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# National implementation of international humanitarian law

## Biannual update on national legislation and case law

July – December 2003

### A. LEGISLATION

#### Belgium

The 2003 Law on Serious Violations of International Humanitarian Law<sup>1</sup> was promulgated on 5 August 2003, published on 7 August 2003 and entered into force on the same date. It abrogates the 1993 Law on the Punishment of Serious Violations of International Humanitarian Law and introduces its content into other laws. The law of 5 August 2003 and the substantial changes it brings about were described in the previous Biannual update of January — June 2003.<sup>2</sup>

#### Burkina Faso

The Law on the Use and Protection of the Red Cross and Red Crescent Emblems in Burkina Faso<sup>3</sup> was adopted on 23 October 2003. It sets out rules on use of the emblem as a protective device by the medical and religious personnel and units of the armed forces, the personnel and units of the Burkinabé Red Cross Society, and by civilian hospitals, personnel and units expressly authorized by the Defence Minister. It also provides rules on use of the emblem as an indicative device by the Burkinabé Red Cross Society, by bodies belonging to a foreign National Red Cross or Red Crescent Society (upon authorization by the Burkinabé National Society), and by the International Red Cross and Red Crescent Movement. The law stipulates that all “authorities involved”, including the Burkinabé National Society, shall exercise strict control over use of the emblem and collaborate so as to prevent and repress unlawful uses thereof. In

addition, it provides for imprisonment and/or fines for the offence of unlawfully using the protected emblem. It also criminalizes the commission or ordering of acts causing death or violence to the physical integrity or health of an enemy through the perfidious use of the emblem and defines perfidy.

### Estonia

The Ratification Act of the Rome Statute of the International Criminal Court (Rahvusvahelise Kriminaalkohtu Rooma Statuudi Ratifitseerimise Seadus) was adopted on 5 December 2001, published on 9 January 2002 and entered into force on 1 June 2002. It provides that the Government of Estonia shall appoint a representative to sit at the Assembly of States Parties, in accordance with Article 112 of the Rome Statute and stipulates that the surrender of a suspect to the Court must follow the extradition procedures provided for by the Estonian Code of Criminal Procedure.

### Georgia

Following the ratification of the Rome Statute of the ICC by Georgia, Parliament adopted a legislative package on 14 August 2003 implementing the Statute and composed of the Law of Georgia on Amendments to the Law of Georgia on Enforcement Procedure, the Law of Georgia on Amendments and Changes to the Criminal Code of Georgia, and the Law of Georgia on Amendments and Changes to the Code of Criminal Procedure of Georgia.<sup>4</sup> These laws were published on 5 September 2003 and entered into force on 20 September 2003.

The Law of Georgia on Amendments to the Criminal Code of Georgia makes several changes to the list of offences under the Criminal Code to bring it in line with the 1949 Geneva Conventions, their Additional Protocols of 1977 and the Rome Statute. The amendments do not distinguish between international and non-international armed conflicts. They notably introduce into the Criminal Code the unlawful act of “making improper use of (...) the emblem of (...) the Red Cross or Red Crescent and/or of any other protective

<sup>1</sup> Loi relative aux violations graves du droit international humanitaire, published in *Moniteur Belge* on 7 August 2003, Ed. 2, N° 286, pp. 40506-40515.

<sup>2</sup> *International Review of the Red Cross*, N° 851, September 2003, pp. 654-661.

<sup>3</sup> Décret N° 2003-621/PRES promulguant la loi N° 059-2003/AN du 23 octobre 2003 portant utilisation et protection des emblèmes de la croix rouge et du croissant rouge au Burkina Faso.

<sup>4</sup> Sakartvelos Sakanonmdeblo Macne # 26 Part I, 2003.

emblem or signal recognized by international humanitarian law, which resulted in death or serious personal injury”. They also criminalize attacks against cultural property “which resulted in destruction and appropriation of property”, provided that the attacks were not justified by military necessity. In addition, the amendments criminalize the act of compelling nationals of an adverse party, a prisoner of war or any other protected person to serve in the forces of an enemy power or “to take part in operations of war directed against their own country”. Looting is also made a criminal offence, and so is the use of weapons, military devices, weapons of mass destruction or “methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which violate the international law of armed conflict” if such weapons or methods of warfare are “subject to universal prohibition”. The amendments furthermore incorporate crimes against humanity in the Criminal Code, set forth the principle of command responsibility, and refer to the Rome Statute of the ICC and to the Law on Cooperation between the International Criminal Court and Georgia for the extradition and surrender of suspects.

The Law on Cooperation between the International Criminal Court and Georgia was published on 5 September 2003 and came into force on 1 October 2003.<sup>5</sup> It provides the legal basis for compliance with requests from the ICC for the arrest and surrender of suspects and for other forms of assistance in criminal matters, including the transmission of evidence and information to the Court, and establishes within the Ministry of Justice a National Agency responsible for cooperation with the ICC on Georgia’s behalf. In addition, it lays down the procedure for Georgian authorities to file a request with the ICC with regard to a crime falling under its jurisdiction, and provides for the enforcement in Georgia of sentences handed down by the Court. The law also provides for judicial guarantees for the benefit of persons suspected of a crime under the jurisdiction of the ICC who are interrogated in Georgia.

#### The Netherlands

The Act of 19 June 2003 containing Rules Concerning Serious Violations of International Law (The International Crimes Act) was adopted on 19 June 2003, published on 3 July 2003 and entered into force on 1 October 2003.<sup>6</sup> It consolidates into national legislation the international

<sup>5</sup> Sakartvelos Sakanonmdeblo Macne # 26 Part I, 2003.

<sup>6</sup> Act of 19 June 2003 containing Rules concerning Serious Violations of International Law (International Crimes Act), *Bulletin of Acts, Orders and Decrees 2003*, No. 270.

crimes of genocide, crimes against humanity and war crimes falling under the Rome Statute of the ICC. The Act repeals the Genocide Convention Implementation Act and the Torture Convention Implementation Act, and criminalizes for the first time crimes against humanity under Dutch law. The definitions of crimes are based on definitions provided by the Rome Statute. However, the Act differs and innovates in that it contains a specific section devoted to grave breaches of 1977 Additional Protocol I and a section dealing with attacks on cultural property and other violations of the protection of such property within an international armed conflict. It provides for the criminal liability of superiors permitting the commission of an offence, or negligently failing to prevent the commission thereof. In addition to principles of active and passive personality, universal jurisdiction is envisaged by the Act, provided that the suspect is present in the Netherlands. With regard to immunities, Section 16 excludes criminal prosecution for incumbent foreign officials, as well as for beneficiaries of other immunities recognized under customary international law.

### Niger

The Code of Military Justice was adopted on 11 March 2003 and published on 5 May 2003.<sup>7</sup> The new Code replaces the French Code of Military Justice, which had been applicable in Niger since its accession to independence. It establishes the military justice apparatus, sets out military procedures and defines military offences. It also provides for the punishment of genocide, crimes against humanity and war crimes. The definition of the crime of genocide is modelled on the 1948 Convention on Genocide, while crimes against humanity are modelled on the 1945 London Charter and the case law of the Nuremberg Tribunal. War crimes liable to punishment under the Code include grave breaches of the Geneva Conventions and Additional Protocol I, but its scope is further extended to non-international armed conflicts covered by Additional Protocol II. The Code also provides for the non-application of statutory limitations to genocide, crimes against humanity and war crimes, as well as for other principles of international criminal law, including the irrelevance of official capacity.

<sup>7</sup> Loi n° 2003-010 du 11 mars 2003, portant Code de justice militaire, *Journal Officiel de la République du Niger*, Spécial N° 6, 5 mai 2003, p. 357-383.

## Peru

The Law on the Creation of the National Register of Information on Missing Persons was adopted on 19 June 2003, promulgated on 10 July 2003 and published the following day.<sup>8</sup> The Register's objective is to centralize and organize, in a database, information on missing persons, persons requiring special attention due to their detention or internment and persons who have been located. This information is also to be made available to the general public via the website of the Ministry of the Interior. Every civil servant belonging to the public administration, the judicial authorities or the Public Prosecutor's Office who receives complaints or information relating to such persons has the duty to pass them on to the Register. Cases of persons whose whereabouts are unknown and of those whose identity is dubious or unknown must be reported. Civil servants must also pass on any information that may help to feed the database and facilitate the search for missing persons. Finally, the law specifies some procedures for setting up the Register and requests the government to draft implementing regulations within a certain time limit after its publication. These regulations were approved by Supreme Decree on 15 December 2003.<sup>9</sup>

## Rwanda

The Law Repressing the Crime of Genocide, Crimes against Humanity and War Crimes was adopted by the Transitional National Assembly on 15 July 2003 and promulgated on 6 September 2003. It was published on November 1, 2003 and entered into force on the same date<sup>10</sup>. It specifically seeks to repress the crime of genocide, crimes against humanity and war crimes. With regard to war crimes, it lists and criminalizes grave breaches of the Geneva Conventions and of Additional Protocol I, as well as other serious violations of the laws and customs of war. No distinction is made between situations of international and non-international armed conflict. An additional offence is attached to the crime of genocide, whereby anyone having publicly, by word or deed, denied that a genocide took place, grossly

<sup>8</sup> Ley No. 28022 que crea el Registro Nacional de Información de Personas Desaparecidas, *El Peruano*, 17 December 2003, p. 247943.

<sup>9</sup> Decreto Supremo No. 017-2003-IN aprueban Reglamento de la Ley No. 28022 que crea el Registro Nacional de Información de Personas Desaparecidas, *El Peruano*, 17 December 2003, pp. 257466-257468.

<sup>10</sup> Loi N° 33 bis/2003 du 06/09/2003 réprimant le crime de génocide, les crimes contre l'humanité et les crimes de guerre, *Journal Officiel de la République du Rwanda*, N° 21 du 1<sup>er</sup> novembre 2003.

minimized it or attempted to justify it or approve the grounds for it, or anyone having concealed or destroyed evidence of it, is guilty of an offence. The law provides for the application of general principles of criminal law relating to individual criminal responsibility, including the order, proposal, incitement, agreement to commit a crime, complicity, failure to act, and attempt to commit a crime. The defence of official capacity is clearly rejected, command responsibility is contemplated, and the crimes covered by the law are clearly exempted from any statute of limitation. Chapter V of the law is devoted to offences against humanitarian organizations, including unlawful use of the protected emblem of the Red Cross, which, under Article 15, is exclusively reserved for medical services and for personnel and material of the International Committee of the Red Cross, the International Federation and National Red Cross and Red Crescent Societies. No distinction is made here between the protective and the indicative use of the emblem. The perfidious use of the “distinctive emblem of humanitarian organizations” is considered to be a war crime and is dealt with as such under the chapter devoted to war crimes.

#### South Africa

The Anti-personnel Mines Prohibition Act<sup>11</sup> was adopted on 2 December 2003 and gazetted on 5 December 2003. The Act implements the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction (the 1997 Ottawa Convention). It broadly defines anti-personnel mines as encompassing “any other mine or device which performs in a manner consistent with an anti-personnel mine as defined in the [Ottawa] Convention”. The Act makes it an offence subject to fining and/or imprisonment to “place, possess, procure, manufacture, stockpile, transfer, deal in, import or export” an anti-personnel mine or component part and stipulates that all existing anti-personnel mines are to be forfeited to the State, the Minister of Defence being responsible for their destruction. It provides for narrow exceptions, notably by allowing the retention of “the least number of mines necessary”, whose total number may not exceed 5,000, for mine detection, mine clearance and mine destruction techniques. A written record of all anti-personnel mines, components and plans must be maintained. In addition to the international fact-finding missions regime established by the Ottawa Convention and implemented by South Africa in Chapter 6 of this

<sup>11</sup> Anti-Personnel Mines Prohibition Act, *Government Gazette*, Act No. 36, 2003.

Act, an original domestic inspections regime is instituted under Chapter 5. International inspectors are granted privileges and immunities, as well as broad powers of search and investigation, the obstruction of which is an offence. The Act also implements the Ottawa Convention in terms of South Africa's obligations to report to the Secretary-General of the United Nations General Assembly. To this end, broad information-gathering powers are conferred upon the Ministry of Defence. Extra-territorial jurisdiction is contemplated by the Act, since in addition to active personality, permanent residency, and the place of registration or incorporation of a legal person, a South African court will also have jurisdiction, regarding an offence under the Act, over a foreign person who does not reside in South Africa, even though the wrongful act or omission was committed outside South Africa.

### Spain

The Law No. 15/2003 Amending the Penal Code was promulgated on 25 November 2003 and published the next day, and will for its main parts enter into force on 1 October 2004.<sup>12</sup> Eight years after the adoption of the Penal Code, it makes a series of amendments to update the content thereof on the basis of the experience gained through its application. Amendments to the general part of the Code mainly concern the system of penalties but also, for instance, the statute of limitations: it now includes crimes against humanity, together with genocide and war crimes, in the list of crimes for which no statutory limitations apply. It should be noted that the amendments to the special part, which relate to very varied topics, also introduce several provisions to adapt the national criminal legislation to the Rome Statute of the International Criminal Court. In particular, the Code now includes crimes against the administration of justice by the Court and a whole chapter on crimes against humanity. It also adds some war crimes that were not previously taken into account in the Penal Code, modifies the definition of others, specifies that acts committed as part of a plan or policy or on a large scale should be punished with the most severe penalties, and introduces specific rules with regard to command responsibility and superior orders.

The Law No. 18/2003 on Cooperation with the International Criminal Court was promulgated on 10 December 2003, published on the

<sup>12</sup> Ley Orgánica 15/2003, de 25 de noviembre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, *Boletín Oficial del Estado*, No. 283, 26 November 2003, pp. 41842-41875.

11th and entered into force on the following day.<sup>13</sup> It lays down rules for cooperation by Spain with the Court through the allocation of competences to State bodies and the establishment of appropriate internal procedures. It deals with issues such as the referral or transmittal of cases to the Court, the arrest and surrender of persons to the Court, the handling of competing requests, the enforcement in Spain of sentences passed by the Court, intervention by the State as *amicus curiae*, the carrying out of procedural acts by the Court on the national territory and the procedure to be followed in the event of offences against the administration of justice by the Court.

### Switzerland

Amendments to the 1996 Federal Law on War Material were adopted on 19 December 2003 and published on 30 December 2003.<sup>14</sup> The amendments in question introduce subparagraphs 2 and 4 into Article 8 of the Federal Law on War Material so as to implement Article 2(3) and Article 3 of the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction* (the 1997 Ottawa Convention). Article 2(4) of the Federal Law on War Material will permit the retention or transfer of a number of anti-personnel mines for the development of mine detection, mine clearance and mine destruction techniques and for training in those techniques, an exception likewise allowed for by the 1997 Ottawa Convention. In accordance with the wording and the aim of the 1997 Ottawa Convention it is also stipulated, however, that the number of these mines shall not exceed the “minimum number absolutely necessary” for those purposes. In addition, Article 8(4) is supplemented by a definition of the term “anti-handling device”, thereby implementing verbatim the 1997 Ottawa Convention and enabling an appropriate distinction to be made between an anti-personnel mine and an anti-vehicle mine.

Amendments to the Military Penal Code were adopted on 19 December 2003 and published on 30 December 2003.<sup>15</sup> They are primarily intended to fill a gap in terms of witness protection. In addition, the legal definition of

<sup>13</sup> Ley Orgánica 18/2003, de 10 de diciembre, de Cooperación con la Corte Penal Internacional, *Boletín Oficial del Estado*, No. 296, 11 December 2003, pp. 44062-44068.

<sup>14</sup> Modification du 19 décembre 2003, *Loi fédérale sur le matériel de guerre* (LFMG) FF 2003 7469, referendum deadline: 8 April 2004.

<sup>15</sup> Modification du 19 décembre 2003, *Procédure pénale militaire* (PPM) FF 2003 7509, délai référendaire: 8 avril 2004.



the jurisdiction of Swiss tribunals with regard to the repression of war crimes is modified by introducing subparagraph *1 bis* into Article 9 of the Military Penal Code. Article 9(1) *bis* provides that the Military Penal Code is applicable to aliens who have committed violations of international law in other countries in the course of an armed conflict and who (a) are located in Switzerland, (b) have a “close link” with Switzerland, and (c) are not extradited or surrendered to an international criminal tribunal.

## B. CASE LAW

### Croatia

On 31 July 2002, the Karlovac County Court in central Croatia found a military leader guilty of war crimes under both domestic and international law and sentenced him to 20 years’ imprisonment. The crimes were committed in Bosnia and Herzegovina between 1993 and 1995 in the “Autonomous Province of Western Bosnia” controlled by the accused and his followers. The defendant was found guilty of war crimes on the basis of command responsibility for the crime of forced mobilization and crimes committed in concentration camps, notably forced labour and torture of civilians and prisoners of war resulting in injury and death. An appeal to the Supreme Court was lodged by the defendant against his conviction by the Karlovac County Court.

### Germany

On 10 December 2003, the regional court in Bonn decided a case brought by 27 Yugoslav citizens<sup>16</sup> who had claimed compensation in relation to a NATO air attack in 1999 on a bridge in a village of the former Yugoslavia. The claimants were all victims of this attack or are legal successors of persons killed as a result of it, and sought compensation on the ground that the attack was in violation of international humanitarian law and of the fundamental rights enshrined in the Federal German Constitution (Basic Law). They argued that NATO members share a common responsibility, and that there is consequently a liability under the principle of joint liability in German law. The court found the action admissible but rejected it on its merits. It stated that there is no rule in international law which would give individuals a direct right to claim compensation for violations of that body of

<sup>16</sup> Landgericht Bonn, 1. Zivilkammer, Urteil, 10.12.2003, 1 O 361/02.

law, except in cases where a treaty provides for the contrary, as in the field of human rights. According to the court, relevant international humanitarian treaties provide only for compensation between States themselves. As for the North Atlantic Treaty, it too is applicable only between States. The court also stated that there is no possibility to derive, from the reference made by Article 25 of the Basic Law to the general rules of international law, a right that could be applicable in Germany to directly claim compensation under international law. Finally, no basis for compensation in such a case exists under German domestic law on State responsibility itself, in particular because these rules do not apply in time of armed conflict, international humanitarian law then intervening as *lex specialis*.

#### Indonesia

At the beginning of August 2003, a court in Jakarta sentenced a general to three years' imprisonment for not having hindered, as military commander, the commission of war crimes and crimes against humanity against the civilian population during the conflict in East Timor in 1999. He is the last of 18 accused and the highest military officer to be sentenced in connection with those events.

### **C. NATIONAL COMMITTEES ON INTERNATIONAL HUMANITARIAN LAW**

#### Brazil

The National Committee for the Dissemination and Implementation of International Humanitarian Law in Brazil was established by Presidential Decree of 27 November 2003, which was published and entered into force on the following day.<sup>17</sup> It is composed of representatives of the Ministries of Foreign Affairs, Justice, Defence, Health, Education, and Culture, and of the Civil House and the Special Secretariat for Human Rights of the Presidency of the Republic. The Ministry of Foreign Affairs is in charge of the chairmanship and secretariat of the Committee. Representatives of the Federal Senate, the Chamber of Deputies, the Brazilian Red Cross and the ICRC may also take part in the Committee's meetings. Other entities and experts may be invited on an *ad hoc* basis to participate in the work of the Committee. Its mandate is to propose to the competent authorities the measures needed for the national implementation and dissemination of international humanitarian law, in

<sup>17</sup> Decreto de 27 de novembro de 2003 cria a Comissão Nacional para a Difusão e Implementação do Direito Internacional Humanitário no Brasil, *Diário Oficial da União*, No. 232, Section 1, 28 November 2003, pp. 1-2.

particular the Geneva Conventions of 1949, their Additional Protocols of 1977 and the other relevant treaties to which Brazil is a party.

#### Comoros (the)

A National Committee was created by decree in the Comoros on 17 November 2003.<sup>18</sup> The Committee is chaired by the governmental delegate for human rights and humanitarian affairs (Ministry of Justice), and comprises representatives of the Ministries of Justice, Social Affairs, Defence and Territorial Security, and Foreign Relations and Cooperation, as well as the General Secretary of the Comoros Red Crescent and the General Secretary of the Grand Mufti. Its mandate is to liaise between the government and other parties concerned with respect for international humanitarian law and to promote ratification and implementation of instruments thereof. It also includes the dissemination and development of international humanitarian law and attendance at relevant international fora.

#### Kazakhstan

On 9 December 2003, the Kazakh government adopted the Regulations on the Interdepartmental Commission on International Law and the International Human Rights Treaties,<sup>19</sup> which entered into force on the same day. The Commission acts as a consultative and advisory body under the aegis of the Ministry of Foreign Affairs, and its members are approved by the government. Its main task is to submit advice and proposals to the government concerning the fulfilment of Kazakhstan's legal obligations under international humanitarian law and international human rights law, the implementation of treaties thereof and the improvement of domestic legislation so that it is in line with international humanitarian and human rights law treaties to which Kazakhstan is a party. The Commission's tasks also include activities to disseminate international humanitarian law and promote wider international cooperation in the application and observance of that law and of human rights law.

#### Kyrgyzstan

On 11 August 2003, the First Deputy Prime Minister of the Kyrgyz Republic signed the Order No. 130 on the Establishment of a Permanent

<sup>18</sup> Décret n°. 03 – 104/PR.

<sup>19</sup> Resolution No. 1251 of the Government of the Republic of Kazakhstan of 9 December 2003.

Interdepartmental Commission on the Implementation of International Humanitarian Law, which entered into force on the same date. Its purpose is to determine the composition of the said Interdepartmental Commission, established by Resolution 361 of 18 June 2003. The First Deputy Minister of Justice is the Chairman of the Commission, which also includes members of the Ministry of Defence, the Ministry of Foreign Affairs, the Ministry of the Interior, the Legal Department of the Social Fund, the Ministry of Health, the Ministry of Ecology and Emergencies and the Ministry of Education, Science and Culture, as well as an ICRC representative and a member of the Red Crescent Society of Kyrgyzstan.

#### Morocco

On 6 October 2003, the Prime Minister decided on the creation of a national mechanism to promote the implementation of international humanitarian law in Morocco, consisting of a sub-committee within the Inter-ministerial Committee for Public Liberties and Human Rights. The sub-committee is presided over by the Prime Minister and includes members of the Ministry of the Interior, the Ministry of Justice, Ministry of Foreign Affairs, Ministry of Education, Ministry of National and Youth Education, Ministry of the Modernization of the Public Sector, Ministry of Employment, Social Affairs and Solidarity, and the government's General Secretariat.