National implementation of international humanitarian law

Biannual update on national legislation and case law
January – June 2004

A. Legislation

Belgium

The Law concerning the Cooperation with the International Criminal Court and International Criminal Tribunals was promulgated on 29 March 2004, published on 1 April 2004[1] and entered into force on the same day. The Law stipulates that the Minister of Justice is the central competent authority for receiving requests for cooperation from the International Criminal Court (the Court) and transmitting to the Court requests for cooperation from Belgian judicial authorities. The Law contains detailed provisions on the removal of a case from the Belgian courts and (temporary) arrest, transfer and transit of persons at the request of the Court. It also provides for other forms of international cooperation such as the identification and interrogation of persons, gathering of evidence, transmission of documents, search for and transfer of persons, and protection of victims and witnesses. The Law also provides for stays of execution and rejections of requests for cooperation in specific cases, and regulates the execution of the decisions of the Court by Belgium. It makes it an offence subject to fining and/or imprisonment to obstruct the administration of justice by the Court. The Law also sets out the procedure for applying for the position of judge at the Court. Concerning cooperation with the International Criminal Tribunals for the former Yugoslavia and Rwanda (the Tribunals), the Law provides that the Minister of Justice is also the central competent authority for receiving requests from the Tribunals. The Law contains provisions on the removal of a case from the Belgian courts, (temporary) arrest and transfer of persons at the request of the Tribunals and execution of the decisions of the Tribunals

by Belgium. It also provides for other forms of international cooperation such as the identification of persons, gathering of evidence, transmission of documents, measures of seizure, and protection of victims and witnesses.

Belize

The 2003 Anti-personnel Mines Act, Act No. 24 of 2003, was assented to on 5 January 2004 and published on 10 January 2004. It 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). The Act makes it an offence to use, develop or produce an anti-personnel mine in Belize, or to participate in the acquisition of, or possess or participate in the transfer of, an anti-personnel mine or its components in Belize. It also makes it an offence to in any way assist, encourage or induce any person to engage in such activities. The Act permits the transfer of anti-personnel mines for the purpose of destruction, and, subject to the authorization of the Commandant, Belize Defence Force, the retention or transfer of a number of anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques, or for use in any criminal investigation or proceeding in which the anti-personnel mine in question is or may be evidence. The Commandant, Belize Defence Force, is responsible for the search for and destruction of anti-personnel mines and their components. The Act also implements the international fact-finding missions regime established by the Ottawa Convention and provides for privileges and immunities for the members of these missions. Obstruction of any member of a fact-finding mission constitutes an offence. Any person who fails to comply with a notice served by the Commandant, Belize Defence Force, requesting that information be given or records kept for purposes of the Ottawa Convention commits an offence. The Act also stipulates that all information required to be furnished to the Secretary-General of the United Nations under the Ottawa Convention shall be furnished by the minister to whom responsibility for defence is assigned.

Colombia

Law 875 on the Use of the Emblem of the Red Cross or Red Crescent and other emblems protected by the Geneva Conventions of 1949 and the

1 *Moniteur Belge*, No. 113, 174th year, Thursday 1 April 2004.

Additional Protocols of 1977 was promulgated on 2 January 2004,[2] was published[3] and entered into force on the same day. It sets out rules on use of the emblem as a protective device by religious and medical personnel, by units and transports of the police and armed forces under the control of the Ministry of Defence, by civilian medical personnel, units and transports expressly authorized by the Ministry of Health, and by Colombia's National Society and entities belonging to a foreign Red Cross or Red Crescent Society or to other components of the International Red Cross and Red Crescent Movement. It also provides rules on use of the emblem as an indicative device by Colombia's National Society and entities belonging to a foreign Red Cross or Red Crescent Society or to other components of the International Red Cross and Red Crescent Movement. All national authorities (including the Ministries of Defence and Health) and the Colombian Red Cross shall exercise strict control over use of the emblem. The law provides for sanctions for unlawful uses of the emblem. It also refers to the perfidious use of the emblem punished under Art. 143 of the Colombian Penal Code and provides for additional disciplinary sanctions in case of perfidious use of the emblem by public services.

Mauritius

The Biological and Toxin Weapons Convention Act of 2004, Act No. 2 of 2004, was passed by the National Assembly of Mauritius on 13 March 2004 and assented to on 6 April 2004. The Act implements the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC). The Act provides for prohibitions relating to biological and toxin weapons as enshrined in Article I of the BWC. It adds that "no person shall transfer any biological agent or toxin to another person, where he knows or has reasons to believe that the biological agent or toxin is likely to be kept or used otherwise than for prophylactic, protective or other peaceful purposes" (Section 5.2). Any person who contravenes the prohibitions contained in the Act commits an offence and is liable to penal servitude. The Act also stipulates that the intermediate Court has jurisdiction to try an offence

2 Ley 875 del 2 de enero de 2004 por la cual se regula el uso del emblema de la Cruz Roja y de la Media Luna Roja y otros emblemas protegidos por los Convenios de Ginebra del 12 de agosto de 1949 y sus protocoles adicionales.

3 *Diario Oficial* 45.418, 2 January 2004.

under the Act in every case where the act constituting the offence is committed in the Republic of Mauritius or by a citizen of Mauritius, whether the act constituting the offence is committed within or outside the Republic of Mauritius.

The Mutual Assistance in Criminal and Related Matters Act of 2003, Act No. 35 of 2003, was passed by the National Assembly on 19 August 2003 and assented to on 17 September 2003. The Act makes provisions for mutual assistance between the Republic of Mauritius and a foreign State or any international criminal tribunal in relation to serious offences, including those committed before the entry into force of the Act. The Act stipulates that, in respect of a request from a State or an international criminal tribunal, the Republic of Mauritius may grant the request, in whole or in part, "on such terms and conditions as it thinks fit" (Section 5.3). It provides for a number of grounds for the Republic of Mauritius to refuse, in whole or in part, the request from a foreign State. The Act further specifies the forms of mutual assistance, such as the procedure for an evidence-gathering order or a search warrant, a foreign request for a virtual evidence-gathering order, a request for transfer of detained persons to Mauritius, a foreign request for consensual transfer of detained persons from Mauritius, a foreign request for a restraining order or confiscation and a foreign request for the location of the proceeds of crime.

Namibia

The Geneva Conventions Act of 2003, No. 15 of 2003, was promulgated on 28 November 2003, published on 18 December 2003[4] and entered into force on the same day. The Act gives effect to the Geneva Conventions of 1949 and to Protocol I additional to these Conventions. It contains provisions on the punishment of grave breaches of the four Geneva Conventions and Additional Protocol I and establishes universal jurisdiction with regard to these crimes. The Act also provides for the jurisdiction of the High Court of Namibia for the purpose of determining the prisoner-of-war status of persons who have taken part in hostilities, in accordance with Article 45, paragraphs 1 and 2 of Protocol I additional to the Geneva Conventions. The Act sets out the obligation to serve notice of trial of protected prisoners of war and internees on the protecting power or the accused or prisoner's representative, and contains provisions on the legal representation of prisoners of war, on appeal by protected prisoners of

4 *Government Gazette of the Republic of Namibia*, No. 3,109, Government Notice No. 256.

war and internees and on reduction of sentence and custody. Finally, the Act provides for the prevention of misuse of the red cross emblem and other emblems, signs, signals, identity cards, insignia and uniforms as prescribed for the purpose of giving effect to Additional Protocol I of 1977.

Niger

Law No. 2003-025 of 13 June 2003 modifying Law No. 61-27 of 15 July 1961 introducing the Penal Code, and Law No. 2003-026 of 13 June 2003 modifying Law No. 61-33 of 14 August 1961 introducing the Code of Penal Procedure, came into force and were published in the official gazette of the Republic of Niger on 7 April 2004.

Law No. 2003-025 introduces, among other things, into Part III of Book II of the Penal Code, a preliminary chapter entitled "Crimes against humanity and war crimes" comprising four sections: genocide, crimes against humanity, war crimes and common principles. The first three sections give definitions of the crimes in question. The definition of war crimes refers to the Geneva Conventions and their two Additional Protocols. Article 208.7 of the fourth section also states that immunity resulting from a person's official status does not apply to the provisions of this chapter. Article 208.8 bans statutory limitations on public action and on sentences related to the crimes covered by the chapter. It also gives national courts jurisdiction to hear cases filed under the chapter, regardless of where the crime was committed.

Law No. 2003-026 introduces, among other things, the following modifications to the Code of Penal Procedure: separation of civil action from public action, right to counsel for anyone brought before the Attorney General (*Procureur de la République*) and for anyone after the first 24 hours of detention, and separation of minors from adults in places of detention. It also introduces changes regarding official designations (names of courts, legal officers) and maximum periods of detention. Section VII discusses the grounds for and terms of provisional detention. It also provides for compensation for persons held in provisional detention during a procedure that ends in their acquittal.

Paraguay

Law No. 2.365 prohibiting the misuse of the name, distinctive signs and emblems of the Red Cross[5] was promulgated on 23 April 2004, published

5 Ley no 2.365 que modifica la Ley no 993 del 6 de agosto de 1928, "Que prohibe el uso del nombre, signos distintivos y emblemas de la cruz roja".

on 29 April 2004[6] and entered into force on 9 May 2004. It sets out rules on the use of the emblem as a protective device by medical personnel, units and vehicles in times of armed conflict, and by armed forces medical personnel, units and vehicles, by civilian or military religious personnel, and, with the authorization of the Ministry of National Defence, by Paraguayan Red Cross medical personnel, units and vehicles, and by civilian medical personnel and hospitals and other civilian medical units or vehicles. The Law also sets out rules on the use of the emblem as an indicative device by the Paraguayan Red Cross and foreign Red Cross and Red Crescent Societies. The use of the emblem by the ICRC and the International Federation of Red Cross and Red Crescent Societies is also provided for. The Ministry of National Defence exercises control over the use of the emblem. Persons guilty of misuse, and in particular of perfidious use, of the emblem are considered to have committed a war crime and shall be liable to a fine in peacetime and to imprisonment in wartime.

Seychelles

The Anti-Personnel Mines (Prohibition) Act was passed by the National Assembly on 30 March 2004, received presidential assent and came into force on 8 April 2004, and was published in the official gazette on 12 April 2004. The Act gives effect to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction. It defines anti-personnel mines as those "designed to be exploded by the presence, proximity or contact of a person." Mines that are designed to explode on contact with or at the approach of a vehicle and that are equipped with an anti-handling device are excluded from the Act's scope of application. The Act makes it an offence subject to imprisonment for a term of five years to use, develop, produce or otherwise acquire, stockpile, retain or transfer anti-personnel mines in the Seychelles. It also makes it an offence to in any way aid and abet, encourage or induce another person to engage in such activities. The same punishment applies to such acts committed outside the country by a Seychelles national. Subject to authorization by the Minister of Defence, the Act nevertheless permits designated persons to transfer anti-personnel mines for the purpose of destroying them and to retain or transfer such mines for the purpose of developing or training others in mine-detection, mine-clearance or mine-destruction techniques. The Act

6 *Gaceta Oficial de la Republica del Paraguay*, no 34, 29 de abril de 2004.

also implements the international fact-finding mission regime established by the Ottawa Convention and provides for five years' imprisonment for the wilful obstruction of its activities.

Uzbekistan

The Law on use and protection of the red crescent and red cross emblems (No. 615-II) was promulgated on 29 April 2004, published on 22 May 2004[7] and entered into force on the same day. It sets out rules on the use of the emblem as a protective device by army medical personnel, units and vehicles, by civilian medical units, personnel and vehicles and, with the consent of the Ministry of Defence of the Republic of Uzbekistan, by medical units, personnel and vehicles of the Red Crescent Society of Uzbekistan made available to army medical units in wartime, and, with the consent of the Ministry of Defence of Uzbekistan and under the control of the Red Crescent Society of Uzbekistan, of foreign Red Cross and Red Crescent Societies made available to army medical units. It also sets out rules on the use of the emblem as an indicative device by the Red Crescent Society of Uzbekistan and by civilian medical units with the consent of the Red Crescent Society of Uzbekistan, and by foreign Red Cross and Red Crescent Societies under the control of the Red Crescent Society of Uzbekistan. It provides for the use of the emblems by the ICRC and by the International Federation of Red Cross and Red Crescent Societies. The Law states that the emblems shall be protected by the State. Persons guilty of misuse, and in particular of perfidious use, of the emblems in times of armed conflict shall be liable to punishment.

Zambia

The Prohibition of Anti-personnel Mines Act No. 16 of 2003 was assented to on 11 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 use, develop, produce, otherwise acquire,

7 *People's Word*, published by the Cabinet of Ministers.

transfer, deal in, import or export an anti-personnel mine, or to possess, procure, manufacture, stockpile, transfer, deal in, import or export a component part or plans or designs for the purpose of manufacturing an anti-personnel mine or a component part. It also makes it an offence to in any way assist, encourage or induce any person to engage in such activities. The Act provides for the surrender of anti-personnel mines and their forfeiture to the State. It allows the retention of the minimum number of anti-personnel mines absolutely necessary for the development of and training in mine detection, mine de activation, mine clearance or mine destruction techniques. The Act applies to all Zambian citizens, all foreign persons living in Zambia, all foreign firms and companies operating in Zambia, all corporate bodies registered in Zambia and any member of an armed force including any person seconded to the armed forces whether or not the person is a Zambian. The Act also implements the international fact-finding missions regime established by the Ottawa Convention and provides for privileges and immunities for the members of these missions. Obstruction of any member of a fact-finding mission constitutes an offence. The Act also contains a provision on international cooperation rendered or received by Zambia under Article 6 of the Ottawa Convention. It establishes the Zambian Anti-personnel Mine Action Centre, which shall be responsible for all mine-clearance programmes under the control and supervision of the Minister for Foreign Affairs, and the Anti-personnel Committee, whose functions are to formulate and review anti-personnel mine policy, to review activities relating to anti-personnel mines, to establish an Anti-personnel Mines Trust Fund and to implement the Ottawa Convention.

B. National Committees on International Humanitarian Law

Greece

The Greek Committee for the Implementation and Dissemination of International Humanitarian Law was set up by Ministerial Decree No. 2/53482/2002 issued on 24 December 2003 and published on 16 January 2004. The Decree came into force on the date of its official publication. The Committee is a permanent body of the Ministry of Foreign Affairs. It is made up of representatives from the Ministry of Foreign Affairs and the Ministries of National Defence; Internal Affairs, Public Administration and Decentralization; Public Order; Education and Religious Affairs; Justice; Health and Social Solidarity; and Culture; the General Secretariat of the New Generation and the Directorate of Political and Emergency Planning.

The Committee also includes two members of the teaching or research staff of a Greek institution of higher education who are specialized in international humanitarian law (IHL), a representative of the Hellenic Red Cross and a person providing scientific support. The Committee's purpose is to promote the implementation and dissemination of IHL. Its activities include advising the Ministry of Foreign Affairs on the implementation of IHL by the administration and various agencies; putting forward initiatives and proposals designed to encourage civil society to take action in the field of IHL; and making recommendations and proposals concerning relevant legislation, the ratification of international treaties and the dissemination of IHL to the media, NGOs, social partners and various agencies. The Committee prepares progress and activity reports and maintains contacts with universities, research centres and international bodies, including the International Committee of the Red Cross, and with similar authorities and agencies in other countries. The Committee may set up working groups on particular issues and invite other agencies or senior civil servants to take part in its work on an ad hoc basis. The chairman, his deputy and the expert providing scientific support are appointed for renewable three-year terms.

Poland

The Polish Commission for International Humanitarian Law Affairs was established by Prime Minister's Regulation No. 51 of 20 May 2004, published on 27 May 2004[8] and entered into force on the same day. The Commission is a consultative and advisory body for the prime minister. It is composed of the chairman, an undersecretary in the Ministry of Foreign Affairs, the deputy-chairman, a representative of the head of the Prime Minister's Office, representatives of the ministers in charge of home affairs, public administration, foreign affairs, public finances, culture and protection of national heritage, science, public health, higher education, national defence and justice, and a secretary appointed by the chairman. Other persons invited by the chairman may also take part in the work of the Commission. The Commission is allowed to employ experts. The Commission's mandate is to promote the standards of international humanitarian law and introduce them into the Polish system. Among the tasks of the Commission are: analysing international agreements on international

8 *Monitor Polski* (Official Gazette), 27 May 2004.

humanitarian law and putting forward proposals of legislation to implement them, presenting to the prime minister views on legislative and educational activities in the field of international humanitarian law, analysing legislation being prepared, government programmes and other documents, and preparing projects for educational programmes in the field of international humanitarian law. The Commission also has the task of maintaining ties with other committees in Poland and abroad concerned with international humanitarian law, and of formulating Poland's position at international conferences based on proposals of the minister in charge.

Syrian Arab Republic (the)

The National Committee on International Humanitarian Law in the Syrian Arab Republic was established by Decree No. 2,989 of 2 June 2004, which entered into force on 3 June 2004. It is chaired by the State Minister for Red Crescent Affairs and the Law of the Sea and otherwise composed of representatives of the Ministries of Foreign Affairs, Defence, Interior and Justice, a professor of public international law (from the Ministry of Higher Education), the president of the Syrian Arab Red Crescent and a representative of the Syrian civil defence. The mandate of the National Committee is to coordinate national action to disseminate international humanitarian law, adopt national legislation, examine violations, improve knowledge of international humanitarian law and patronize the Syrian Arab Red Crescent and the general directorate for civil defence and international cooperation.

C. Case Law

Israel

On 30 June 2004, the Israeli High Court handed down its decision on a petition brought by several Palestinian villages concerning the legality of orders issued by the Israel Defense Forces (IDF) commander regarding the route of several contested sub-sections of the West Bank barrier. The petitioners contended that the barrier's proposed path would seriously disturb life in their villages. The Court considered two distinct questions: the legal authority of the IDF commander to build a barrier in the West Bank and the proportionality of the barrier's impact on the security situation in view of the harm it would cause the local population.

The Court ruled that, contrary to the petitioners' arguments, the construction of the barrier was motivated not by political but by security

considerations, which, in the Court's opinion, justified taking possession of land in the West Bank. At the same time, the Court held that, along with the authority to build the barrier, the IDF commander had a legal duty to strike a proper balance between security needs and humanitarian concerns. This duty was based, according to the Court, on provisions of Israeli administrative law and public international law. While the Court upheld the IDF commander's position regarding the security grounds for the barrier, it nevertheless ruled that he had not acted proportionately. It found that although the commander had taken account of the grave security issues at stake, he had failed to give due consideration to the barrier's infringement on the rights of the area's 35,000 inhabitants.

Both the petitioners and the Council for Peace and Security had proposed alternative routes for the barrier. The respondent claimed that those routes would seriously jeopardize national security. The Court found that a certain degree of risk had to be endured if due account were to be taken of humanitarian considerations and that, while the barrier's impact on the local population could not be totally avoided, the IDF commander should take measures to limit that impact by altering the path of the barrier in most of the areas referred to in the petition. The petition was denied with regard to one order concerning the western part of the path. Another order, concerning the village of Har Adar, was returned to the respondents for further consideration.

Nepal

On 9 January 2004, after a petition was filed by a national human rights organization, the Supreme Court of Nepal issued a directive ordering the government to conduct necessary studies and enact laws implementing the 1949 Geneva Conventions. The petitioners argued that, although Nepal had ratified the Geneva Conventions in 1964, no specific national legislation had been adopted to implement them. According to the petitioners, this constituted an infringement on the rights of the Nepalese people, who were caught up in a civil war, and a violation of the National Treaty Act, which provides for the adoption of legislation to implement treaties. The government and the National Assembly replied that the Human Rights Commission Act had been adopted with the Geneva Conventions in mind, and that, in any case, those Conventions were applicable only in time of war, which did not correspond to the situation in Nepal. The Supreme Court nevertheless decided that, even if the Human Rights Commission Act

implemented some of the provisions of the Geneva Conventions, further laws to address all aspects of those Conventions had to be adopted.

United States

On 28 June 2004 the US Supreme Court issued three decisions regarding the rights of US citizens and aliens detained on US territory or at the Guantanamo Bay naval base in Cuba, all of them as "enemy combatants."

The first case concerns a US citizen, José Padilla, who was brought to New York and held in federal custody after being arrested on US soil for allegedly having plotted with al-Qaeda. The US president subsequently issued an order to the US secretary of defence designating Mr. Padilla as an "enemy combatant" and directing that he be held in military custody. Padilla was later moved to a Navy brig in South Carolina. Counsel for the detainee filed a *habeas corpus* petition in the US District Court for the Southern District of New York (Southern District), which alleged that Mr. Padilla's military detention violated the Constitution and named as respondents the president, the secretary of defence and the commander of the place of detention. The Court of Appeals for the Second Circuit agreed with the District Court on the designation of the secretary of defence as a proper respondent to the *habeas corpus* petition, owing to his "personal involvement" in the case, and on the extension of the District Court's jurisdiction over the secretary under New York's long-arm statute, notwithstanding his absence from the Southern District. At the same time, unlike the District Court, the Court of Appeals held that the President lacked the authority to detain Padilla in military custody. The Supreme Court dismissed the case, saying that the commander in charge of the place of detention was the only proper respondent to the petition, because the custodian was the sole person with the ability to effectively bring the prisoner before the court, and, moreover, that the Southern District lacked jurisdiction over the case because the petition should have been filed in the place of confinement, i.e. the District of South Carolina.

The Supreme Court only ruled on jurisdictional matters and did not address the question of whether the president had the authority to hold Mr. Padilla in military custody.

In the second case, Yaser Esam Hamdi, an American citizen captured in Afghanistan, detained at an American naval base in South Carolina and designated by the government as an "enemy combatant" for having allegedly fought with the Taliban during the conflict, filed a *habeas corpus* petition

alleging that the government was holding him in violation of the Constitution. The petition also claimed that the detainee had gone to Afghanistan for other purposes than to fight with the Taliban and did not therefore qualify for "enemy combatant" status. A declaration to the contrary was made by an official from the Department of Defence. The District Court, however, asked for additional evidence from the government to support the petitioner's detention. The US Court of Appeals for the Fourth Circuit reversed the District Court's request and dismissed the *habeas corpus* petition, holding that the undisputed fact that the petitioner was captured in an active combat zone was sufficient cause for detention and that, if express congressional authorization were required to detain an American citizen, the provisions of the Congress' Authorization for Use of Military Force Resolution should serve that purpose. The Supreme Court handed down a divided opinion. Four justices upheld the "enemy combatant" status, deeming the detention to be legal, and the four other justices ruled that the detention was unauthorized and therefore illegal. However, all the justices recognized the petitioner's right to a meaningful opportunity to contest his detention.

The third case, *Rasul at al.*, concerns a number of detainees held at Guantanamo Bay. The petitioners, two Australians and 12 Kuwaitis captured in Afghanistan during the hostilities, filed suits challenging the legality of their detention and alleging that they had never fought against the US, that they had never been charged with wrongdoing and that access to judicial guaranties had been denied them. The District Court construed the suits as *habeas corpus* petitions and dismissed them for want of jurisdiction, holding that aliens detained outside the US may not invoke *habeas corpus* relief. The US Court of Appeals for the District of Columbia Circuit confirmed this opinion. The Supreme Court, however, held that US courts had jurisdiction to consider challenges to the legality of the detention of the petitioners as their reach extended to aliens held in territories over which the US exercised plenary and exclusive jurisdiction (such as Guantanamo Bay Naval Base).