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INTERNATIONAL REVIEW of the Red Cross

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 2013

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

Besides a compilation of domestic laws and case law, the biannual update includes other relevant information related to regional events organised by the ICRC, to the development of national IHL committees and to accession and ratification of IHL and other related international instruments.

Relevant ICRC regional events

To further its work on implementation of IHL, the ICRC organised a

ICRC Advisory Service

The ICRC 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, its four priorities are: (i) to encourage and support adherence to IHL-related treaties; (ii) to assist states by providing them with the technical expertise required to incorporate international humanitarian law into their domestic legal frameworks; (iii) to collect and facilitate the exchange of information on national implementation measures; 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 Julian Jaccard, Legal Attaché of the ICRC Advisory Service on International Humanitarian Law.

number of workshops as well as national and regional events in the period under review. Of particular interest was the first Regional Seminar on National Implementation of IHL in Naivasha, Kenya. Held in May 2013 and jointly organised by the ICRC Delegation in Nairobi and the State Law Office of the Government of Kenya, the Seminar brought together governmental officials from seven countries including Djibouti, Ethiopia, Kenya, Somalia, South Sudan, Tanzania and Uganda, as well as an African Union official. The aim of the Seminar was to give the participants an update on IHL developments and to present new tools that could facilitate the process of national implementation.[1] This first regional Seminar provided a forum for participants to share mutual experiences and best practices, and to review the challenges faced and progress made in the implementation of IHL.

Similarly, the Chinese National IHL Committee, with support from the ICRC Delegation in Beijing, organised the first Regional Meeting on the Promotion and Implementation of IHL in Beijing, China. The Meeting was attended by forty-one governmental officials and representatives from the National Red Cross Societies from twelve countries of East and South-East Asia. It was aimed at exploring current issues relating to the national implementation of IHL, in particular regarding the protection of health care in times of armed conflict,[2] and to the repression of serious violations of IHL.[3] Representatives of China, Indonesia and the Philippines took the occasion to present their country's progress in implementing IHL. For the ICRC, this was a unique opportunity to hold bilateral discussions on national implementation of IHL with state representatives from the region.

Update on national IHL committees

Another way in which the Advisory Service facilitates the domestic implementation of IHL is through support of the national IHL committees or similar bodies – inter-ministerial or inter-institutional bodies which advise the governments of their respective countries on all matters related to IHL. Such Committees *inter alia* promote ratification of or accession to IHL treaties, make proposals for the harmonisation of domestic legislation with the provisions of these treaties, and participate in the formulation of the state's position regarding matters related to IHL. There were 102 national IHL committees across the world by mid-2013.

1 For further information regarding IHL national implementation, see the section 'IHL and Domestic Law', available at: www.icrc.org/eng/war-and-law/ihl-domestic-law/index.jsp. All internet references were last accessed in June 2013.

2 Further information on the ICRC's Health Care in Danger project is available at: www.icrc.org/eng/what-we-do/safeguarding-health-care/solution/2013-04-26-hcid-health-care-in-danger-project.htm.

3 For further information, see the fact sheet on 'Penal Repression: Punishing War Crimes', available at: www.icrc.org/eng/assets/files/other/penal_repression.pdf.

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

Universal participation in IHL treaties is a first vital step toward the respect of life and human dignity in situations of armed conflict, and is therefore a priority for the ICRC. In the period under review, eighteen of the twenty-eight IHL and other related international conventions and protocols[4] were ratified or acceded to by various states. In particular, there has been notable accession to the Convention on Cluster Munitions (CCM). Indeed, six states ratified the Convention in the first half of 2013. Moreover, the adoption on 2 April 2013 of the Arms Trade Treaty (ATT) by the United Nations (UN) General Assembly should not go unnoticed. The treaty, largely signed on the date it was opened for signature (3 July), regulates international trade in conventional weapons and ammunition. As of 30 June 2013, no state had yet ratified the ATT. This treaty will enter into force ninety days following the date of the deposit of the fiftieth instrument of ratification (Article 22).

Apart from the twenty-eight IHL-related international conventions and protocols mentioned above, the Advisory Service also follows ratification of other international treaties that may be of a relevance *inter alia* for the protection of persons during armed conflict and the prevention and repression of violations of IHL, such as the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of all Persons from Enforced Disappearance. With regard to the latter, two states have ratified the Convention in the first half of 2013, bringing the total number of ratifications to thirty-nine (as of 30 June 2013). The Convention entered into force in December 2010.

The table on the following page outlines the total number of ratifications, as of June 2013, of relevant IHL treaties and other related international instruments.

National implementation of international humanitarian law

The laws and case law presented in the following sections were either adopted by states or delivered by domestic tribunals in the first half of 2013, or collected by the ICRC Advisory Service during that period. They cover a variety of topics linked to IHL, such as the status of protected persons, criminal and disciplinary repression of IHL violations, and weapons regulations. This compilation is not meant to be exhaustive; it represents a selection of the most relevant developments relating to IHL implementation.

The full texts of these laws and case law can be consulted in the ICRC's database on national implementation.[5]

4 To view the full list of IHL-related treaties, see the ICRC's Treaty Database, available at: www.icrc.org/ihl.
5 See the ICRC Database on National Implementation of IHL, available at: www.icrc.org/ihl-nat.

Conventions	States	Ratification date	Total number of ratifications
1949 Geneva Conventions I–IV	South Sudan	25.01.2013	**195**
1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and Their Destruction	Cameroon	18.01.2013	**170**
	Nauru	05.03.2013	
	Guyana	26.03.2013	
	Malawi	02.04.2013	
1977 Additional Protocol I to the Geneva Conventions	South Sudan	25.01.2013	**173**
1977 Additional Protocol I to the Geneva Conventions – Declaration Article 90	Kuwait	21.06.2013	**73**
1977 Additional Protocol II to the Geneva Conventions	South Sudan	25.01.2013	**167**
1980 Convention on Conventional Weapons	Kuwait	24.05.2013	**116**
1980 Protocol I to the Convention on Conventional Weapons	Kuwait	24.05.2013	**111**
1980 Protocol III to the Convention on Conventional Weapons	Kuwait	24.05.2013	**107**
1995 Protocol IV to the Convention on Conventional Weapons (blinding laser weapons)	Kuwait	24.05.2013	**102**
1996 Amended Protocol II to the Convention on Conventional Weapons	Kuwait	24.05.2013	**99**
1998 Rome Statute of the International Criminal Court	Côte d'Ivoire	15.02.2013	**122**
2000 Optional Protocol to the Convention on the Rights of Child	Cameroon	04.02.2013	**152**
	Zimbabwe	22.05.2013	

(Cont.)

2001 Amendment to the Convention on Conventional Weapons	Kuwait	24.05.2013	**77**
2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Portugal	15.01.2013	**69**
	Nauru	24.01.2013	
	Italy	03.04.2013	
	Norway	27.06.2013	
2003 Additional Protocol V to the Convention on Conventional Weapons (explosive remnants of war)	Kuwait	24.05.2013	**82**
2005 Additional Protocol III to the Geneva Conventions	South Sudan	25.01.2013	**64**
	Suriname	25.06.2013	
2006 Convention against Enforced Disappearances	Morocco	14.05.2013	**39**
	Cambodia	27.06.2013	
2008 Convention on Cluster Munitions	Nauru	04.02.2013	**83**
	Liechtenstein	04.03.2013	
	Chad	26.03.2013	
	Andorra	09.04.2013	
	Bolivia	30.04.2013	
	Iraq	14.05.2013	

A. Legislation

The following section presents, in alphabetical order by country, the domestic legislation adopted during the period under review (January–June 2013). Countries covered are Bangladesh, Croatia, Libya, Mexico, Micronesia, the Philippines, Syria and Venezuela.

Bangladesh

International Crimes (Tribunals) (Amendment) Act, 2013 (Act No. III of 2013)

On 17 February 2013, the Parliament of Bangladesh passed a bill amending the International Crimes (Tribunal) Act of 1973. The amended Act implements an International Crimes Tribunal which has jurisdiction over genocide, crimes against humanity, war crimes and other crimes under international law that could have been committed during the country's liberation war in 1971.

The amendment added three significant changes relating to both substantial and procedural provisions. The first of them deals with the jurisdiction of the Tribunal (Article 3), which, after the amendment, can also try and punish organisations for their participation in the 1971 armed conflict. This amendment is intended to address the important role played by political parties during this war.

The two other changes are related to the right of appeal (Article 21). In particular, the amendment extends the right of appeal to 'the complainant or the informant' (Article 21(2)). Before the amendment, only the convicted person and the Government could lodge an appeal. The amendment also broadened the scope of this right by granting appeals against 'an order of sentence' (Article 21(2)) and not only against 'an order of acquittal'. Finally, Article 21 was also amended regarding the time limits for lodging an appeal. Appeals 'shall be preferred within 30 (thirty) days from the date of conviction … or acquittal' and 'shall be disposed of within 60 (sixty) days from the date of [their] filing' (Article 21(3 and 4)).

The Amendment has a retroactive effect starting from 14 July 2009. This allows the Tribunal to review the judgment and the sentence of already closed cases such as that of Abdul Quader Molla, who was already convicted before the Amendment.

Croatia

Law on Defence and *Law on Service in the Armed Forces of the Republic of Croatia*

In the process of aligning its legislation with European Union standards, the Croatian parliament adopted two laws (published in the *Official Gazette*, No. 73/13,

on 18 June 2013). Both laws include precise obligations regarding the respect of IHL by armed forces.

The first one is the new Law on Defence, which provides that, during military and non-military activities, IHL should be respected by members of the armed forces (Article 40(1)). They have the right and the obligation to refuse a command or an order requiring from them an act that would be contrary to IHL (Article 40(2)).

The second one is the Law on Service in the Armed Forces of the Republic of Croatia, which further develops the obligation of armed forces to respect IHL (Article 10). According to this law, military service members are bound to execute commands and orders from their superiors, except those which violate IHL (Article 17). Moreover, members of the armed forces are required to report the unlawful order and the person who gave it to their immediate superior in the chain of command. Article 178 further provides that there is no disciplinary responsibility for a member of the armed forces who refuses to carry out orders that contravene IHL, the customs of war and the laws of armed conflict.

Libya

Law No. 10 on the Criminalization of Torture, Forced Disappearances and Discrimination

On 14 April 2013, the Libyan General National Congress adopted a law concerning the criminal repression of torture, enforced disappearances and discrimination. Libya is party to the International Convention on the Elimination of All forms of Racial Discrimination since 3 July 1968 and to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) since 16 May 1989. However, it is still not party to the International Convention for the Protection of All Persons from Enforced Disappearance.

Law No. 10 aims to protect the rights to personal liberty (Article 1), to physical integrity (Article 2) and to non-discrimination (Article 3). Penalties provided by the Law vary from three to fifteen years of imprisonment for those who restrict by force, threat or treachery the personal liberty of a person, five to fifteen years of imprisonment for committing physical or mental torture, and three to fifteen years of imprisonment for depriving a person of any of his/her rights on the basis of discrimination. The Law provides a penalty of life imprisonment for cases in which the victim dies as a result of the treatment inflicted.

The definition of torture (Article 2) provided in Law No. 10 does not correspond to the one stipulated in the CAT. It establishes that torture is committed when a person inflicts physical or mental suffering to somebody under his or her custody 'to elicit a forced confession … or for discrimination of any form, or for revenge of whatever motive' without limiting torture to acts 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity' as specified by Article 2 of the CAT.

Of particular interest are the modes of individual criminal responsibility identified by Law No. 10. For instance, a person can be held responsible when ordering or keeping silence 'on torture while having the ability to stop it' (Article 2). Article 5 further establishes that political, administrative, executive or military leaders are responsible for the above-mentioned crimes when committed by those under their control and when they did not take necessary measures to prevent or repress the criminal conduct.

Mexico

Law Decree enacting the General Law on Victims and *Law Decree that Reforms, Derogates and Adds Different Provisions to the General Law on Victims; and Reforms the First Paragraph of Article 182-R from the Federal Code of Criminal Procedure*

On 9 January 2013, the president of Mexico signed the Decree enacting the General Law on Victims (published in the *Official Gazette* the same day). After bringing some modifications to the draft project, the newly elected president signed the Law so that it could enter into force. However, in order to broaden the protection given to victims, an amendment to the General Law on Victims was already proposed and approved by the Mexican Congress on April 2013. This amendment (signed by the president on 2 May 2013 and published in the *Official Gazette* on 3 May 2013) reforms Articles 1–180 and abrogates Articles 181–189.

The reformed General Law on Victims aims to guarantee victims' rights to assistance, protection, care, truth, justice, comprehensive reparation and due diligence (Article 2). According to the law, victims are those who have suffered directly or indirectly from any economical, physical and/or psychological harm as a consequence of a violation of the human rights recognised by the Mexican Constitution and by international treaties (Article 4). Protection is also granted to 'potential victims' (persons who could face threats to their personal integrity because of the assistance they give to victims) and to groups, communities or organisations from civil society who could have suffered from a human rights violation (Article 4).

In order to guarantee victims' rights, the Law establishes different protection and assistance mechanisms: a National System for Victim Care for the planning and supervision of the provision of assistance to victims (Title VI); an Executive Commission for Victim Care that will control the execution of the Law (Article 44); the Agency for Legal Aid for Victim Care (Title X); a National Victims Register (Article 96); and a Care, Assistance and Reparation Fund (Title VIII).

From a comprehensive catalogue of rights granted by this law to the victims, one can mention the right to family reunification (Article 7 (XVI)), the right to truth, which implies a right to know the whereabouts and the fate of missing relatives, and the obligation of the authorities to take all effective and urgent measures in order to satisfy the right to truth (Articles 19 and 21). Families of missing persons also have the right to be present during exhumations and to receive the remains of their relatives (Article 21).

Micronesia

Act to further amend Title 11 of the Code of the Federal States of Micronesia, as amended, by creating a new Chapter 13 to implement the provisions of the Chemical Weapons Convention at the National level, and for other purposes

On 14 June 2013, the Eighteenth Congress of the Federated States of Micronesia adopted an act to implement the Chemical Weapons Convention (CWC), which was ratified by Micronesia on 21 June 1999. The Law does so by amending Title 11 of the Code of the Federated States of Micronesia (Criminal Code) and inserting a new Chapter 13, which is entitled the Federated States of Micronesia Chemical Weapons Act.

The definitions of 'chemical weapon' and 'toxic chemical', among other terms provided for in the Act, correspond to those stipulated in the CWC. The Act prohibits the development, production, acquisition, stockpiling, retention, transfer or use of (including for military purposes) chemical weapons and punishes any breach of these prohibitions with a term of not more than twenty years' imprisonment (Section 1303). The Act also creates a licensing system for scheduled chemicals (Section 1310) establishing restrictions on their use and transfer and creating criminal offences in case of breaches (Sections 1304, 1305 and 1306).

Section 1309 of the Act establishes a reporting system for those producing, using scheduled chemicals. Section 1311 allows for national and international inspections for compliance purpose, requiring either the consent of the person in control of any premises or a previous warrant. According to Section 1313, 'the Department of Justice of the Federated States of Micronesia shall be the National Authority for the purposes of implementing the provisions of the Convention' and the Act.

The Philippines

Republic Act No. 10530, defining the use and protection of the red cross, red crescent and red crystal emblems, providing for penalties for violations thereof and for other purposes

On 7 May 2013, the Congress of the Philippines adopted an act (published the same day in the *Official Gazette*) to protect the red cross, red crescent and red crystal emblems.

The Act includes in its Section 2 a Declaration of Principles wherein it is stated that 'the Philippines renounces war as an instrument of national policy' and that it 'shall secure the protective use and indicative use of the emblems both in times of peace' and during armed conflict. The Act also provides for a definition of key terms, such as 'distinctive signals', 'emblem', 'indicative use' and 'perfidious use' (Section 3).

The legislation further stipulates some responsibilities over state institutions in order to control the use of the emblems. For instance, the Department of National Defence (DND) is expected to supervise and control their use by the Medical Service of the Armed Forces (Section 4) and by the Philippines Red Cross (PRC). The Department of Health (DOH) has to do the same regarding civilian medical personnel, transport and buildings (Section 5). The DND and the DOH must ensure 'strict compliance with the rules governing the use of the emblems', and shall take appropriate measures to prevent their misuse, including dissemination of these rules (Section 10).

The Act establishes penalties with regard to the misuse of the emblems. During peace time it shall be punished with a maximum imprisonment of six months or a fine (Section 11), and in times of armed conflict it shall be punished with a maximum imprisonment of life sentence and a fine (Section 12).

Syria

Law No. 11, Addendum to the Penal Code Regarding the Involvement of Children in Hostilities

On 24 June 2013, the Syrian Parliament approved an amendment to the Syrian Criminal Code in relation to the involvement of children in hostilities. The Syrian Arab Republic ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict on 17 October 2003.

The amendment modifies Article 488 of the Criminal Code by establishing a punishment of ten to twenty years' temporary hard labour for any person recruiting 'a child under 18 years old for the purpose of involving him in hostilities or other related acts such as carrying arms or equipment or ammunitions'. The same sanction is applied to persons recruiting a child to use him/her as a human shield or for any purpose relating to criminal conducts (Article 1(1)). A penalty of lifetime forced labour is foreseen if the child suffers from a permanent disability as a result of his/her participation in the hostilities, or if he/she was sexually abused or given drugs while being recruited. Moreover, the death penalty punishment is foreseen for cases where a child dies as a result of his/her involvement in hostilities (Article 1(2)).

Venezuela

Law for Disarmament and Arms and Munitions Control

On 11 June 2013, the National Assembly of the Bolivarian Republic of Venezuela adopted a law (published on 18 June 2013 in the *Official Gazette*, No. 40.190) aimed at disarmament and the control of the trade of arms and munitions (Article 1). Prior to this, Venezuela ratified the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons and its three Protocols on 19 March 2005, and

the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction on 3 December 1997.

The Law prohibits certain weapons including weapons of mass destruction, atomic weapons, chemical and biological weapons and all other weapons which are prohibited by international treaties ratified by the state (Article 7). Following the same rationale, the Law prohibits production, import, export, transit or trade of weapons which, because of their nature or characteristic, have been prohibited by international treaties ratified by Venezuela (Article 9).

As per Article 8 of the Law, the armed forces have the exclusive competence to deliver authorisation for the production, import, export and trade of non-prohibited weapons. Furthermore, the Law imposes the following penal sanctions for the respective criminal conduct: six to ten years for the illegal years of imprisonment for the illegal possession of weapons (Article 111); eighteen to twenty-five years for the illegal production of weapons; and twenty to twenty-five years for the illegal trade of weapons.

B. Case law

The following section lists, in alphabetical order by country, relevant domestic jurisprudence related to IHL and released during the period under review (January–June 2013). Countries covered are Argentina, Colombia, France, the Netherlands, Pakistan, Sweden and the United Kingdom of Great Britain and Northern Ireland.

Argentina

Campo de Mayo (third case), Cases No. 2047, 2426, 2257 and 2526, Federal Criminal Oral Tribunal No. 1 of San Martín

Keywords: crimes against humanity, Argentinian military junta.

On 12 March 2013, Federal Criminal Oral Tribunal No. 1 of San Martín sentenced Reynaldo Benito Antonio Bignone, former president of Argentina (1982–1983), to life imprisonment. This is the fourth sentence issued against Mr. Bignone resulting from his role during the military junta's regime.

From 6 December 1976 to 2 December 1977, Mr. Bignone was second commander of the military institutes and, as such, was in charge of Campo de Mayo, one of the biggest clandestine detention and torture centres existing during the military regime in Argentina. Mr. Bignone is also known for issuing, as the last member of the junta to be in power, a decree aiming at destroying all documents relating to the detention, torture and murder of disappeared persons. In 1983, he passed a self-amnesty law covering all members of armed forces for acts committed during the regime of the junta (1976–1983).[6]

6 Ley 22.924, Ley de Pacificación Nacional, 22 September 1983, *Boletín Oficial de la República Argentina*, 27 September 1983.

On 14 June 2005, the Argentinian Supreme Court declared amnesty laws[7] to be unconstitutional as they violated Argentina's international human rights obligations. This key decision allowed the prosecution of those responsible for major human rights violations during the military regime, including Mr. Bignone. On 8 March 2007, as one of the top officers in charge of Campo de Mayo, he was accused of committing enforced disappearances and torture against some detainees of this centre.

In this decision the Tribunal concluded that murders, torture and arbitrary deprivation of liberty (among other criminal conducts) targeting a specific type of population and committed during the military junta by state agents are considered crimes against humanity. On the basis of his individual criminal responsibility relating to the events that took place in Campo de Mayo, Mr. Bignone was sentenced to life imprisonment for his participation in twenty cases of murder, illegal deprivation of liberty and torture as a crime against humanity.

Colombia

Decision No. C-120/13, Constitutional Court

Keywords: protection of families of missing persons.

On 13 March 2013, the Colombian Constitutional Court released a decision broadening the scope of protection granted by Law No. 1531 to the families of missing persons.

On May 2013, the Colombian president signed Law No. 1531 on the declaration of absence of missing persons.[8] According to Article 7(d) of the Law, such a declaration allowed the family and the underage children of a missing person to receive the salary that the missing person was receiving at the time he/she disappeared. However, the article restricted this guarantee to the families and underage children of public servants.

Considering this provision to be contrary to the constitutional right to equality (Article 13), the Court concluded that it was partially unconstitutional and that it should be interpreted in order to enlarge the protection of missing relatives. In particular, the 'family' concept should be broader and, for the purpose of Article 7(d), should also include partners of the same sex. Furthermore, the notion of underage children should be interpreted as including disabled adults who

7 On June 1983 the Argentinian Supreme Court declared that the self-amnesty law enacted by Bignone was unconstitutional. However, between December 1986 and May 1987, the Argentinian Parliament approved two new amnesty laws, one called 'final point', which set a sixty-day limitation for prosecuting crimes against international law committed during the military junta. The other was called the 'due obedience' law, which exempted from prosecution all members of the armed forces who committed crimes as a result of following given orders. These were the laws that the Argentinian Supreme Court declared to be unconstitutional on 14 June 2005.

8 For further information, see: 'What's New in Law and Case Law across the World? Biannual Update on National Legislation Implementing Humanitarian Law and Relevant Case Law, January–June 2012', in *International Review of the Red Cross*, Vol. 94, No. 887, 2012, p. 1151, available at: www.icrc.org/eng/assets/files/review/2012/irrc-887-national-implementation.pdf.

were sustained by the missing person at the time he/she disappeared. Finally, the Court declared that the protection granted by the Article cannot be restricted to families and children of public servants but should also cover relatives of all other types of workers.

Ruling No. 119 from 2013, Special Chamber for the follow-up of Decision No. T-025-04, Constitutional Court

Keywords: protection of civilians, non-international armed conflict in Colombia.

On 24 June 2013, the Colombian Constitutional Court issued a ruling allowing forced displacement victims (resulting from violent episodes caused by the BACRIM[9]) to be included in the National Victims Register (NVR). This decision put an end to a discriminatory practice that excluded those victims from the benefits offered by Law No. 1448, which was intended to protect, assist and provide reparations to victims of the country's armed conflict.

Law No. 1448 provided for the creation of the NVR, aiming to draw a list of victims that would be entitled to the benefits offered by the Law. According to the head of the National System of Reparations for Victims (NSRV), the definition given by the Law for 'victims'[10] excluded those affected by the violence caused by the BACRIM. Hence people who had suffered from forced displacement because of this kind of violence could not benefit from Law No. 1448.

Considering this practice to be discriminatory, the Colombian Constitutional Court declared it to be unconstitutional. The Court clarified that the inclusion of forced displaced persons in the NVR (a) did not depend on whether the displacement resulted from the armed conflict or not, (b) was independent from the reasons and the armed actor that caused the violence leading to the displacement, and (c) was not related to the place, be it rural or urban, where the violence occurred. For the Court, any person who would meet the forced displacement criteria[11] should be included in the NVR and benefit from Law No. 1448.

Moreover, the Court ordered the head of the NSRV to establish a working group comprising the Ombudsman's Office, the Office of the Public Ministry, the Office of the High Commissioner for Human Rights, and the ICRC in order to study and follow up on the cases of victims excluded from the NVR so that they could offer advice and recommendations in this regard.

9 BACRIM (*bandas criminales*), or 'criminal bands', is an expression used by the Colombian government.

10 'The Law defines "victims" as those who, individually or collectively, have suffered harm in acts that occurred on or after 10 January 1985, as a consequence of violations of international humanitarian law or international human rights law, occurring in the midst of the internal armed conflict. The term extends to family members and partners of those killed or disappeared.' See 'What's New in Law and Case Law across the World: Biannual Update on National Legislation and Case Law January–June 2011', in *International Review of the Red Cross*, Vol.93, No. 883, September 2011, p. 859, available at: www.icrc.org/eng/assets/files/review/2011/irrc-883-reports-documents.pdf.

11 For the Court, an enforced displaced person is anyone who had a well-founded fear, resulting from widespread violence, which led him to abandon his place of residence or the place where he was developing his economic activity.

The importance of this decision is also related to the fact that it ordered the head of the NSRV to issue a quarterly document reporting on the advances, obstacles and difficulties relating to the inclusion of victims in the NVR, as well as presenting the patterns of forced displacement in Colombia.

France

Association France-Palestine Solidarité 'AFPS' v. *Société ALSTOM Transport SA,* Case No. 11/05331, Versailles Court of Appeal

Keywords: corporate liability for IHL violations.

On 22 March 2013, the Versailles Court of Appeal dismissed the legal claims of the France–Palestine Solidarity Association (FPSA) and the Palestine Liberation Organisation (PLO) aiming to hold responsible Alstom, Alstom Transport and Veolia Transport (French corporations) for IHL violations in Israel.

On 22 September 2004, the State of Israel and a French–Israeli private consortium (which included Alstom and Alstom Transport SA) signed a contract to install a public transport service in Jerusalem. Another contract was signed between the city of Jerusalem and Veolia Transport for public transport maintenance. The tram system was built and ready to be used on 19 August 2011. On 22 February 2007, the FPSA filed a lawsuit against Veolia Transport and Alstom denouncing the contract they had signed with Israel for the construction of the tram system as unlawful. Subsequently, the PLO joined the plaintiff's side. According to the FPSA, the unlawfulness of the contract resulted from the fact that it involved the illegal construction of a tram system in the Occupied Territories, which is a violation of IHL. In particular, the FPSA claimed that the French corporations violated Articles 49 and 53 of the Fourth Geneva Convention of 1949, Articles 23(g) and 46 of the Fourth Convention respecting the Laws and Customs of War on Land of 1907, and Articles 4.1 and 4.3 of the Hague Convention of 1954, as well as customary IHL. On 30 May 2011, the Lower Court dismissed the legal claims of the FPSA and PLO, who lodged an appeal against the decision.

The Versailles Court of Appeal did not overturn the decision of the Lower Court. Rather, the Court considered that the provisions cited by the organisations were related to international instruments signed by states, which established concrete obligations for the Occupying Powers, but not for private corporations. The Court further stated that these provisions have neither a vertical[12] nor a horizontal effect[13] towards corporations. Moreover, the Court set aside the claim

12 For the Court, the vertical effect of treaties relates to those situations where a treaty is sufficiently clear and explicit to create direct obligations for nationals of the country which ratified the treaty. In this case, the Court concluded that the Fourth Geneva Convention did not create direct obligations for French corporations.

13 For the Court, 'horizontal effect' means that only when a corporation is a signatory of an international agreement will this agreement be binding for it. Furthermore, the Court affirms that as corporations are not subjects of international law, they cannot sign an international agreement and, as such, cannot be directly bound by it.

about an alleged violation of a customary rule establishing a 'general responsibility of corporations regarding human rights violations'. For the Court, there is not enough evidence to prove such a customary rule and, therefore, bearing in mind the Statute of the International Court of Justice,[14] it cannot be considered as binding. Finally, the Court dismissed the plaintiffs' argument regarding the *jus cogens* character of the provisions allegedly violated by the corporations. It considered that *jus cogens* is a concept that can only be applied to subjects of international law, and corporations are not considered as such.

The Netherlands

The Prosecutor v. *Yvonne Basebya,* Case No. LJN BZ4292, District Court of The Hague

Keywords: Rwandan genocide, incitement to commit genocide.

On 1 March 2013 the District Court of The Hague found Ms. Basebya guilty of incitement to genocide in relation to the Rwandan genocide of 1994.

Investigations were initiated against the defendant because of her close links in the National Republican Movement for Democracy and Development (*Mouvement Républicain National pour la Démocratie et le Development*, MRND), a political party whose youth wing was deeply involved in the Rwandan genocide. Living in Gikongo, one of the neighbourhoods of Kigali considered to be a hotbed of the MRND and its youth wing, the defendant often participated in their rallies where racial hatred against Tutsis was incited. For these reasons, she was accused of abetting genocide, attempted genocide, murder, conspiracy to genocide, incitement to genocide, and war crimes.

The Court acquitted Ms. Basebya on most of the charges due to lack of evidence, but she was convicted for the charge of incitement of genocide. She was found guilty of this charge because of her active participation in MRND rallies where she led the crowd to sing the 'Tubatsembesembe' song, inciting the listener to 'kill them all'. Bearing in mind the highly volatile political and social context and given that this incitement was direct and public, the Court found that the defendant had the intent to incite people to kill Tutsis. Moreover, citing a decision of the International Criminal Tribunal for Rwanda (ICTR) which recognised Tutsis as a protected group within the meaning of the 1948 Genocide Convention,[15] the Court concluded that all elements for incitement to genocide were met in the case.

Apart from the fact that this is the first time a Dutch citizen has been condemned for being involved in the Rwandan genocide, this decision is also important because it explicitly recognises that incitement to genocide, as an

14 Statute of the International Court of Justice, Art. 38(1) (b): 'the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: … b. international custom, as evidence of a general practice accepted as law'.

15 International Criminal Tribunal for Rwanda, *The Prosecutor* v. *Jean-Paul Akayesu*, ICTR 97-23-S, Trial Chamber I, 2 September 1998.

international crime, should be strongly punished by national courts. Indeed, even if the Court's hands were tied by the provisions of the previous criminal code,[16] it declared itself to be mindful that the punishment given to the defendant (six years and eight months) was not in accord with the gravity of the conduct. The Court admitted that the incitement to genocide committed by the defendant was an essential step in the outbreak of the Rwandan genocide and, as such, should be strongly punished.

Pakistan

Foundation for Fundamental Rights v. *Federation of Pakistan,* Decision on the Writ Petition No. 1551-P/2012, Peshawar High Court[17]

Keywords: drones/remotely piloted aircrafts, protection of civilian population, war crimes.

On 11 March 2013, the Peshawar High Court released a decision considering, among other conclusions, that US drone strikes in Pakistan amounted to war crimes.

Following a drone strike that took place on 17 March 2011 and which caused several civilian casualties, the Foundation for Fundamental Rights, acting on behalf of the son of one of the victims, lodged a complaint against the Federation of Pakistan. The Court connected this case with other writ petitions also related to drone strikes.

Citing the significant number of civilian casualties and civil property loss caused by drones in the north and south Waziristan region of Pakistan,[18] and given that most of victims were not taking direct part in hostilities, the Court declared that these attacks were violations of international law. In particular, the Court stated that such strikes were a breach to Pakistani national sovereignty and violated Article 2(4) of the UN Charter, as well as the principles of international law established by the UN Declaration on Friendly Relations among States.[19] In addition, the Court ruled

16 Prior to 1 October 2003, the Netherlands' criminal code established a penalty of not more than five years' imprisonment for the crime of incitement to genocide. Because the facts of this case occurred in 1994 and given the principles of most favourable legislation, non-retroactivity and legality, the District Court of The Hague had to apply the past provisions of the Netherlands' criminal code.

17 On 19 December 2013 the Peshawar High Court began contempt proceedings against the government of Pakistan due to its failure to obey the orders given by the Court.

18 According to the decision of the Peshawar High Court, '896 Pakistani civilians, residents of the said Agency, were killed during the last five (05) years till December 2012 while 209 were seriously injured. . . . Many houses & vehicles of different category, make & model, worth millions dollars, were destroyed during these attacks. Besides, many cattle heads of different kinds were torn into pieces & charred, belonging to the local residents. Similarly, in South Waziristan Agency 70 drone strikes were carried out during last five (05) years till June 2012 in which 553 local civilians were killed, 126 were injured, 03 houses were destroyed and 23 vehicles were badly damaged.'

19 See UNGA Res. 2625 (XXV), 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. In particular, the Peshawar High Court states that these drone strikes violated the principle according to which 'every State has the duty to refrain in its international relations from the threat or use of force

that drone strikes which took place in the Waziristan region were also a violation of the right to life. Finally, the Court also declared that these attacks were a violation of the Geneva Conventions of 1949 and their Additional Protocols as they were not respectful of the principles of distinction and proportionality. For these reasons, the Court declared that these strikes amounted to war crimes and were 'absolutely illegal'.

In order to put an end to such violations, the Court requested that the Federation of Pakistan adopt an escalating response at a national and international level. At the national level, if the government of Pakistan could not manage to stop drones strikes, security forces should solve the situation, even by resorting to the use of armed force. At the international level, Pakistan should raise the issue to the UN Security Council and, if facing restrictions relating to veto power, it should ask for an urgent session of the UN General Assembly. Furthermore, Pakistan should ask the UN Secretary-General to 'constitute an independent War Crimes Tribunal which shall have the mandate to investigate and enquire into all these matters and to give a final verdict as to whether the same amounts to War Crime'.[20] Finally, if these steps prove to be unsuccessful, according to the Court, the Federation of Pakistan should 'sever ties' with the government of the United States of America and 'deny all logistic and other facilities to the USA within Pakistan'.[21]

Sweden

The Prosecutor v. *Stanislas Mbanenande,* Stockholm District Court

Keywords: Rwandan genocide, *ne bis in idem*, grave breaches of IHL.

On 20 June 2013, Stanislas Mbanenande was sentenced to life imprisonment for his direct participation in the events that led to the Rwandan genocide of 1994.

Stanislas Mbanenande was an intellectual belonging to the Hutu ethnic group. He was accused of participating in several massacres and other violent events that led to the death and forced displacement of Tutsis in the Kibuye prefecture of western Rwanda in 1994. He was first tried *in absentia* by the Gacaca Courts of Rwanda[22] and sentenced to life imprisonment in 2009. As a result of this sentence, Interpol issued an arrest warrant for Mr. Mbanenande and he was captured in Sweden in 2011. However, because of his Swedish citizenship, obtained after fleeing

against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues' (op. para. 1).

20 Peshawar High Court, Peshawar Judicial Department, Writ Petition No. 1551-P/2012, Judgment, 11 March 2013, para. 22(vii).

21 Peshawar High Court, Peshawar Judicial Department, Writ Petition No. 1551-P/2012, Judgment, 11 March 2013, para. 22(ix).

22 The Gacaca Courts were an alternative judicial authority that was created by the Rwandan presidency. These courts were intended to try low- and middle-level perpetrators of the Rwandan genocide, while the International Criminal Tribunal for Rwanda was to try higher-ranked responsible persons. On 18 June 2012, the Rwandan president announced the end of the Gacaca Courts.

Rwanda, and given that the Swedish judicial authorities did not recognise the authority of the sentence issued by the Gacaca Courts, the defendant was indicted in 2012 by the Stockholm District Court for charges of genocide and war crimes, including crimes of murder, attempted murder and abduction.

According to the findings of the Court, Mr. Mbanenande had a leading role at a lower level and directly participated in several events relating to the Rwandan genocide. In this context, he committed criminal offences such as murder, attempted murder, incitement to murder and kidnapping. For the bench, it was clear that the attacks were directly targeting a group of persons because of their ethnic origins. Given that Tutsis were recognised as an ethnic group, the Court concluded that these acts amounted to the crime of genocide. The Court also found that Mr. Mbanenande was involved in the recruitment of new members of the Hutu militias.

With regard to the alleged commission of war crimes, the District Court first recognised that, at the time, there was an ongoing non-international armed conflict between the government army and the Rwandan Patriotic Front. Then it declared that this context played a decisive role in the defendant's ability and decision to engage in criminal conduct. Therefore, the Court found that Mr. Mbanenande was guilty of committing grave breaches of IHL as established by Common Article 3 of the Geneva Conventions of 1949 and by its Second Additional Protocol.

United Kingdom

Smith and others (Appellants) v. *The Ministry of Defence (Respondent); Ellis (Respondent)* v. *The Ministry of Defence (Appellant);* and *Allbutt and others (Respondents)* v. *The Ministry of Defence (Appellant),* Judgment, United Kingdom Supreme Court

Keywords: positive obligations of the European Convention of Human Rights, state responsibility for IHRL violations.

On 19 June 2013, the United Kingdom (UK) Supreme Court delivered a judgement relating to the extra-territorial applicability of the European Convention on Human Rights (ECHR) to military operations taking place abroad.

The factual background of this case arises from the UK intervention in Iraq and, in particular, from the death of three soldiers in different circumstances, allegedly resulting from the inappropriate equipment given to the deceased by the Ministry of Defence. Three different claims were lodged in relation to these facts, each trying to demonstrate that they represented a violation of Articles 1 and 2 of the ECHR. On 30 June 2011, the Lower Court struck out the claims, considering that such acts were not within the jurisdiction of the UK for the purposes of Article 1 of the ECHR and that there was no basis for extending the scope of positive obligations derived from Article 2 of the ECHR to decisions taken in the course of military operations. On 19 October 2012, the Court of Appeal dismissed the appeals

with regard to whether the UK had jurisdiction over the events that led to the death of the soldiers and considered it unnecessary to go further in the study of the application of the substantive obligations resulting from the ECHR articles.

The Supreme Court first addressed the question of whether the deaths of the soldiers were within the jurisdiction of the UK for the purpose of Article 1 of the ECHR, and then the question of whether Article 2 of the ECHR imposed positive obligations on the UK 'with a view to preventing the deaths of their . . . soldiers in active operations against the enemy'.

In relation to the first question, the Supreme Court followed the ruling of the European Court on Human Rights (ECtHR) in the *Al-Skeini* case, in which the ECtHR ruled that the principle of extra-territorial jurisdiction 'can exist whenever a state through its agents exercises authority and control over an individual', concluding therefore that the death of the soldiers occurred within the jurisdiction of the UK.

In relation to the second question, the Supreme Court started by recognising that an important distinction had to be made between a context relating to military training, where the state has almost absolute control over the outcome of operations, and a context of armed hostilities, where the evolution of military operations is frequently unpredictable. Whereas in the first scenario, it is easiest for a judicial authority to intervene and order the respect of Article 2 of the ECHR, in the second case, an excessive restriction of state discretion resulting from a court's intervention would be incompatible with the nature of military operations. The 'court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate'.[23] Furthermore, some issues, such as training, procurement and the conduct of operations, are closely related to political considerations and thus fall outside the scope of Article 2.

Even if the final conclusion of the judgment was to allow the claims to proceed to trial, the majority of the Supreme Court was ultimately sceptical with respect to extending the responsibilities of the state in such an unpredictable field as that of armed hostilities. According to the Court, the recognition of positive obligations for the purpose of Article 2 in these situations needs to be established on a case-by-case basis.

23 United Kingdom Supreme Court, *Smith and others (Appellants)* v. *The Ministry of Defence (Respondent); Ellis (Respondent)* v. *The Ministry of Defence (Appellant)*; and *Allbutt and others (Respondents)* v. *The Ministry of Defence (Appellant)*, Judgment, 19 June 2013, para. 76.