

REPORTS AND DOCUMENTS

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

Biannual update on national implementation of international humanitarian law* January–June 2017

: : : : : :

The biannual update on national legislation and case law is an important tool for promoting the exchange of information on national measures for the implementation of international humanitarian law (IHL).

In addition to a compilation of domestic laws and case law, the biannual update includes other relevant information related to accession and ratification of IHL and other related instruments, and to developments regarding national committees or similar bodies on IHL. It also provides information on some efforts undertaken by

ICRC Advisory Service

The ICRC's Advisory Service on International Humanitarian Law aims to provide a systematic and proactive response to efforts to enhance the national implementation of international humanitarian law (IHL). Working worldwide, through a network of legal advisers, to supplement and support governments' own resources, its four priorities are: (i) to encourage and support adherence to IHL-related treaties; (ii) to assist States by providing them with specialized legal advice and the technical expertise required to incorporate international humanitarian law into their domestic legal frameworks;¹ (iii) to collect and facilitate the exchange of information on national implementation measures and case law;² and (iv) to support the work of committees on IHL and other bodies established to facilitate the IHL implementation process.

* This selection of national legislation and case law has been prepared by Silvia Scozia, Legal Attaché in the ICRC Advisory Service on International Humanitarian Law, with the collaboration of regional legal advisers.

the ICRC Advisory Service during the period covered to promote universalization of IHL and other related instruments, and their national implementation.

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

Universal participation in IHL and other related treaties is a first vital step toward the respect of life and human dignity in situations of armed conflict. In the period under review, twelve IHL treaties or other relevant instruments (or amendments to them) were ratified or acceded to by ten States.³ In particular, there has been notable adherence to the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property. Indeed, three States have acceded to the said Protocol in the first half of 2017. In addition, two States have acceded to the Amendment to the Rome Statute on war crimes during the period in question. Furthermore, one State has ratified and another State has acceded to the International Convention for the Protection of All Persons from Enforced Disappearance during the first six months of 2017.

Other international treaties of relevance for the implementation of IHL include the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict – which has the ratification or accession of 129 States as of 30 June 2017 – and its first Protocol, the Convention on Certain Conventional Weapons and its Protocols, the Convention on Cluster Munitions, and the Arms Trade Treaty.

The following table outlines the total number of ratifications of and accessions to IHL treaties and other relevant related international instruments, as of the end of June 2017.

Ratifications and accessions, January–June 2017

Convention	State	Ratification/ accession date	Number of parties
1954 Hague Convention for the Protection of Cultural Property	Togo	24 January 2017	129

- 1 In order to assist States, the ICRC Advisory Service proposes a multiplicity of tools, including thematic fact sheets, ratification kits, model laws and checklists, as well as reports from expert meetings, all available at: www.icrc.org/en/war-and-law/ihl-domestic-law (all internet references were accessed in January 2019).
- 2 For information on national implementation measures and case law, please visit the ICRC National Implementation Database, available at: www.icrc.org/ihl-nat.
- 3 To view the full list of IHL-related treaties, visit the ICRC Treaties, States Parties and Commentaries Database, available at: www.icrc.org/ihl.

1954 Hague Protocol for the Protection of Cultural Property	Togo	24 January 2017	106
1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property	Togo	24 January 2017	73
	Liechtenstein	31 January 2017	
	France	20 March 2017	
2006 International Convention for the Protection of All Persons from Enforced Disappearance	Seychelles	18 January 2017	56
	Czech Republic	8 February 2017	
2010 Amendment to the Rome Statute of the International Criminal Court, amended Article 8	Portugal	11 April 2017	34
	Argentina	28 April 2017	
2008 Convention on Cluster Munitions	Madagascar	20 May 2017	101
2013 Arms Trade Treaty	Honduras	1 March 2017	92
1980 Convention prohibiting Certain Conventional Weapons	Lebanon	5 April 2017	124
2001 Amendment to Article 1 of the Convention on Certain Conventional Weapons	Lebanon	5 April 2017	84
1980 Protocol I to the Convention on Certain Conventional Weapons on Non-Detectable Fragments	Lebanon	5 April 2017	117
1996 Amended Protocol II to the Convention on Certain Conventional Weapons on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices	Lebanon	5 April 2017	103

Convention	State	Ratification/ accession date	Number of parties
1980 Protocol III to the Convention on Certain Conventional Weapons on Prohibitions or Restrictions on the Use of Incendiary Weapons	Lebanon	5 April 2017	114

National implementation of international humanitarian law

The laws and case law presented below were either adopted by States or delivered by domestic courts in the first half of 2017. They cover a variety of topics linked to IHL, such as the criminal repression of war crimes, the protection of the emblem, the protection of missing persons and their families, the protection of cultural property, the power to detain in non-international armed conflicts, and the establishment of national committees or similar bodies on IHL.

This compilation is not meant to be exhaustive; it represents a selection of the most relevant developments relating to IHL implementation and related issues based on information collected by the ICRC. The full texts of these laws and case law can be found in the ICRC’s Database on National Implementation of IHL.⁴

A. Legislation

The following section presents, in alphabetical order by country, the domestic legislation adopted during the period under review (January–June 2017). Countries covered are Afghanistan, the Central African Republic, China, Colombia, Kenya, Peru and the United Kingdom.

Afghanistan

Law on the Prohibition of Torture, 22 April 2017⁵

The Law on the Prohibition of Torture aims at preventing acts of torture from being perpetrated against suspects, accused persons, convicts and other individuals during investigation and detention, as well as against victims and witnesses. Besides providing a definition of what is considered “torture” for the purposes of the law – which

4 See the ICRC National Implementation Database, available at: www.icrc.org/ihl-nat.

5 Available at: <https://tinyurl.com/ycnqqoln>.

includes threat of torture, but excludes the enforcement of lawful sanctions – the law provides for the possibility of the victim, the relatives or the defence lawyer filing a complaint for an alleged act of torture to the Attorney General's office, the Independent Human Rights Commission of Afghanistan and/or the Higher Commission on Torture Prohibition, as well as to a Court and/or other competent entities. The Law, furthermore, recognizes the victim's right to compensation (Articles 5 and 18) and prescribes the obligation to adopt preventive measures.

Article 7 of the Law prohibits the invocation as a justification for torture of exceptional circumstances such as a state of war, risk of war or internal political instability, as well as superior orders.

Article 10 establishes the Commission of Prohibition of Torture, which will carry out its responsibilities with regard to the investigation of alleged cases of torture through a Torture Investigation Committee, in charge, *inter alia*, of reporting cases of alleged acts of torture to the competent authorities for prosecution. It refers to the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and to the Istanbul Protocol of 2004 (*Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*) to regulate the investigation of incidents of torture by the Committee.

*Afghanistan Penal Code, 15 May 2017*⁶

The new Penal Code of Afghanistan was approved through the Presidential Legislative Decree dated 4 March 2017, published by the Ministry of Justice on 15 May 2017 (*Official Gazette* No. 1260), and entered into force on 14 February 2018, nine months after the date of approval by the State president. It combines ten former separate criminal laws and also brings together the penal provisions of thirty-three laws of other scopes. With the application of this new Penal Code, the following shall be repealed: the Criminal Procedure Code, the Law on Detection and Investigation of Crimes and Oversight by the Prosecutor's Office on the Legality of Its Implementation, the Interim Criminal Procedure Code for Courts, and the provisions of Articles 161–171 of the 1976 Penal Code.

The 2017 Penal Code has 916 articles in two sections: general penal law and specific penal law (crimes and punishments). It criminalizes international crimes listed in the Rome Statute of the International Criminal Court, including war crimes, crimes against humanity, genocide and aggression, and it sets forth the criminal liability for civilian superiors or military commanders who fail to prevent or punish subordinates who commit these crimes. It further prevents an alleged perpetrator from invoking the defence of superior orders for genocide, crimes against humanity, war crimes, aggression and torture.

The Penal Code further punishes, *inter alia*, illicit manufacturing and trafficking in firearms; sexual abuse of boys, extending the prohibition to all related acts, including knowingly attending a performance that involves such

6 Available at: <https://tinyurl.com/ybtvs76b>.

practice; and forced virginity testing of women suspected of having engaged in consensual extramarital sex (clearly distinguished from rape).

Other novelties of the new Penal Code include the incorporation of alternatives to imprisonment (of up to five years) and incarceration of minors (of up to three years) with the discretion of the judge. War crimes are excluded from such alternatives. The number of death penalty offences is reduced from fifty-four to fourteen. Several crimes formerly liable for the death penalty are assigned a form of imprisonment called “first degree continued imprisonment (30 years)” in the new Code.

Finally, the Penal Code addresses topics such as the protection of cultural property, the protection of the dead, and the recruitment of children.

Central African Republic

Law 17.012 containing the Code of Military Justice, 24 March 2017⁷

According to the judicial system of the Central African Republic (CAR), the Permanent Military Tribunal is competent for all military offences as well as ordinary law offences committed by the military⁸ (or forces considered assimilated to the military⁹) in the exercise of their functions in the barracks, during service or in any military establishment in peacetime.

According to Article 23 of the Code of Military Justice, in times of armed conflict or during a state of emergency, the military tribunal¹⁰ is competent with regard to violations committed by any civilian or military person, although ordinary courts remain competent when a co-perpetrator or accomplice is not amenable to military jurisdiction, including minors. The definition of who is considered as part of the military under this law includes any member of the national army, including the national gendarmerie, as well as any prisoner of war. Considered as equal to the previous category are members of the CAR police force, customs agents, water and forestry agents, reservists, those ordered to join or to return to military service, military personnel exercising their functions in a hospital or in a penitentiary establishment, any civilian who has taken up arms or participated in an armed organization fighting against the State, and civilian personnel employed on a statutory or contractual basis by the armed forces.

7 Available at: <https://tinyurl.com/ycrvscxd>.

8 As defined by Article 25, Law 17.012 containing the Code of Military Justice.

9 *Ibid.*, as defined by Article 26.

10 The martial court is competent in criminal matters, while the military tribunal has jurisdiction in correctional matters. It should be noted that the Code of Criminal Procedure of 2010 applies in proceedings on correctional matters before the military tribunal, and in criminal proceedings before the martial court. Further differences between the two can be seen in the appeals procedure: for correctional matters (competence of the military tribunal), the appeal is made before the correctional chamber of the Court of Appeal, while for criminal matters (competence of the martial court), the appeal is made before the criminal chamber of the Court of Cassation. The Code of Criminal Procedure of 2010 is available at: <https://tinyurl.com/y9h3u4uu>.

The law defines a military establishment as any temporary or permanent installation used by the armed forces and assimilated bodies, as well as any military building or aircraft, wherever located.

China

*Amended Law of the People's Republic of China on the Red Cross Society, 24 February 2017*¹¹

The Law of the People's Republic of China on the Red Cross Society was originally promulgated on 31 October 1993, in accordance with Article 4 of the Statute of the International Red Cross and Red Crescent Movement (the Movement). As part of the reform initiative of the Red Cross Society of China (RCSC) and with the technical support of the ICRC, the RCSC advocated for an amendment in order to reaffirm its status and to change certain provisions, including its legal status, its legal mandate and the use and protection of the red cross emblem. The amendment was adopted on 24 February 2017 and came into force on 8 May 2017.

The Law defines the RCSC as the unitary Red Cross organization of China and a social relief and aid society that engages in humanitarian work. It provides that the RCSC shall adhere to the Fundamental Principles laid down by the Movement, and carry out its work independently in accordance with the Geneva Conventions and their Additional Protocols acceded to by China, and the Statutes of the RCSC. It prohibits any organization or individual from obstructing the RCSC from carrying out its duties of rescue, relief and first aid.

The Law also regulates the use of the red cross emblem and accords protection to the emblem to that effect, the violation of which will trigger civil, administrative or criminal liability. In particular, Articles 14 to 16 stipulate that the use of the red cross emblem must be in compliance with the Geneva Conventions of 1949 and their Additional Protocols.

The functions and duties of the RCSC include the dissemination of the Geneva Conventions of 1949 and their Additional Protocols, as well as of the Fundamental Principles of the Movement.

Colombia

*Legislative Act No. 1 of 2017 – Constitutional Reform – Establishing the System of Truth, Justice, Reparation and Non-Repetition, 4 April 2017*¹²

On 4 April 2017, the Congress of Colombia issued Legislative Act No. 1 of 2017 by means of which the Integral System of Truth, Justice, Reparation and Guarantees of

¹¹ Available at: <https://tinyurl.com/yb75vrbv>.

¹² Available at: <https://tinyurl.com/yaew3qu>.

Non-Repetition was created. This law, which modifies the Political Constitution, was adopted as a result of the Peace Agreement reached between the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo, FARC-EP) and the government of Colombia.

The System envisaged by the Act contemplates the creation of three entities: the Commission for Clarification of the Truth and Guarantees of Non-Repetition, the Search Unit for Missing Persons, and the Special Jurisdiction for Peace.

Being of a temporary and extrajudicial nature, the mandate of the Commission for Clarification of the Truth and Guarantees of Non-Repetition is to find out the truth of what happened during the armed conflict and to contribute to the clarification of violations and infractions in order to promote a shared understanding of the conflict in Colombian society. Given its extrajudicial nature, the Commission is not mandated to prosecute any of the actors involved in the armed conflict; its officials furthermore enjoy testimonial immunity with regard to the information acquired through the exercise of their functions.

The Search Unit for Missing Persons is an entity of a humanitarian and extrajudicial nature which directs, coordinates and contributes to the implementation of humanitarian actions aimed at searching for persons who have gone missing in the context and because of the armed conflict in Colombia.

The Special Jurisdiction for Peace is composed of: the Chamber for the Recognition of Truth, Responsibility and Determination of the Facts and Conduct; the Chamber for the Definition of Legal Situations; the Chamber for Amnesty or Pardon; the Tribunal for Peace; the Investigation and Prosecution Unit; and the Executive Secretariat. It has jurisdiction over crimes committed prior to 1 December 2016 (the date of the Peace Agreement), for cause, on occasion or in direct or indirect relation to the armed conflict, especially with regard to conduct considered a serious breach of IHL or a serious violation of human rights. To make such determination, the Legislative Act provides that IHL (in conjunction with domestic criminal law, international criminal law and international human rights law) will be among the parameters of interpretation for the legal qualification of the behaviour.

The Special Jurisdiction for Peace, besides investigating and punishing serious breaches of IHL, identifies those acts and conduct that are susceptible of being granted an amnesty. The Legislative Act further provides a special chapter on the differentiated treatment granted to members of the State forces who have carried out punishable conduct falling under the competence of the Special Jurisdiction for Peace, including command responsibility (Chapter VII). IHL is applied as *lex specialis* for the determination of the superior responsibility of members of the State forces of Colombia (Provisional Article 24).

*Decree No. 589 establishing the Search Unit for Missing Persons, 5 April 2017*¹³

13 Available at: <https://tinyurl.com/ycxy6p96>.

On 5 April 2017, Decree 589 establishing the Search Unit for Missing Persons in Colombia was promulgated by the president. The issue of missing persons was a central part of the negotiations between the government and the FARC-EP. The objective of the Search Unit is to fulfil the right to truth and reparation to victims and their families.

Article 2 of the Decree establishes that the functions and activities of the Unit will be deployed in the search for persons who went missing in connection to the armed conflict, with a particular focus on women and children. In the case of death, the Unit will contribute to the implementation of actions aimed at, when possible, the identification of the bodies and the dignified delivery of their remains.

The Unit will operate under the principle of confidentiality of its actions and its findings and, as a general rule, the activities of the Unit will not substitute or prevent investigations of a judicial nature that may arise in compliance with the obligations of the State, and the results of the investigations will not be used as evidence in judicial processes (Article 3).

Article 5 lays out the functions and competencies of the Search Unit, which include collecting information necessary to carry out the search for missing persons; designing and executing the national plan for the search, location, recovery, identification and management of the dead in the context and in connection with the armed conflict; coordinating with other technical scientific entities to reach its objectives; guaranteeing the participation of the family of the missing person in this process and coordinating with other institutions to provide the relatives with psychosocial assistance; and various reporting obligations.

Kenya

Prevention of Torture Act, 20 April 2017¹⁴

On 20 April 2017, the Prevention of Torture Act was issued in the Republic of Kenya. The Act implements Kenya's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Kenya ratified on 21 February 1997. It further provides for the prevention, prohibition and punishment of such acts as well as for reparations to victims.

Articles 4 to 8 of the Act define and criminalize torture and the offence of cruel, inhuman and degrading treatment or punishment, as well as aiding and abetting the aforementioned and using information obtained through torture.

Article 10 establishes that neither amnesty nor immunity shall be granted to persons accused of torture or cruel, inhuman or degrading treatment or punishment, and Article 6 confirms the applicability of the Act in times of armed conflict.

14 Available at: <https://tinyurl.com/yctnejz8>.

Section 4 of the Act provides a non-exhaustive list of acts that constitute physical and psychological torture. In addition, the Act establishes torture as an extraditable offence and guarantees that no one shall be expelled, returned or extradited to a location where there is reason to believe that the person will be in danger of being tortured (Article 21).

Finally, the Act confers upon the Kenya National Commission on Human Rights the duty to investigate alleged violations of the provisions of the Act upon receipt of a complaint or on its own initiative, and the power to monitor the compliance by the State with international treaty obligations relating to torture and cruel, inhuman and degrading treatment and punishment.

Peru

*Supreme Decree No. 013-2017-JUS Providing for the Regulation on the Organization and Functions of the Ministry of Justice and Human Rights, 22 June 2017*¹⁵

On 22 June 2017, Supreme Decree No. 013-2017-JUS was promulgated in Peru, establishing the new Regulation on the Organization and Functions of the Ministry of Justice and Human Rights.

Article 88 of the Regulation creates the General Directorate for the Search of Missing Persons, within the Vice-Ministry of Human Rights and Access to Justice, in charge of designing, approving and executing the National Plan on the Search of Missing Persons. It is also tasked with administering the National Registry of Missing Persons and Burial Sites.

Article 89 lays out the specific functions of the Directorate, which include promoting and participating in the search process, promoting the participation of the families of missing persons in the process, coordinating psychological and logistical assistance to the relatives of missing persons, and, more generally, supporting the technical capacity and State infrastructure involved in the search for missing persons.

Finally, Article 90 prescribes that the General Directorate be composed of two sub-directorates: the Registry and Forensic Investigation Directorate and the Care and Accompaniment Directorate.

United Kingdom

*Cultural Property (Armed Conflicts) Act, 23 February 2017*¹⁶

On 23 February 2017, the Cultural Property (Armed Conflicts) Act was enacted by the United Kingdom. This Act implements the Hague Convention of 1954 for the

¹⁵ Available at: <https://tinyurl.com/y8msj9u7>.

¹⁶ Available at: <https://tinyurl.com/ycwrtefq>.

Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) and the Protocols to that Convention of 1954 and 1999.

Part 1 of the Act sets out key definitions, and replicates the definition of “cultural property” from Article 1 of the 1954 Hague Convention. Part 2 incorporates into domestic law the offences created by Article 15 of the Second Protocol to the 1954 Hague Convention (1999 Protocol) and establishes the appropriate penalties. In particular, the Act does not restrict the repression of such offences on the condition that these are committed in the territory of the United Kingdom. The Act authorizes the exercise of universal jurisdiction for intentionally attacking cultural property under enhanced protection, using cultural property under enhanced protection or its immediate surroundings in support of military action, or causing extensive destruction or appropriation of cultural property (1999 Protocol, Article 15(1)(a–c)).

For the offences outlined in paragraphs 1(d–e) of Article 15 of the 1999 Protocol – namely, making cultural property protected under the Convention and the 1999 Protocol the object of attack (para. 1(d)), and the theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property (para. 1(e)) – the Act affirms that such offences will be committed only if the person is a national of the UK or is subject to the service jurisdiction of the UK, as defined by the Act.

Part 3 of the Act prohibits the unauthorized use of the cultural emblem, the symbol created by the 1954 Hague Convention to identify protected cultural property. The Act identifies what constitutes an authorized use of the emblem (e. g., to identify moveable cultural property) and gives the appropriate national authority power to designate further authorized uses.

Finally, Part 4 regulates the repression of unlawfully exporting cultural property from an occupied territory. Cultural property is considered unlawfully exported if the export was in contravention of the laws of the territory from which the property was exported or if it was in contravention of any rule of international law (Article 16(3)). For the assessment on whether a territory can be considered occupied, the Act refers to Article 42 of the Regulations respecting the Laws and Customs of War on Land annexed to the 1907 Convention respecting the Laws and Customs of War on Land, requiring that the territory is “actually placed under the authority of the hostile army”. At the time of the export, the occupying State must have been a party to the First or Second Protocol to the 1954 Hague Convention or the occupied territory must have been the territory of a State that was party to the First or Second Protocol of said Convention.

Part 5 provides immunity from seizure or forfeiture of cultural property that is entitled to special protection under Article 12 of the 1954 Hague Convention (namely, cultural property that is being transported for safekeeping during a period of armed conflict) and is being transported from outside the UK into its territory, through the UK to another destination, or to the UK as its depository, if it is under the control of the secretary of State or a person to whom the secretary of State has entrusted its safekeeping (Article 28(5)).

B. National committees or similar bodies on IHL

National authorities face a formidable task when it comes to implementing IHL within the domestic legal order. This situation has prompted an increasing number of States to recognize the usefulness of creating a group of experts or similar body – often called a national IHL committee or a national commission for IHL – to coordinate activities in the area of IHL. Such committees *inter alia* promote ratification of or accession to IHL treaties, make proposals for the harmonization of domestic legislation with the provisions of these treaties, promote dissemination of IHL knowledge, and participate in the formulation of the State’s position regarding matters related to IHL.

Ukraine

*Interdepartmental Commission on Questions of Application and Realization of Regulation of International Humanitarian Law in Ukraine*¹⁷

On 26 April 2017, the Cabinet of Ministers of Ukraine adopted Resolution No. 329 establishing the Interdepartmental Commission on Questions of Application and Realization of Regulation of International Humanitarian Law in Ukraine (replacing Resolution No. 1157 of 21 July 2000), its Annex on the structure of the Commission, and Regulations on its internal functioning.

Tajikistan

*Governmental Decree on the Composition of the Commission on the Implementation of International Humanitarian Law under the Government of the Republic of Tajikistan, No. 1666, 1 April 2017*¹⁸

In Tajikistan, the adoption of the Governmental Decree on the Composition of the Commission on the Implementation of International Humanitarian Law under the Government of the Republic of Tajikistan, No. 1666 of 1 April 2017, modified the Statute of the IHL Commission, including in its composition the director of the National Mine Action Centre.

17 Available at: <https://tinyurl.com/yaqxm5ee>.

18 Available at: <https://tinyurl.com/ybup8u7c>.

C. Case law

Chile

*Court of Appeals of Chile, Episode “Operation Colombo” – Victim “Francisco Aedo and Others”, 30 May 2017*¹⁹

Keywords: enforced disappearances, statute of limitations, superior orders.

On 30 May 2017, the Court of Appeals of Santiago de Chile convicted 106 agents of the Chilean secret police active during the government of Augusto Pinochet for their participation in “Operation Colombo”, specifically for the crime of aggravated kidnapping committed against sixteen victims.

In its judgment, the Court considered the said act a crime against humanity. The victims were politicians, workers, students and professionals accused after 11 September 1973 of belonging to, or being ideologically supportive of, Allende’s government – or opposed to the *de facto* government – and were for this reason the target of a large-scale policy of exclusion, harassment, persecution and extermination.

The Court, after highlighting that the Geneva Conventions do not need an explicit declaration of war to be applicable to a situation of armed conflict, affirmed the applicability of Article 3 common to the four Geneva Conventions to the situation in Chile between 1973 and 1974.

The Court further rejected the arguments related to statutes of limitations, on the basis of the continuative nature of the crime in question. As the victims were not proved dead or released, the crime is considered by the Court as “permanent kidnapping”: as long as the deprivation of liberty continues, the crime is still being committed, and criminal responsibility cannot be extinguished through the application of the statute of limitations. The Court reinforced its argument by stating the inapplicability of statutes of limitations to crimes against humanity.

The argument of the continuative nature of the crime was also used to reject the applicability of amnesties to the present charges. The Court further referred to the jurisprudence of the Inter-American Court of Human Rights regarding the inadmissibility of the amnesty when it pretends to impede the investigation and the punishment of grave violations of human rights, as in the case of enforced disappearances.

The Code of Military Justice of Chile allows for the defence of superior orders upon cumulative fulfilment of the following criteria: that the order has been issued by a superior, that the order regards the exercise of the official functions of the subordinate and that, if the order aims at the perpetration of a crime, it is noted and communicated by the subordinate and insisted upon by the superior. The Court addressed this issue, noting first of all that the crime perpetrated against the victims of this case cannot be considered as part of the

¹⁹ Available at: <https://tinyurl.com/y8fsjgiz>.

official functions attributed to the members of the armed forces by the law. The defence of superior orders was therefore dismissed by the Court.²⁰

Finally, the Court established that civil claims resulting from these crimes are not subject to statutes of limitations and ordered reparations to the relatives of the victims, including financial compensation.

Germany

*Berlin Higher Regional Court (Kammergericht), The Prosecutor v. Rami K., 1 March 2017*²¹

Keywords: respect for the dead, war crimes.

The defendant, a member of the Iraqi Armed Forces, allegedly posed for a photo holding the decapitated heads of two fighters of the armed group Islamic State, who had been killed during fighting in the north of Baghdad in 2015. He subsequently shared the image on his Facebook profile. In July 2016, when he was investigated for a separate charge, his tablet was confiscated and the images were discovered by the police.²²

The defendant was arrested on 29 August 2016 by the German police for having disrespected and degraded the dead, and later confessed to the crime. Two charges of war crimes for degrading treatment towards persons protected under IHL were confirmed, and trial opened on 22 February 2017 before the Berlin Higher Regional Court. On 1 March 2017, the Court found the defendant guilty of war crimes and sentenced him to 20 months' imprisonment.

20 See also Supreme Court of Chile, *Wenzel Salas, Hugo and Others*, 21 March 2017. First of all, the Court recalled that the jurisprudence – on the basis of the recognition of the international commitments of Chile enshrined in its Constitution – highlighted that human rights treaties to which Chile is a party take priority over national law. On the premises of the continuative nature of the crime of “permanent kidnapping” and its characterization as a crime against humanity, the Court ruled the inapplicability of statutes of limitations and condemned thirty-three former State agents for the illegal deprivation of liberty of five members of the Manuel Rodriguez Patriotic Front in 1987. The Court rejected the applicability of the defence of superior orders, on the basis that the act ordered could not be considered as belonging to the category of “official acts”, as required by the Code of Military Justice of Chile. Furthermore, with regard to some of the accused, the Court rejected the defence as it considered that they knew that the order was unlawful.

21 Available at: <https://tinyurl.com/yaouqkqp>.

22 See also Blekinge (Appeals) Court of Sweden, Judgment No. B 3187-16, 11 April 2017. The Court confirmed the first-instance judgment of 6 December 2016 against a former Iraqi soldier, but increased the penalty from six to nine months' imprisonment. The defendant was found guilty of inhuman treatment against the dead for having posed for a picture with a decapitated head on a plate next to other bodies with severed heads, and having posted the picture online.

Senegal

*Extraordinary African Chambers (EAC), The Prosecutor v. Hissein Habré, 27 April 2017*²³

Keywords: war crimes, command responsibility.

On 27 April 2017, the Court in Dakar, Senegal, rejected Hissein Habré's appeal and confirmed his trial conviction for crimes against humanity and war crimes, including murder and torture.

The Appeals Chamber upheld the life sentence decided by the Trial Chamber for the former president of Chad, and confirmed the amounts and types of reparations decided by the Trial Chamber to be granted to 7,396 victims.

The Appeals Chamber was satisfied that the Trial Chamber demonstrated that Hissein Habré had exercised effective control over the troops, since he had the material capacity to prevent and punish their actions. With regard to command responsibility, the Court highlighted that the hierarchical relationship between the superior and his or her subordinates does not need to be direct or immediate for the superior to exercise effective control and be responsible for the actions of the subordinates. However, the Appeals Chamber noted that it was under the joint criminal enterprise (JCE) doctrine that the Trial Chamber found Hissein Habré liable, and not for the responsibility of commanders or other superiors. According to the Appeals Chamber, the conclusions of the Trial Chamber on the responsibility of Mr Habré under JCE were not specifically challenged by the defence, and were therefore confirmed by the Court.

The Appeals Chamber acquitted the appellant of the charge of direct rape. It found that the Trial Chamber exceeded its power to re-characterize the crimes by convicting the accused for a crime that was not included in the indictment. However, this partial reversal of the trial judgment had no impact on the final sentence, in view of the exceptional magnitude and gravity of the crimes of which the accused had been found guilty.

Sweden

*Stockholm District Court, Judgment no. B 3787-16, 16 February 2017*²⁴

Keywords: non-State armed group, administration of justice, extrajudicial killings.

The District Court of Stockholm convicted a former member of an armed group active in Syria, the Suleiman Company, of serious crime against the law of the nation, for the killing of one Syrian soldier detained by the armed group.

²³ Available at: <https://tinyurl.com/ycg6owxy>.

²⁴ Available at: <https://tinyurl.com/ybpy78gn>.

In the context of the armed conflict in Syria, the defendant joined the armed group in the beginning of May 2012. He shortly thereafter participated in an attack in which seven soldiers from the Syrian armed forces were captured and, less than two days later, executed.

The defendant, a permanent resident of Sweden, argued that his actions were taken while executing superior orders received to enforce a death sentence adjudicated by a legitimate court, and that the accused had been granted a fair trial.

Such argument allowed the District Court to examine whether a non-governmental actor can establish its own courts to maintain law and order within the context of a non-international armed conflict. The Court has reached the conclusion that it may be possible during certain circumstances, provided that, at a minimum, it fulfils the criteria of independence and impartiality and is able to meet the basic requirements to guarantee a fair trial. However, in the present case, less than two days passed between the capturing of the soldiers and the execution. This contributed to the exclusion by the Court of the fulfilment of the requirement of fair trial, and to the sentencing of the defendant to life imprisonment.

The United Kingdom

*Supreme Court, Serdar Mohammed (Respondent) v. Ministry of Defence (Appellant), 17 January 2017*²⁵

Keywords: detention, non-international armed conflicts, procedural guarantees.

This case concerns the detention of Mr Serdar Mohammed in Afghanistan, following his capture by British armed forces.

The UK Supreme Court found that there is a lack of international consensus on the limits of the right of detention, as well as on the conditions of its exercise and the extent of the application of special provisions to non-State actors. The Court stated that common Article 3 “does not [as treaty law] in terms confer a right of detention”. In such circumstances, it argued, “the existence of a legal right in international law to detain members of opposing armed forces in a non-international armed conflict must depend on (i) customary international law, and/or (ii) the authority of the Security Council of United Nations”.

The Court concluded that the basis of a right to detain in non-international armed conflicts cannot yet be found in a crystallized rule of customary international law. However, the Court recognized that the UK forces had the power to detain individuals for periods exceeding ninety-six hours pursuant to a United Nations Security Council Resolution authorizing the use of “all necessary measures”, if the detention was found to be required for imperative reasons of security.

²⁵ Available at: <https://tinyurl.com/yd2dnnop>.

Nevertheless, the Court found that the procedural guarantees in place were not in compliance with Article 5(4) of the European Convention on Human Rights, as Mr Mohammed was not granted an effective right to challenge his detention.

Other efforts to strengthen national implementation of IHL

To further its work on implementation of IHL, the ICRC Advisory Service organized, in cooperation with respective host States, regional or sub-regional organizations, several regional conferences directed at engaging national authorities in the period under review.

From 12 to 16 June 2017, the ICRC, the government of Namibia and the Namibia Red Cross Society co-hosted, with the support of the Commonwealth Secretariat and the British Red Cross, the 4th Meeting of Representatives of National Committees on International Humanitarian Law of Commonwealth States, in Swakopmund, Namibia. The event brought together representatives from national IHL committees, civil servants, members of National Red Cross and Red Crescent Societies, representatives from the military forces and police, representatives from NGOs, and representatives from various ministries (foreign affairs, justice, defence, health, labour, education) of Commonwealth countries, to discuss the challenges and opportunities of national IHL committees in countries of the Commonwealth. In particular, the protection of cultural property from the Commonwealth perspective was discussed, as well as the relationship between national IHL committees and parliamentarians, the implementation of the resolutions and pledges of the 32nd International Conference, and the promotion and implementation of the Arms Trade Treaty in the Commonwealth. Participants from Australia, Bangladesh, Botswana, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Mauritius, Mozambique, Namibia, New Zealand, Nigeria, Papua New Guinea, Samoa, South Africa, Sri Lanka, Swaziland,²⁶ Tanzania, Trinidad and Tobago, Uganda, the United Kingdom and Zambia took part in the discussion. On this occasion, the national IHL committees shared their experiences and discussed their respective committees' roles. The event concluded with the adoption of a document entitled "Generating Respect for IHL: A Commonwealth Perspective", identifying points for further action, including considering the creation of mechanisms within national IHL committees aimed at ensuring the continuity of the work of those committees.

National IHL committees of Latin American and Caribbean countries shared their experiences at the "Weapons under IHL" regional meeting of national IHL committees in the Americas, in San José, Costa Rica, on 30 and 31 May 2017. The event was organized by the national IHL committee of Costa Rica and the ICRC, in collaboration with the Ministry of Foreign Relations and Worship of Costa Rica. The meeting facilitated an exchange on the challenges arising in the implementation of IHL rules that govern means and methods of

26 The official name of Swaziland was changed to the Kingdom of Eswatini on 19 April 2018.

warfare in armed conflicts, as well as on the challenges faced by some of the main treaties on weapons in Latin America and on solutions for their effective implementation at the domestic level of States Parties. Participants included members of national IHL committees, governmental officials, experts from NGOs, representatives from regional (CARICOM IMPACS, OAS) and international organizations (*inter alia*, UNLIREC, ICAN), from Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Dominican Republic, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela. The event further contributed to potentiating the effectiveness of the work of national IHL committees and, more generally, of IHL implementation processes in the region, including on the regulation of weapons.

Representatives from various governments, the diplomatic community based in Pretoria, and South African-based academics and think tanks from South Africa, Namibia, Nigeria, Algeria and Niger met in Pretoria, South Africa, on 24 and 25 May 2017, to discuss nuclear non-proliferation and disarmament, on the occasion of the Roundtable on the African Contribution to Nuclear Weapons Ban Negotiations in 2017, organized by the ICRC. By the end of the roundtable, participants agreed on the value of a nuclear ban treaty for the African continent, and adopted a number of outcome elements that could feed into the interventions made by African States during the second negotiation conference in New York.

To promote national implementation of IHL in East Africa and the Horn of Africa, the 5th Regional Seminar on IHL National Implementation was organized by the ICRC in Nairobi, Kenya, from 3 to 5 May 2017. On this occasion, participants from Djibouti, Ethiopia, Kenya, Somalia, South Sudan, Uganda and Tanzania met to discuss the prospects and perspectives of the domestic implementation of IHL in contemporary armed conflicts, including the role and work of national IHL committees. The participants identified suggestions and recommendations to advance and support domestic IHL implementation in the region.

Using in-house expertise on Islamic law, the ICRC contributed to discussions on the relationship between Islamic law and IHL, and protection in armed conflicts, at three regional events.²⁷ Among these, of particular interest is the Third Workshop on IHL and Islamic Law entitled “Protection of Civilians during Armed Conflict: An Overview of Islamic Law and International Humanitarian Law”, organized by the ICRC in Nairobi, Kenya, on 10–11 May 2017. Academics, teachers, judges, imams, researchers, human rights defenders and experts from Djibouti, Kenya, Nigeria, Sudan, Tanzania and Uganda discussed Islamic law’s principles and philosophy and their relationship with IHL, including Islamic law perspectives on the right of civilians to receive humanitarian assistance in times of armed conflict; protection of medical personnel, facilities and patients; protection of civilian persons detained in

27 Arabic Regional Course, Beirut, Lebanon, February 2017; Arabic Regional Course, Tunis, Tunisia, April 2017; Third Workshop on IHL and Islamic Law, Nairobi, Kenya, May 2017.

relation to armed conflicts; protection of cultural property and civilian property; protection of women and children; and protection of refugees and internally displaced persons. The discussion enhanced the participants' knowledge of the similarities and complementarities between the legal systems of IHL and Islamic law in the field of protection and assistance of civilians during armed conflicts. Participants identified good practices that can be an inspiration in promoting IHL among Muslim circles.

On 27 and 28 April 2017, civil servants, representatives from various ministries (defence, foreign affairs), diplomats, experts and academics from South Asian countries met at the IHL Regional Conference in East and South East Asia on "Generating Respect for the Law" in Singapore, jointly organized by the ICRC and the S. Rajaratnam School of International Studies. The participants, coming from Australia, Cambodia, China, Indonesia, Japan, Laos, Malaysia, New Zealand, Philippines, the Republic of Korea, Singapore, Switzerland, Thailand, East Timor and Vietnam, discussed the enduring importance of IHL in Asia today. Topics included the current humanitarian challenges in Asia, in particular generating respect for IHL in Asia through the International Humanitarian Fact-Finding Commission; the Philippines' experience with reducing attacks on civilians, health-care workers and health-care facilities; and IHL and the challenges of contemporary armed conflicts. Throughout the discussion, the participants proposed a wide variety of tools to ensure greater compliance with IHL and committed to addressing an identified range of issues in order to better regulate IHL domestically.

Another event of particular interest was the Expert Meeting on "Health Care in Danger: A Central and Eastern European Perspective", which took place in Olomouc, Czech Republic, on 11 and 12 May 2017. On this occasion, representatives from the Ministries of Defence, the Interior and Health, representatives from National Red Cross and Red Crescent Societies, NGOs, health professional associations and military medical agencies, as well as diplomats and academics, discussed the legal aspects of the protection of the wounded, sick and health-care personnel during armed conflicts and other emergencies; access to health care during emergency situations in peacetime, including migration; and military and emergency services in the context of armed conflict. The event, jointly organized by the Palacký University Olomouc, the Czech Red Cross and the ICRC, brought together participants from Austria, the Czech Republic, Hungary, the Slovak Republic, Ukraine and the UK. The plenary session that followed allowed for multidisciplinary discussions among all participants and the identification of key outcomes containing reflections on the way forward.

