

# National implementation of international humanitarian law

## Biannual update on national legislation and case law January–June 2006

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### A. Legislation

#### Albania

*Law No. 9515 on implementation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel mines and on their Destruction* was adopted by Parliament on 18 April 2006.

The Law defines the national authorities and other entities responsible for implementing the Ottawa Convention of 3 December 1997. It prohibits the use, development, production, purchase, storage, stockpiling or transfer of anti-personnel landmines, as well as any assistance or encouragement of such acts. The retention, use, storage and transfer of a limited number of anti-personnel landmines is nevertheless permitted for the purpose of training in mine detection, mine clearance and mine destruction techniques. The Law stipulates that non-compliance with its provisions may constitute either a criminal offence under the criminal code (Article 278 of the Criminal Code) or an administrative violation punishable by a fine.

The Law also provides for international inspections and specifies the manner in which these may be carried out in cooperation with the national authorities concerned.

#### Peru

*Law No. 28824 concerning conduct prohibited by the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their*

*Destruction*<sup>1</sup> was adopted on 10 July 2006 and published in the Official Gazette on 22 July 2006. The Law implements Article 9 of the Convention and introduces into the Penal Code a new provision (Article 279-D) stipulating prison sentences for acts prohibited under the Convention.

An exception is nevertheless provided for the authorized retention or transfer – under the auspices of the *Peruvian Centre for Action against Anti-personnel Landmines* (CONTRAMINAS) – of a limited number of anti-personnel mines to be specified by the Ministries of Defence and the Interior, in conjunction with the Ministry of Foreign Affairs, for the purpose of developing mine clearance and mine-destruction techniques and training in the field of mine detection.

## Sri Lanka

The *Geneva Conventions Act*, No. 4 of 2006, was adopted on 26 February 2006 and published in the *Official Gazette* on 3 March 2006. The Act gives effect to the Geneva Conventions of 1949. It contains provisions on the punishment of grave breaches of the four Geneva Conventions and establishes universal jurisdiction over these crimes.

The Act sets out the obligation to serve notice of trial of protected prisoners of war and internees on the protecting power or on the prisoner's representative. It contains provisions on the legal representation of persons brought for trial for a breach of the Act, on appeals by protected prisoners of war and internees, on reduction of sentence and on custody. The Act also establishes the jurisdiction of the High Court of Sri Lanka for the purpose of determining whether persons who have taken part in hostilities should be granted prisoner-of-war status in accordance with Article 5 of the Third Geneva Convention. The Act provides for the prevention and sanction of misuse of the red cross emblem and other distinctive emblems.

## United States

The *Detainee Treatment Act, 2005*,<sup>2</sup> part of the *Department of Defense Appropriations Act, 2006*, was adopted by Congress and signed by the president on 30 December 2005. Section 1002 of the Act makes the US Army *Field Manual* on Intelligence Interrogation binding for all interrogations of persons in the custody or under the effective control of the Department of Defense or detained in a Department of Defense facility, with the exception of persons detained pursuant to a US criminal or immigration law.

1 Ley que sanciona penalmente conductas prohibidas por la convención de Ottawa sobre la prohibición del empleo, almacenamiento, producción y transferencia de minas antipersonales y sobre su destrucción, *El Peruano*, 22 de julio de 2006.

2 Detainee Treatment Act, 2005, as included in the Department of Defense Appropriations Act, 2006 and agreed to by the US House and Senate and signed by President Bush, December 30, 2005 (incorporating the McCain Amendment and the Graham-Levin Amendment on detainees), available at <<http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php>>.

The Act contains a prohibition on cruel, inhumane and degrading treatment or punishment of persons under the custody or control of the US government. It also sets out procedures for reviewing the status of detainees held outside the United States and assigns exclusive jurisdiction to the US Court of Appeals for the District of Columbia Circuit for the purpose of reviewing the detention of an enemy combatant, the decisions of combatant status review tribunals and the decisions of military commissions.

## B. National Committees

### Libya

The *Decree of the General Popular Committee No.253 of 2005 regarding the creation of the National Committee for International Humanitarian Law* was adopted on 18 December 2005.

The Committee is responsible for defining, in co-ordination with the relevant authorities, strategies and programmes for the implementation and dissemination of international humanitarian law (IHL) and for drawing up proposals to adapt national legislation to the requirements of IHL treaties. The Committee has also been assigned to monitor and document violations of IHL, and to propose appropriate remedies.

The Committee is chaired by the secretary of the General Popular Committee for Justice and is composed of 15 members, including representatives of different ministries (General Popular Committees) and of various centres and associations, of the secretary-general of the Libyan Red Crescent, and of nine eminent experts in the field of IHL to be named by the Committee chair.

The Decree states that the Committee's expenses will be covered by annual allocations from the state budget and donations accepted by the chair.

### Romania

The National Committee for IHL was set up by means of a decision of the prime minister taken on 29 March 2006 and published in the *Official Gazette* on 13 April 2006.<sup>3</sup>

The Committee serves as an advisory body composed of representatives of various ministries and of independent experts. It may invite members of parliament and representatives of governmental or non-governmental organizations, of the Romanian Red Cross and of the ICRC to take part in its meetings.

The Committee has the task of proposing measures for the implementation of IHL at the national level. To this end it will examine the conformity of national legislation with IHL, issue recommendations on relevant draft laws and

3 *Official Gazette*, No. 420/2006.

regulations, and promote the dissemination of IHL by means of expert meetings and specialized courses on IHL. The Committee will also be responsible for drawing up a national strategy and for preparing an annual report on the implementation of IHL. The Committee will be chaired, in turn, by the state secretaries of the ministries of Foreign Affairs, the Interior and Justice. The Committee will meet in ordinary session every three months and will hold extraordinary sessions as needed.

## Tunisia

Decree No. 2006-1051 on the creation of a national commission on international humanitarian law<sup>4</sup> was enacted on 20 April 2006 by the Tunisian president acting on the proposal of the Minister of Justice and Human Rights.

The Commission has the task of promoting and disseminating IHL. Its primary responsibilities include preparing recommendations for the adaptation of national legislation and practice to the requirements of IHL, and for drawing up and carrying out an annual strategy in conjunction with relevant national bodies. When called upon to do so, the Commission may also issue legal recommendations on questions related to IHL and its field of application.

The Commission will be chaired by the Minister of Justice and Human Rights or his representative, and is composed of the general commissioner for human rights and representatives of various ministries, the High Committee for Human Rights and Fundamental Freedoms, the Tunisian Union of Solidarity, and the Tunisian Red Crescent, as well as various other experts in the field of IHL.

The Commission will meet at least twice a year and on any other occasion deemed necessary. It may create sub-commissions to study specific matters falling within its mandate. The Decree stipulates that office services for the Commission will be provided by the Ministry of Justice and Human Rights and that its expenses will be covered by that ministry's budget.

## South Africa

South Africa's National Committee on IHL was established in April 2006 by a decision of the executive management committee of the Department of Foreign Affairs. The Committee will be chaired by the Department of Foreign Affairs and composed of two representatives from relevant government entities (such as the ministries of Foreign Affairs, Justice, Defence, Police, Health and Education). The Committee may co-opt members from outside the government (e.g. the ICRC and academic circles).

The Committee is assigned a broad mandate and should act as a focal point, providing leadership on all issues related to the domestic implementation and dissemination of IHL.

<sup>4</sup> Décret n° 2006-1051 du 20 avril 2006, portant création de la commission nationale de droit international humanitaire, publié au *Journal Officiel de la République Tunisienne* n°33 du 25 avril 2006.

## C. Case law

### Bosnia and Herzegovina

On 4 April 2006, the Appellate Division of the Court of Bosnia and Herzegovina passed sentence in a case involving a citizen of Bosnia and Herzegovina convicted of war crimes for having intentionally helped abduct civilians.<sup>5</sup> The Court sentenced him to five years' imprisonment.

Referring to past ICTY decisions<sup>6</sup> and to an agreement between the warring parties, the Court found no grounds for disputing that at the time of the events, in 1993, an international conflict had existed between Bosnian Croats and Bosniaks in the Travnik area.

Regarding the status of the abducted persons, the Court held that, while they had been members of the Croatian Defence Council, the facts clearly showed that they should be considered as civilians, since at the moment of their abduction they were not present in the combat zone, were not wearing uniforms and were not armed.

Referring to the values upheld by IHL, in particular those enshrined in Article 3 common to the four Geneva Conventions, and basing itself on Articles 31 and 173 of the Criminal Code of Bosnia and Herzegovina, the Court concluded that the accused had been accessories to war crimes committed against civilians.

On 7 April 2006, the Court of Bosnia and Herzegovina, Section I (War Crimes), pronounced its first sentence in a case involving a Bosnian Serb who had belonged to the Republika Srpska army at the time of the events. It convicted him of crimes against humanity committed in 1992–93 against Muslim civilians. He was sentenced to 12 years' imprisonment (to which was added time unserved for another sentence, thus bringing his prison time to nearly thirteen and a half years).<sup>7</sup>

The accused was found guilty of illegal detention and other severe deprivation of physical liberty, as well as of various sexual crimes including rape and aiding and abetting in holding women in sexual slavery.

As to the applicable law, the Court denied an objection by the defence, which had argued for the applicability to the case of the Criminal Code of the Socialist Federal Republic of Yugoslavia. The Court decided that the provisions relevant to the case drawn from the Criminal Code of Bosnia and Herzegovina could be considered as "an integral part of the codification of crimes already recognized under international customary law at the time relevant to this case". Since international customary law forms a part of the general principles of international law, the Court concluded that trying the accused under the

5 Court of Bosnia and Herzegovina, *Maktouf*, No. KPŽ 32/05, 4 April 2006.

6 *Prosecutor v. Kordić and Cerkez*, ICTY, case No. IT-95-14/2, Trial Chamber, 26 December 2001 (particularly para. 145 and 146 – added), confirmed by the Appeals Chamber, case No. IT-95-14/2-A, 17 December 2004 (particularly para. 374 – added).

7 Court of Bosnia and Herzegovina, *Samardžić*, No. X-KR-05/49, 7 April 2006.

provisions of the Criminal Code of Bosnia and Herzegovina did not constitute a breach of the principle of *nullum crimen sine lege*. In support of its conclusions, the Court referred to the Report of the UN Secretary-General pursuant to para. 2 of S/RES/808,<sup>8</sup> the Commentaries on the draft Code of Crimes against the Peace and Security of Mankind,<sup>9</sup> and past case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).<sup>10</sup>

## Central African Republic

In its decision of 11 April 2006,<sup>11</sup> the Cour de Cassation (highest criminal court) of the Central African Republic rejected in part the General Prosecutor's appeal against a decision by the Bangui Court of Criminal Appeals dated 16 December 2004. The case concerned crimes committed in the Central African Republic since July 2002.

Confirming the decision of the Court of Criminal Appeals, which had declared the country's domestic courts incompetent to hear the case, and noting that the alleged perpetrators were all located outside the national territory, the Cour de Cassation concluded that the judicial system was clearly incapable of carrying out effective investigations and prosecutions for the crimes in question. The Cour de Cassation added that the crimes came under the jurisdiction of the International Criminal Court, which constituted the most effective opportunity to find and punish the perpetrators of the most serious crimes of concern to the international community as a whole.

## Netherlands

On 14 October 2005, the *rechtbank's-gravenhage* (district court) of The Hague was called upon to examine the case of an Afghan asylum seeker whom the Netherlands authorities suspected of having committed acts of torture and war crimes in Kabul in the period between late 1985 and late 1990,<sup>12</sup> while serving as a general in the Afghan army and later as deputy minister for state security and head

8 Doc. S/25704, Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, available on <<http://daccessdds.un.org/-web.washer/-progress?pages&id=2747172583&url=http://daccessdds.un.org/doc/UNDOC/GEN/N93/248/35/IMG/N9324835.pdf?OpenElement&fileName=N9324835.pdf&foo=3>> (visited on 23 August 2006).

9 Draft Code of Crimes against the Peace and Security of Mankind with commentaries, article 18, pp. 32–5, available at <[http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7\\_4\\_1996.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf)> (visited on 23 August 2006).

10 ICTY, *Tadić*, case N° IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 141; ICTY, *Tadić*, case N° IT-94-1, Trial Chamber, Judgement, 7 May 1997, paras. 618–623; ICTR, *Akayesu*, case N° ICTR-96-4-T, 2 September 1998, paras. 563–577.

11 Cour de Cassation, *Etat centrafricain contre Ange Félix PATASSE et autres*, arrêt du 11 avril 2006, répertoire N° 006, année 2006.

12 *Rechtbank's-Gravenhage*, AU4347, 09/751004-04 (dagvaarding I); 09/750006-05 (dagvaarding II), 14 October 2005.

of the military intelligence service. The accused was alleged to have transferred persons to places of detention where he knew torture to be common practice during interrogation, and to have failed to put an end to such practices in his capacity as deputy minister for state security.

The court convicted the accused under the Netherlands Criminal Law in Wartime Act<sup>13</sup> on counts of torture and complicity to commit torture as a violation of the laws and customs of war. The court sentenced him to twelve years' imprisonment.

On 23 December 2005, the *rechtbank's-gravenhage* of The Hague examined the case of a Netherlands citizen alleged to have supplied the Republic of Iraq in the 1980s with one of the main ingredients of mustard gas, which was later used in Iraq's chemical warfare programme against the country's Kurdish population and against Iran.<sup>14</sup>

The court acquitted the suspect on the first count of the indictment, that is complicity to commit genocide, as it had not been legally and convincingly proved that, at the time of delivery of the substances mentioned in the charges, the accused knew that he was making a contribution to attacks aimed at the total or partial destruction of the Kurdish population in Iraq.

Turning to the other charges of complicity in the commission of war crimes in the framework of attacks launched between 11 April 1987 and 2 August 1988, the court first established that an international armed conflict between Iran and Iraq and a non-international armed conflict on the territory of Iraq between Iraqi government troops and armed (Kurdish) resistance had existed during the above-mentioned period.

The court found that the requirement of intent for war crimes had been proved because "a person who supplies chemicals, which he knows will be used for the production of poison gas by a country engaged in a lengthy war that it started, can be safely said to have consciously accepted the risk that the poison gas to be produced would eventually be used on the battlefield".

The court concluded that complicity was established since it had been determined that the deliveries, to which the accused had contributed, had furthered or facilitated the execution of the attacks. It sentenced the accused to fifteen years' imprisonment on the basis of the Netherlands Criminal Law in Wartime Act.<sup>15</sup>

On 7 June 2006, the *rechtbank's-gravenhage* of The Hague ruled in a case involving the activities of a Netherlands national in Liberia. The suspect had been chairman of the Oriental Timber Corporation, a company alleged to have transported and imported arms in the period between 2001 and 2003 on behalf of

13 Wet Oorlogstrafrecht (Wet van 10 Juli 1952, houdende vaststelling van Wet Oorlogstrafrecht alsmede van enige daarmede verband houdende wijzigingen in het Wetboek van Strafrecht, het Wetboek van Militair Strafrecht en de Invoeringswet Militair Straf), *Official Gazette*, p. 408.

14 *Rechtbank's-Gravenhage*, AX6406, 09/751003-04, 23 December 2005.

15 Wet Oorlogstrafrecht (Wet van 10 Juli 1952, houdende vaststelling van Wet Oorlogstrafrecht alsmede van enige daarmede verband houdende wijzigingen in het Wetboek van Strafrecht, het Wetboek van Militair Strafrecht en de Invoeringswet Militair Straf), *Official Gazette*, p. 408.

Charles Taylor and his regime. The suspect being the only link between the Oriental Timber Corporation and Charles Taylor, the court concluded that the suspect had played a substantial role in importing weapons. The case against the accused was based on two series of charges: war crimes and violation of a sanction regime.

Regarding the first of these, by virtue of his delivery of weapons to a warring party the accused was alleged to have participated in and incited others to commit, *inter alia*, indiscriminate attacks against civilians, murder and plunder. The court acquitted him of this charge, finding that the mere delivery of weapons, which may also be used for authorized purposes, was insufficient to prove participation in war crimes.

The court sentenced the accused on the second charge, finding that, by delivering the weapons, he had acted in contravention of the Netherlands 2001 Regulation on Sanctions against Liberia<sup>16</sup> and its annex<sup>17</sup> establishing a prohibition on selling or delivering weapons, ammunition or other military technology to individuals or companies in Liberia. This prohibition was established in accordance with the EU regulation regarding limitative measures regarding Liberia, as adopted in implementation of Security Council resolutions 1343 and 1408.<sup>20</sup> The court ruled that by contravening this prohibition, the accused had undermined both international peace and stability in West Africa. It sentenced him to eight years' imprisonment.

## United States

On 29 June 2006, the Supreme Court of the United States rendered a decision in which it ruled that military commissions established to try detainees held at the Guantanamo Bay naval base in Cuba were illegal and violated the Uniform Code of Military Justice and the Geneva Conventions of 1949.<sup>18</sup>

The case involved a Yemeni national captured by militia forces in Afghanistan in 2001 and transported by US forces to the Guantanamo Bay facility. The US president deemed the petitioner eligible for trial by military commission, as authorized under Military Commission Order No. 1 of 21 March 2002.<sup>19</sup> Detained on charges of conspiracy to commit terrorism, the petitioner filed a writ of habeas corpus, arguing that the military commission lacked authority to try him and that he was being held without due process.

The US district court for the District of Columbia granted relief to the petitioner and stayed the Commission's proceedings on the grounds that the president lacked the authority to establish military commissions, and that the procedures established to try the petitioner violated basic protections

16 Sanctieregeling Liberia 2001, Regeling van de Minister van Buitenlandse Zaken.

17 In-en uitvoerbesluit strategische goederen, annex to the Strategic Goods Import and Export Order.

18 *Hamdan v. Rumsfeld, Secretary of Defense, et al.*, No. 05-184. Argued 28 March 2006 – Decided June 29, 2006. <<http://www.supremecourt.us/opinions/05pdf/05-184.pdf#search=%22Hamdan%20District%20Court%22>>.

19 Military Commission Order No. 1 <<http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>>.

recognized under the Uniform Code of Military Justice and Common Article 3 of the four Geneva Conventions of 1949.

The US court of appeals for the District of Columbia Circuit<sup>20</sup> reversed the decision of the district court. The court of appeals concluded that the military commissions were legal and legitimate forums for the trial of enemy combatants and that the Third Geneva Convention, as a treaty concluded between nations, did not confer individual rights and was therefore not judicially enforceable.

The Supreme Court reversed the court of appeals ruling and remanded the case.

On the issue of jurisdiction, the majority opinion first denied the government's motion to dismiss the writ of *certiorari* brought on the basis of the Detainee Treatment Act of 2005,<sup>21</sup> which, it was argued, precluded Supreme Court review over final decisions of combatant status review tribunals and military commissions.

On the merits of the case relating to the legality of military commissions, the Court acknowledged that the military commission had not been authorized by any congressional act and that neither the congressional resolution entitled "Authorization for Use of Military Force"<sup>22</sup> nor the Detainee Treatment Act could be interpreted as expanding the president's war powers or his mandate to convene military commissions. Instead, the above-mentioned resolution, the Uniform Code of Military Justice and the Detainee Treatment Act at most recognized the president's authority to convene military commissions, but only in circumstances in which this was justified under the Constitution and the law, including the laws of war. In the absence of a specific congressional authorization, the Court stated that it was its task to decide whether the petitioner's military commission was justified or not.

As to the legality of the petitioner's military commission trial in the case in question, the majority opinion was that the laws of war necessarily included both the Uniform Code of Military Justice and the Geneva Conventions of 1949, and that at a minimum Common Article 3 of the Geneva Conventions was applicable to the armed conflict in the context of which the petitioner had been captured. The Supreme Court found that the structure and procedures of the military commission presented substantial departures from, and therefore violated, the rules and protections contained in the Uniform Code and applicable in courts-martial and military commissions (e.g. the right of the defendant and his counsel to access certain evidence used during the trial). In the case of the petitioner's trial, the Court concluded that it had not been demonstrated *why the danger posed by international terrorism, considerable though it was, should require any variance from courts-martial rules*. The Court also ruled that the procedures

20 *Salim Ahmed Hamdan v. Donald H. Rumsfeld, United States Secretary of Defense, et al.*, No.04-5393, July 15, 2005 <<http://pacer.cadc.uscourts.gov/docs/common/opinions/200507/04-5393a.pdf>>.

21 See above note 2.

22 Authorization for Use of Military Force, 18 September 2001, Public Law 107-40 (S. J. RES. 23), 107th CONGRESS.

adopted to try the petitioner did not comply with Common Article 3 of the Geneva Conventions. In particular, the Court recalled that the minimal protection afforded under Article 3 included being tried by “a regularly constituted court”, subject to general requirements “crafted to accommodate a wide variety of legal systems”. The military commission convened by the president to try the petitioner, the Court majority opinion found, did not meet those requirements.<sup>23</sup>

23 Three justices dissented in their respective opinions. The Chief Justice took no part in the consideration or decision of the case since he had sat on the bench which delivered the judgment under review.