 A first decision of acquittal in the case was issued by the Circuit Military Court for the region of the Southern Caucasus on 11 May 2004, but was repealed by resolution of the Military Collegium of the Supreme Court of the Russian Federation on 26 August 2004, on the grounds that the jury had been improperly selected. Thus, the Supreme Court ruled that the case should be heard again by the same Circuit Court.

United States

On 19 January 2005, the US District Court for the District of Columbia²⁷ issued its second decision regarding the legality of the continued detention of persons held at the US naval base at Guantanamo Bay and on the status of these persons.

The case involved seven foreign nationals — five Algerian-Bosnian citizens, one Algerian citizen and one French citizen — captured outside Afghanistan by the United States forces and detained pursuant to a US President's Order on Detention dated 13 November 2001. The petitioners challenged the legality of their detention on the basis of the US Constitution, different federal statutes and international law, and filed a petition calling for the court to issue a writ of *habeas corpus*.

The District Court concluded that “[...] *no viable legal theory exists by which it could issue a writ of habeas corpus under these circumstances*”, and granted the US government's motion to dismiss the petitions.

Apparently disregarding the terms of the US Supreme Court decision of 28 June 2004, in the *Rasul v. Bush* case,²⁸ the District Court considered that the fact had been well established before the Supreme Court decision that the petitioners possessed no cognizable constitutional rights resulting from their *habeas corpus* petitions. The court held that the rights of the detainees, as non-resident aliens captured outside the US during a time of armed conflict, were a matter within the exclusive responsibility of the executive and legislative branches of power and that the United States constitutional system precluded the judiciary from engaging in a substantive evaluation of the conditions of their capture and detention. The judicial review was hence limited to the question of whether Congress had or had not given the military the authority to detain or charge the individuals as *enemy combatants*.

The District Court also declared that the president's war power must include *the power to capture and detain the United States' enemies*, thus recalling the findings of the US Supreme Court in its decision of 28 June 2004 in the *Hamdi et al. v. Rumsfeld* case.²⁹

On 31 January 2005, the US District Court for the District of Columbia³⁰ was called upon to examine the same issues as those prompting its prior decisions

27 United States District Court for the District of Columbia Court, *Khalid v. Bush*, Civil Action No. 2004-1142, *Memorandum Opinion & Order*, 19 January 2005, by Judge Richard J. Leon, available at <<http://www.dcd.uscourts.gov/opinions/2005/Leon/2004-CV-1142~7:40:40~3-2-2005-a.pdf>> (visited on 8 September 2005).

28 US Supreme Court, *Rasul v. Bush*, No. 03-334. The Supreme Court held that foreign nationals imprisoned without charge at the Guantanamo Bay interrogation camps were entitled to bring legal action challenging their captivity in US civilian federal courts.

29 US Supreme Court, *Hamdi et al. v. Rumsfeld, Secretary of Defense, 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, Vol. 86, No. 855, September 2004, p. 705.

30 United States District Court for the District of Columbia Court, *In re Guantanamo Detainees Cases*, Civil Action No. 2002-0299, *Memorandum Opinion* issued January 31, 2005. Order issued January 31, 2005, available at <<http://www.dcd.uscourts.gov/opinions/2005/Green/2002-CV-299~8:57:59~3-2-2005-a.pdf>> (visited on 8 September 2005).

of 8 November 2004 and 19 January 2005. This case involved a third District Court judge. This time the court found in favour of the detainees, ruling that the petitioners did enjoy constitutional rights, as well as rights resulting from international treaties cognizable in a US court.

This case involved 11 detainees held as enemy combatants at the US naval base at Guantanamo Bay and accused of ties with al Qaeda or other terrorist organizations. The petitioners had been taken into custody in distant locations including Afghanistan, Gambia, Zambia, Bosnia-Herzegovina and Thailand, and some had already been detained for as long as three years.

The petitioners asserted that the detention and the conditions thereof at Guantanamo Bay violated a variety of laws, among which the Fifth Amendment to the US Constitution (the right not to be deprived of liberty without due process of law), as well as the Third and Fourth Geneva Conventions of 1949.

Following the reasoning of the Supreme Court in its decision of 28 June 2004, the court ruled that the “special nature of the base at Guantanamo Bay” justified that it be treated as the equivalent of sovereign US territory and held that fundamental constitutional rights, including the Fifth Amendment, applied to detainees held there, even if they were not US citizens.

The court also found that the procedures provided by the Combatant Status Review Tribunal failed to satisfy constitutional due process guarantees in different respects, i.e. that the detainees did not enjoy the assistance of counsel, were not provided with sufficient notice of the factual basis for their detention, and that some of the evidence against them may have been obtained by torture or other forms of coercion.

With respect to the 1949 Geneva Conventions, in particular Articles 4 and 5 of the Third Convention, the court held, in accordance with the District Court’s ruling in its decision of 8 November 2004,³¹ that the Geneva Conventions were self-executing. It also went on to decide that the US president’s early and broad determination that the detainees were not entitled to prisoner-of-war status was incorrect. This determination had to be made on an individual basis and if there was any doubt the matter had to be resolved by a competent tribunal, for which a broad characterization by the US president was no substitute.³²

31 United States District Court for the District of Columbia Court, *Hamdan v. Rumsfeld*, Civil Action No. 04-1519 (JR), 8 November 2004, see also National Implementation of International Humanitarian Law — biannual update on national legislation and case law, July-December 2004, *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, p. 225.

32 The latter decisions are manifest of a split in opinion among the judges of the US District Court for the District Court of Columbia, which by 30 June 2005, remained to be resolved before a Federal Court of Appeals and eventually before the US Supreme Court. On 15 July 2005, the United States Court of Appeals for the District of Columbia Circuit issued a decision on appeal from the United States District Court for the District of Columbia in the *Hamdan Case*, which will be commented in the next *Biannual update on national legislation and case law* to be published in this Review for the period July-December 2005.