

National implementation of international humanitarian law

Biannual update on national legislation and case law July–December 2005

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A. Legislation

Afghanistan

The *Order of the Minister of National Defence on the Establishment of a Board of Curriculum on [the integration of] the International Law of Armed Conflict into the Educational and Training Institutions of the National Armed Forces, as well as National Army Units* was adopted in July 2005. The Order nominates the members of the Board and defines a number of duties and actions to be undertaken for the training and education of national armed forces in the law of armed conflict. These activities include in particular the preparation of teaching materials, the appointment of instructors, and the proposed establishment of a legal department within the education and training institutions of the Ministry of Defence.

Brazil

The *Law No. 11.254 on the Establishment of Administrative and Penal Sanctions in relation to Activities prohibited by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*¹ was adopted on 27 December 2005 and published in the Official Gazette on 28 December 2005. It entered into force on the day of its publication.

1 Lei No. 11.254 de 27 de Dezembro de 2005. Estabelece as sanções administrativas e penais em caso de realização de atividades proibidas pela Convenção Internacional sobre a Proibição do Desenvolvimento, Produção, Estocagem e Uso das Armas Químicas e sobre a Destruição das Armas Químicas existentes no mundo (CPAQ).

The law provides for administrative and penal sanctions in the case of activities prohibited by the Chemical Weapons Convention of 13 January 1993.

Colombia

Law No. 971² setting out regulations for the urgent search mechanism and other provisions was adopted on 14 July 2005 and published in the Official Gazette on 15 July 2005. The purpose of the law is to permit national authorities to take immediate measures in order to prevent forced disappearances and to search for missing persons. The law provides for applicable rules and procedures, and establishes a mechanism to preserve the rights of persons unaccounted for.

France

Instruction No. 201710³ on the implementation of the Decree relating to general military discipline⁴ was adopted on 4 November 2005. The aims of this directive and its Annex I are to define the rules relating to military discipline in the various army corps and their respective hierarchical structures. The directive outlines the duties and responsibilities of military commanders and their subordinates, as well as those of servicemen engaged in combat or held in enemy hands. While recalling that the primary duty of a subordinate is to obey orders, it stipulates that he or she must refuse to execute an order which is *manifestly unlawful*, subject to his or her criminal and disciplinary responsibility. The directive also provides for a range of measures to be taken for the treatment of prisoners of war. It addresses the duties and responsibilities of medical personnel in times of armed conflict and provides for the latter's special protection and for their entitlement, in accordance with international humanitarian law conventions, to make use of the red cross emblem for the purpose of identification.

Lesotho

The *Lesotho Chemical Weapons Act 2005⁵* was published in the Official Gazette on 9 June 2005. The purpose of the Act is to make provision for giving effect to certain obligations of the Kingdom of Lesotho as a party to the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, and for related matters. It establishes a legal framework for inspection and for the seizure and forfeiture

2 Ley número 971 de 2005 por la cual se reglamenta el mecanismo de búsqueda urgente y se dictan otras disposiciones, Diario oficial número 45.970 de 15 de julio de 2005.

3 Instruction No. 201710/DEF/SGA/DFP/FM/1 d'application du décret relatif à la discipline générale militaire du 4 novembre 2005, publié au BOC/BP No. 49 du 5 décembre 2005, pp. 8299–329.

4 Décret No. 2005-796 du 15 juillet 2005, publié au Journal Officiel No. 165 du 17 juillet 2005, texte No. 9; BOEM 300.

5 Chemical Weapons Act 2005, published in *Lesotho Government Gazette* (Extraordinary), Vol. L, No. 62, 9 June 2005, p. 583.

of goods controlled and prohibited under that Convention, and provides for penalties for violators. The Chemical Weapons Act authorizes the Minister to designate a National Authority on Chemical Weapons within a department, organ or unit of Lesotho's security establishment. The Act also grants the Minister the authority to adopt regulations giving effect to the provisions of the Act and of the said Convention.

Peru

*Law No. 28665 on the Organization, Duties and Competence of the Special Jurisdiction in Penal Military Police Matters*⁶ was approved on 29 December 2005 and promulgated on 6 January 2006. It was published in the Official Gazette on 7 January 2006. Chapter III of the Law, entitled "Organization of the special jurisdiction in penal military police matters in time of armed conflict", defines international and non-international armed conflicts and gives the executive branch the authority, during an armed conflict, to initiate proceedings before the special jurisdiction. It furthermore entrusts the Commander with the responsibility to establish within the new jurisdiction both a jurisdictional and a non-jurisdictional board and to designate the members and the judges on such boards. The *Code of Military Justice*⁷ was approved on 10 January 2006 and published in the Official Gazette on 11 January 2006. Part II of the Code, entitled "Crimes against international humanitarian law", defines crimes committed against protected persons and includes provisions on command responsibility, superior orders and universal jurisdiction, in accordance with Protocol I additional to the Geneva Conventions of 1949.

Singapore

*The Biological Agents and Toxins' Act No. 36 of 2005*⁸ was passed by the Parliament of Singapore on 18 October and entered into force on 3 January 2006. The Act implements the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction and provides for prohibitions relating to biological agents and toxins as defined in that Convention. Any person who contravenes the prohibitions contained in the Act commits a criminal offence and is liable to a fine or imprisonment, or both. Moreover, the Act stipulates that a District Court shall have jurisdiction to try certain offences under the Act (other than those defined under sections 5, 16 and 30), and to impose appropriate penalties.

6 Ley número 28665 de organización, funciones y competencia de la jurisdicción especializada en materia penal militar policial.

7 Código de Justicia Militar Policial. Decreto legislativo número 961.

8 Biological Agents and Toxins Act 2005, No. 36 of 2005. An Act to prohibit or otherwise regulate the possession, use, import, transshipment, transfer, and transportation of biological agents, inactivated biological agents and toxins, to provide for safe practices in the handling of such biological agents and toxins, and to make a related amendment to the Infectious Diseases Act (Revised Edition, Chapter 137).

Sudan

The *Interim Decree Law concerning the Sudanese Red Crescent Society*⁹ was signed and entered into force on 3 August 2005. The Decree defines the legal personality, mandate and spheres of competence of the National Society. It outlines the aims and responsibilities of the National Society as an auxiliary to the armed forces in the provision of medical services in all fields of activity specified under the 1949 Geneva Conventions in favour of military and civilian victims of armed conflict, and in support of state structures in emergency and aid activities. It reiterates the stipulation that the National Society shall be bound by the seven Fundamental Principles of the International Red Cross and Red Crescent Movement and declares misuse of the red crescent emblem of the Society to be an offence liable to punishment under domestic law.

Syria

The *Law No. 36 on the Protection of the Emblem*¹⁰ was adopted on 23 November 2005. It defines the persons entitled to make use of the protective and of the indicative emblem. It also provides for the protection of the emblems and the names of the red crescent and red cross and for penalties in cases of emblem misuse, and assigns responsibility for monitoring application of the law to the Syrian Red Crescent Society.

United Kingdom (Gibraltar)

The *Weapons of Mass Destruction (Amendment) Ordinance 2005 [Gibraltar]*¹¹ was enacted by the Gibraltar House of Assembly on 23 May 2005. The Ordinance provides new definitions for and clarifications of the Weapons of Mass Destruction Ordinance 2004 [Gibraltar].¹²

United States

The *Directive of the Department of Defense 3115.09 on Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning*¹³ was adopted on 3 November 2005.

9 2005 Interim Decree Law concerning the Sudanese Red Crescent Society, signed 3 August 1426 (Hijra).

10 Law 36 on the Protection of the Emblem, 23 November 2005.

11 Weapons of Mass Destruction (Amendment) Ordinance 2005 [No. 38 of 2005], First Supplement to the Gibraltar Gazette, No. 3471 of 26 May 2005.

12 The Weapons of Mass Destruction Ordinance 2004 [Gibraltar]. An Ordinance to make provision for the purpose of prohibiting the development, production, acquisition and possession of certain weapons of mass destruction; implementing in Gibraltar the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, signed at Washington, London and Moscow on 10 April 1972, and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, signed at Paris on 13 January 1993; and for connected purposes, Second Supplement to the Gibraltar Gazette, No. 3437 of 4 November, 2004, [Legal Notice No. 105 of 2004].

13 DoD Directive No. 3115.09, Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, November 3, 2005.

By the authority vested in the Secretary of Defence under Title 10, Title 50, United States Code, Executive Order 12333, “United States Intelligence Activities”, December 4, 1981, as amended, the Directive consolidates and codifies existing departmental policies, including the requirement for humane treatment during all intelligence interrogations, detainee debriefings or tactical questioning to gain intelligence from captured or detained personnel. It stipulates that all interrogations shall be conducted humanely and in accordance with applicable law and policy, including the laws of war, assigns responsibilities, and establishes requirements for reporting violations.

The *Amendment to the 2006 Department of Defence Authorization Bill*¹⁴ relating to the military use of riot control agents was adopted on 9 November 2005. The amendment restates the current policy of the United States with regard to the use of riot control agents by military forces. It notably provides that riot control agents, as they are not chemical weapons, may be employed by members of the Armed Forces in war in defensive military mode in order to save lives. The President may consequently authorize their use as *legitimate, legal and non-lethal alternatives to the use of lethal force*.

B. Case law

Colombia

On 2 March 2004, the Constitutional Tribunal of Colombia¹⁵ gave effect to *Law No. 833* of 10 July 2003 approving the *Optional Protocol to the Convention on the Rights of the Child on involvement of children in armed conflict* of 25 May 2000 (hereinafter *Optional Protocol*).

The Constitutional Tribunal, having considered the purposes of the *Optional Protocol*, declared the latter consistent with Colombia’s Constitution,¹⁶ which recognizes the special protection and the specific rights of children, and called upon the State to adopt all measures required to give effect to these rights. The Tribunal held that the *Optional Protocol*, while increasing the protection of children from direct involvement in armed conflict and imposing commitments in this regard upon States Parties, develops and strengthens Colombia’s constitutional requirements.

On 10 May 2005, the Constitutional Tribunal of Colombia¹⁷ gave effect to draft statutory *Law No. 064* (Senate) and *197* (Chamber) of 2003¹⁸ regulating the

14 Amendment to the 2006 FY Department of Defence Authorization Bill, 9 November 2005.

15 Sentencia C-172/04: Revisión de Constitucionalidad de la Ley 833 del 10 de julio de 2003, “por medio de cual se aprueba el “PROTOCOLO FACULTATIVO DE LA CONVENCION SOBRE LOS DERECHOS DEL NIÑO RELATIVO A LA PARTICIPACION DE NIÑOS EN LOS CONFLICTOS ARMADOS”, adoptada en Nueva York el veinticinco (25) de mayo de dos mil (2000).

16 Constitución Política de Colombia, Article 44.

17 Sentencia C-473/05: Revisión de constitucionalidad del proyecto de ley estatutaria número 065 de 2003 Senado, 197 de 2003 Cámara, “por medio de la cual se reglamenta el mecanismo de búsqueda urgente y se dictan otras disposiciones”.

18 Proyecto de ley estatutaria número 065 de 2003 Senado y 197 de 2003 Cámara.

mechanism established to conduct immediate investigations into enforced disappearances. In examining the constitutionality of the draft law, the Court referred to the Inter-American Convention on the Forced Disappearance of Persons (adopted at Belém do Pará on 9 June 1994 at the Twenty-fourth Regular Session of the General Assembly), the Declaration on the Protection of All Persons from Enforced Disappearance,¹⁹ the Rome Statute of the International Criminal Court and the report of the Working Group on Enforced or Involuntary Disappearances.²⁰

Germany

On 28 July 2005, the Higher Regional Court of Cologne (hereinafter Regional Court)²¹ dismissed an appeal concerning the civil responsibility of the German State for alleged violations of international humanitarian law committed by NATO forces in Kosovo.

The case concerned the civil law suit brought against the German state by the victims of a NATO air bombardment which had destroyed a bridge in the Serbian town of Varvarin, thereby killing both military personnel and civilians. The bridge, it was claimed, had served no military purpose and had not represented a legitimate military target at the time. In a first judgment in the case, the District Court of Bonn had rejected the compensation claims and dismissed the case as a matter of principle, holding that any entitlement based on public international law only existed between states and that no exceptions to this principle could be derived from the rules of international humanitarian law.

In contrast to the lower court, the Higher Regional Court of Cologne, while ruling against the claimants on the facts of the case, accepted the claim in principle. The Court first confirmed that no individual claim to compensation existed under international humanitarian law. It did not, however, exclude the possibility of claims based on national law as such, and notably on the German law, deriving from Germany's Basic Law and Civil Code, on compensation for wrongful acts committed by government authorities. In support of its ruling, the Regional Court referred further to recent developments in international law, such as the evolving codification of rules on the protection of the individual under human rights and humanitarian law, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Rome Statute of the International Criminal Court.

The Higher Regional Court nevertheless rejected the claims and held that German officials had not, in view of the facts of the case, violated any laws by their indirect involvement in the bombing and therefore had not triggered the liability of the German state.²²

19 A/RES/47/133.

20 Doc. E/CN.4/1989/18/Add.1, 6 February of 1989.

21 Oberlandesgericht Köln (Higher Regional Court of Cologne), Judgment of 28 July 2005, Case No. 7 U 8/04.

22 The judgment is not final and leave for further appeal to the Federal High Court has been granted.

Spain

On 5 October 2005, Spain's Tribunal Constitucional²³ ruled that cases of genocide committed abroad could be prosecuted in Spain, irrespective of whether the victim is a Spanish national. In so doing, the Constitutional Court overruled the interpretation given by Spain's Tribunal Supremo (Supreme Court)²⁴ to section 23(4) of the Organic Law on the [organization of the] Judicial Power (i.e. the judicial system),²⁵ on the grounds that it had denied the right to effective access to justice as guaranteed under Section 24.1 of the Spanish Constitution.

The case in question related to the prosecution of acts committed in Guatemala in the 1970s and 1980s and alleged to have constituted crimes of genocide, terrorism and torture. The plaintiffs challenged the restrictive interpretation given by the Supreme Court to the principle of universal jurisdiction under Spanish law.

Section 23(4) of the Organic Law on the Judicial Power recognizes the principle of universal jurisdiction over several crimes, including genocide and terrorism. The Supreme Court had rejected the case, on the basis of the principle of *subsidiarity* under section 6 of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and ruled that the plaintiffs had failed to prove that the courts of another state (Guatemala) had *de facto* rejected the claim. The Constitutional Court decided that such an interpretation defeated the purpose of universal jurisdiction as provided for under both Spanish law and the Genocide Convention, and held that it is enough, in order for domestic courts to exercise jurisdiction, to present serious and reasonable evidence of a failure to prosecute. Furthermore, the Constitutional Court rejected the Supreme Court's assertion that, since no international treaty establishes the principle of universal jurisdiction, universal jurisdiction is restricted under customary international law. While referring to the definition of universal jurisdiction in criminal matters given by the Institute of International Law in 2005, the Constitutional Court held that international law does not subject the competence of States to prosecute genocide and punish offenders to the existence of a connection or link with the place of jurisdiction, whether based on the principles of territoriality, active or passive personality, or *national interest*.

United Kingdom

On 12 August 2005, the United Kingdom's High Court of Justice²⁶ rejected the case advanced on behalf of a dual British and Iraqi national arrested and detained

23 Sala Segunda del Tribunal Constitucional, *Rigoberta Menchú and others*, 5 October 2005.

24 Plenary Assembly of the National Audience, No.115-2000, 13 December 2000; Supreme Court, No.327-2003, 25 February 2003.

25 Ley orgánica del poder judicial (LOPJ).

26 United Kingdom High Court of Justice, Queen's Bench Division, *The Queen (on the application of Hilal Abdul-Razzak Ali Al-Jedda) v. Secretary of State for Defence*, 12 August 2005, Citation number [2005] EWHC 1809 (Admin).

in Iraq by British forces on suspicion of membership in a terrorist group deploying its activities in Iraq. In the proceedings, the claimant contended that his continued detention in Iraq and the failure to return him to the United Kingdom were unlawful and in breach of the rights conferred on him by Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as scheduled to the United Kingdom's Human Rights Act 1998. In rebuttal, the main argument of the defendant Secretary of State was that the claimant's detention was authorized under United Nations' Security Council Resolution 1546 of 8 June 2004 (hereinafter Resolution 1546), and that the effect of the said resolution was to displace the claimant's rights under the ECHR.

The Court first examined the scope of application of the 1998 Act. In so doing, it recognized that the latter was capable of applying to the claimant since he had been detained, although outside the UK, in a facility operated by British forces. It also confirmed, on the basis of precedent, that UK courts had a duty to interpret the Human Rights Act and the latter's jurisdictional scope in a manner consistent with the duties of the UK under the ECHR as interpreted by the European Court of Human Rights in Strasbourg. Accordingly, the public authorities of the UK were required to secure the rights recognized under the Convention.

The Court then proceeded to examine whether Resolution 1546 had the effect, as a matter of international law, of displacing the claimant's *right to liberty and security of person* as recognized under Article 5 of the ECHR. The Court first recognized that the said rights, while deriving from Article 5 of the ECHR as set out in Schedule 1 of the Human Rights Act, are domestic rights conferred by the UK Act and enforceable before UK courts. Considering the natural meaning and context of Resolution 1546, the Court determined that the latter's intention had been to continue the mandate of the multinational force in Iraq after the transfer of authority of the Coalition Provisional Authority to the Iraqi Interim Government. Hence, the Court concluded, by Resolution 1546, the Security Council had continued the powers previously exercised by the multinational force when in belligerent occupation; these, the Court held, included the power under Article 78 of the Fourth Geneva Convention of 1949 relative to the protection of civilian persons in a time of war to detain persons *for imperative reasons of security*, and thus had the effect of displacing Article 5 of the ECHR.

Considering further the lawfulness of the detention under the regime established by Resolution 1546, the Court concluded that the procedures applicable to the claimant's detention did not strictly meet the procedural requirements under Article 78 of the Fourth Geneva Convention, but that the non-compliance was in its view more technical than substantial.

Last, in examining the legality of the defendant's failure to return the claimant to the UK, the Court concluded that the power of internment under Resolution 1546 is directed towards the detention of persons in Iraq, not their removal therefrom. Consequently a transfer to the UK would involve actions inconsistent with Resolution 1546.

For these reasons, the Court dismissed the case brought on the claimant's behalf.

United States

On 9 September 2005, the US Court of Appeals for the Fourth Circuit²⁷ reversed the judgment of the District Court of South Carolina, which had held that the US President lacks the authority to detain militarily a US citizen arrested in the United States on suspicion of having been recruited abroad by al Qaeda members in order to commit terrorist acts in the US. Following the President's determination that the appellant in the case was an *enemy combatant*, the latter had been taken into military custody and had subsequently filed a petition for a writ of *habeas corpus*. The District Court had held that his continued detention was unlawful under the Constitution and the laws of the United States and that the defendant should have been either charged or released.

The issue raised before the Court of Appeals was whether the President possesses the authority to detain militarily a US citizen closely associated with al Qaeda, an entity with which the United States is at war, who had taken up arms on behalf of that enemy in a foreign combat zone, and who thereafter had travelled to the United States with the avowed purpose of further prosecuting that war on American soil against American citizens and targets.

The reasoning of the Court of Appeals is based on the *Authorization for Use of Military Force Joint Resolution*, enacted by the US Congress on 18 September 2001, which states that "The President is authorized to use all necessary and appropriate force ... in order to prevent any future acts of international terrorism against the United States ...", as well as on the Supreme Court's ruling in the *Hamdi v. Rumsfeld* case.²⁸ In that decision, the Supreme Court had interpreted the *Joint Resolution* and upheld that the Executive has the authority to detain citizens who qualify as "enemy combatants" *within the meaning of the laws of war*. The petitioner in the present case contended that his situation was different from that of *Hamdi*, for the latter had had been captured on a foreign battlefield. Referring to the reasoning of the Supreme Court, the Court of Appeal found no support for a distinction to be drawn on the basis of the *locus of capture* and concluded that the petitioner's military detention was authorized as *an incident fundamental to the President's prosecution of the war against al Qaeda in Afghanistan*. The petitioner also contended that his military detention was "neither necessary nor appropriate", since he was amenable to criminal prosecution. The Court of Appeal held that the availability of criminal process cannot be determinative of the power to detain, since the mere availability of criminal prosecution could not, of

27 US Court of Appeals for the Fourth Circuit, *Jose Padilla v. C.T. Hanft, et al.*, No. 05-6396, 9 September 2005.

28 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.

itself, guarantee the very purpose for which detention is authorized in the first place, namely the prevention of return to the field of battle.

In the case, the Court of Appeals concluded that the petitioner *unquestionably* qualified as an “enemy combatant” and that his military detention was therefore justified and fully authorized under the *Authorization for Use of Military Force Joint Resolution*.