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INTERNATIONAL REVIEW of the Red Cross

REPORTS AND DOCUMENTS

What's new in law and case law across the world

Biannual update on national legislation and case law

January–June 2011

The biannual report on national legislation and case law is an important tool in promoting the exchange of information on national measures for implementation of international humanitarian law (IHL). The ICRC was asked to undertake this task of information exchange through a resolution adopted at the 26th International Conference of the Red Cross and Red Crescent in 1996.

The laws presented below are those adopted by states in the first half of 2011 (January–June) and cover a variety of topics linked to IHL: from emblem protection to reparation for conflict victims to prohibition or restriction of certain weapons. The full texts of these laws are included in the ICRC's database on national implementation at: http://www.icrc.org/ihl-nat, and can be used by states working on implementing law in their own country.

ICRC Advisory Service

The ICRC's Advisory Service aims to foster 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 three priorities are: to encourage and support adherence to IHL-related treaties; to assist states by providing technical assistance directly to governments to incorporate IHL into the domestic legal framework; and to collect and facilitate exchange of information on national measures of implementation.

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The inclusion of selected cases illustrates, among other things, the growing number of domestic prosecutions for violations of IHL and shows the practical application of domestic implementing measures to punish these crimes. National IHL committees and other similar bodies are also increasing in number. More and more states find them an important tool in facilitating national measures of implementation. The recent creation of a committee in the Cook Islands has brought the global total to 101.

To further its implementation work, the ICRC organized a number of workshops and national and regional events in the period under review. Of particular note was the 3rd Commonwealth Red Cross and Red Crescent IHL Conference, which brought together countries and National Red Cross and Red Crescent Societies from all around the Commonwealth to discuss developments in IHL and prepare for the 31st International Conference of the Red Cross and Red Crescent. In a strong outcome statement, participants agreed to give greater priority to promoting respect for IHL by encouraging Commonwealth states to accede to outstanding relevant treaties and adopt effective measures where necessary to implement their obligations under IHL treaties. The Commonwealth Secretariat was invited to continue to work to include IHL on the agenda of relevant Commonwealth meetings and to continue its valuable work in the IHL field.

Universal participation in international 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, ten of the twenty-eight IHL-related international conventions and protocols were ratified or acceded to, showing continued steady accession to the Protocols Additional to the 1949 Geneva Conventions and a number of states adhering to the Convention on Cluster Munitions. It is worth noting that the Convention on Cluster Munitions, which was only adopted at the end of 2008, came into force on 1 August 2010 and by the end of 2011 already has fifty-nine states parties (the complete list can be found at http://www.icrc.org/ihl).

Conventions	States	Ratification Date	Total number of ratifications (as of 30 June)
1977 Additional Protocols I (AP I) and II (AP II) to the Geneva Conventions	Morocco	03.06.2011	AP I **171** AP II **166**
2005 Additional Protocol III to the Geneva Conventions	Argentina Belarus	16.03.2011 31.03.2011	**56**
2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts	Djibouti St. Vincent and the Grenadines Saudi Arabia	27.04.2011 29.03.2011 a 10.06.2011 a	**142**
1998 Rome Statute of the International Criminal Court	Grenada Tunisia	19.05.2011 a 24.06.2011 a	**116**
1999 Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict	Oman	16.05.2011	**60**
1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction	Mozambique	29.03.2011	**16**
1976 Convention on the Prohibition of Military or any Hostile use of Environmental Modification Techniques	Estonia Cameroon	14.04.2011 18.04.2011	**76**

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(*Cont.*)

Conventions	States	Ratification Date	Total number of ratifications (as of 30 June)
Amended Protocol II (1996) to the 1980 Convention on the Prohibitions or Restrictions on the use of certain Conventional Weapons	Serbia (Republic of)	14.02.2011	**97**
2008 Convention on Cluster Munitions	Botswana	27.06.2011	**59**
	Bulgaria	06.04.2011	
	Costa Rica	28.04.2011	
	El Salvador	10.01.2011	
	Ghana	03.02.2011	
	Grenada	29.06.2011 a	
	Lithuania	24.03.2011	
	Mozambique	14.03.2011	
	Netherlands	23.02.2011 a	
	Portugal	09.03.2011	

INTERNATIONAL REVIEW of the Red Cross

Ratifications January–June 2011

A. Legislation

Argentina

Crimes Against Liberty, Law No. 26.679, amending the Penal Code and the Code of Criminal Procedure, 5 May 2011

Congress adopted amendments to the Criminal Code and Code of Criminal Procedure on 13 April 2011, effectively penalizing enforced disappearances and barring the applicability of statutes of limitations to the crime. The law, promulgated on 5 May 2011, creates an offence where 'any public officer or person or member of a group of persons, acting with the authorization, support or acquiescence of the State', deprives someone of their liberty, followed by a lack of information or a refusal to acknowledge such deprivation of liberty or to provide any information on the whereabouts of such person.

The offence is Article 142ter of the Criminal Code and carries a penalty of ten to twenty-five years' imprisonment, along with a permanent and absolute prohibition to hold any public office or act as a private security agent. The penalty is raised to life imprisonment if the act results in death of the victim, or when the victim is a pregnant woman, any person under 18 or over 70 years of age, or has disabilities, or when the victim is a person born during the disappearance of their mother.

Finally, a new Article, 194bis, mandates judges to remove from the investigation, on their own initiative or upon request from one of the parties to the case, any security forces involved in the search upon mere suspicion that members of these forces were involved as perpetrators or participants in the commission of the offence.

Bahrain

Ministerial Resolution No. 5 on the establishment and formation of the National Committee for the Prohibition of the Creation, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 10 February 2011

On 10 February 2011, the Council of Ministers of the Kingdom of Bahrain approved the formation of a National Committee for the Prohibition of the Creation, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. According to Ministerial Resolution No. 5, which entered into force on the date of issuance, the Committee falls under the jurisdiction of the Ministry of Foreign Affairs, and shall have the authority, *inter alia*, to 'review legislation, regulations and decisions necessary for the implementation' of the Convention on the Prohibition of

the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction and shall inform the Organisation for the Prohibition of Chemical Weapons (OPCW) of the legislative and administrative measures taken to that effect.

The Committee is composed of representatives of the Ministries of Foreign Affairs, Health, the Interior, Internal Affairs, Industry and Trade, Municipalities Affairs, and Urban Planning; and representatives of the Defence Force, the Public Authority for the Protection of Marine Resources, Environment and Wildlife, and the National Organization for Oil and Gas. It is empowered to create a permanent communication channel with the OPCW, perform the inventory and classification of chemicals relevant to the Convention, and set the necessary rules and regulations for the use of such chemicals. It controls anything related to chemical activities, in both governmental and private agencies, and ensures compliance with the regulations stipulated, as well as educating the public and private sectors on the Convention. Finally, it shall develop the appropriate mechanisms to facilitate the inspection of chemicals and shall follow up and implement decisions issued by the Technical Secretariat of the Organization with respect to the implementation of the provisions of the Convention.

Colombia

Law No. 1424 on transitional justice, truth, justice and reparation of victims of demobilized groups, and the granting of benefits and other provisions

The Government of Colombia adopted and published Law 1424 on 29 December 2010, entering immediately into force, with the expressed objective of 'contributing to achieving a lasting peace, satisfying the guarantees of truth, justice and reparation, all within a transitional justice framework, in regards to the conduct of members of demobilized groups' involved only in the commission of such crimes as the illegal use of military uniforms and emblems, carrying weapons, and being part of a joint criminal enterprise.

The Government shall promote the implementation of an Agreement for the Contribution to Historic Truth and Reparation with those members who, within twelve months after the entry into force of the law, show a commitment to the process of reintegration to society and contribute all pertinent information regarding the armed groups to which they belonged. Once the former member of an armed group has expressed commitment to the process, the relevant judicial authority may suspend any warrant for his or her arrest. The law also allows those already convicted and sentenced to have their sentences reduced.

The law does not exempt those members of armed groups falling under its scope and benefits from being investigated and/or prosecuted according to the penal laws applicable at the time of the offence (Article 5).

Law No. 1448 on the provision of attention, assistance and integral reparation to the victims of the internal armed conflict and other provisions, 10 June 2011

The Law on Reparation to Victims, adopted and published in the Official Gazette on 10 June 2011, entered into force on the same day. The law aims to establish a number of judicial, administrative, social, economic, individual, and collective measures to benefit the victims of the internal armed conflict, allowing them to exercise their rights to truth, justice, and reparations. It provides humanitarian assistance and reparations to allow victims to recover their dignity and exercise their full citizenship.

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. The definition shall not be interpreted to grant any sort of recognition to terrorist or other armed groups.

The text extensively defines and describes the rights and general principles of law applicable to victims of the armed conflict, such as the right to truth, justice, and full reparation, including modalities for providing testimony, access to judicial assistance, and payment of judicial expenses.

Title IV focuses exclusively on reparations, defined to include restitution, compensation, rehabilitation, satisfaction, and guarantees of no repetition. Articles 72 and following establish the state adoption of measures to restore the lands of the displaced or to compensate accordingly, and to provide for extensive provisions on identification, registration, proof of loss of lands, and the legal procedure to certify ownership.

Finally, the law also provides for the creation of the necessary institutions in charge of implementing the law. Thus it contemplates a National Network to provide information and attention to victims, a National Victims Register, a National System of Reparations for Victims, and other subsidiary offices. The law shall remain in force for ten years after its promulgation.

Cook Islands

Geneva Conventions and Additional Protocols Amendment Act 2011, Act No. 6, 2011

The Parliament of the Cook Islands enacted an Act, assented to by the Queen's Representative on 14 July 2011, to amend the Geneva Conventions and Additional Protocols Act 2002, to enable effect to be given to Additional Protocol III to the Geneva Conventions. The Protocol regulates the existence, use, and abuse of an additional distinctive emblem, composed of a red crystal on white background.

The Act incorporates definitions and references to the third Protocol into the provisions of the 2002 Act. Among the most relevant changes, it is worth noting that Section 5(2) includes a new paragraph (f), establishing as a grave breach

of Protocol Additional III any 'misuse of the third Protocol emblem amounting to perfidious use in the meaning of Article 85 paragraph 3 of Protocol Additional I'. Section 10 of the 2002 Act is also amended to prohibit the use for any purpose of the additional emblem, except when under the authority of the Minister of Foreign Affairs. A breach of this provision shall be considered an offence and the person responsible for its commission liable upon conviction to a fine and the forfeiture of any goods upon or in connection with which the emblem was used.

Cluster Munitions Act 2011, Act No. 8, 2011

An Act to implement the Convention on Cluster Munitions in the Cook Islands was enacted by Parliament and assented to by the Queen's Representative on 14 July 2011. The Act provides for relevant definitions of the terms 'cluster munition', 'explosive bomblet', 'transfer', and others. An offence is committed if someone uses, develops, produces, acquires, possesses, retains, stockpiles, or transfers to any other person cluster munitions or explosive bomblets. It provides penalties of imprisonment for up to ten years, or a fine, or both. The High Court has jurisdiction in these offences.

A person also commits an offence if, being a director, manager, or other similar officer of a body corporate, he or she 'fails or refuses to take all reasonable practicable steps to ensure that the body corporate does not commit an offence' in the terms mentioned above. Section 6 establishes extra-territorial jurisdiction for the offences committed abroad 'by body corporate incorporated under the laws of the Cook Islands or residents of the Cook Islands'.

The Act creates exceptions to the prohibitions under Section 4, allowing the retention or acquisition of a specified number of cluster munitions or bomblets for such purposes as the development of techniques for and training in the detection, clearance, or destruction of cluster munitions and explosive bomblets. The exception shall also apply to, *inter alia*, police officers and members of the New Zealand or Australian Defence Forces acting in the course of their duties for the purpose of the conduct of criminal proceedings or rendering cluster munitions harmless.

The Minister has power to require any information or documents relevant to the administration or enforcement of the Act, or the Cook Islands' obligation to report under Article 7, or the country's obligation to provide information under Article 8 of the Convention. Failure without reasonable excuse, refusal to comply, or knowingly making a false or misleading statement in response to such a request shall be considered an offence and subject to a term not exceeding five years' imprisonment, or a fine, or both.

Fiji

The Biological and Toxin Weapons Decree 2011, Decree No. 17 of 2011, 6 May 2011

The Biological and Toxin Weapons Decree 2011 was signed by the President of Fiji on 28 April 2011 and published in the Official Gazette on 6 May 2011, with the

stated purpose of fulfilling Fiji's obligations under the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, and the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

The Act makes it an offence to develop, produce, manufacture, possess, stockpile, acquire, retain, import, export, re-export, transport, transit, trans-ship, transfer to any recipient direct or indirectly, or use any microbial or other biological agent or any toxin whatsoever, of types and quantities that have no justification for prophylactic, protective, or other peaceful purposes. The offence also applies to any weapon, equipment, or means of delivery designed to use or share such agents or toxins for hostile purposes or in armed conflict. The prohibition extends to anyone who aids, abets, encourages or incites, or finances the commission, or attempts to commit any act mentioned above. Penalties include conviction and imprisonment not exceeding fourteen years or a fine. Bodies corporate may also be fined.

Extra-territorial jurisdiction is provided for and the offences may be prosecuted if, at the time of commission, the perpetrator was a citizen of Fiji or a citizen of a state engaged in an armed conflict against Fiji. They may also be prosecuted if the victim of the alleged offence was a citizen of Fiji or a citizen of a state allied with Fiji in an armed conflict. The Decree would allow prosecution even under the principle of universal jurisdiction if the suspect of the offence is found to be present in Fiji.

The Decree also extensively addresses enforcement and control. Part III provides for the appointment and powers of inspectors, including the capacity to enter and inspect any place, with the consent of the occupant or under authority of a warrant, believed on reasonable grounds to hold any microbial or other biological agent, weapons, or means of delivery, or any information relevant to the administration of the Decree. Part IV regulates the disclosure of information on persons involved with biological agents or toxins. It also empowers the Minister to appoint analysts. Under Section 37 the Minister for Defence and any other Minister with powers in relation to biological agents or toxins may make regulations for the purpose of implementing the Decree.

France

Law No. 2011-266 of 14 March 2011 on the fight against the proliferation of weapons of mass destruction and their means of delivery[1]

On 14 March 2011, the French Executive and Legislature adopted Law No. 2011-266 relative to the fight against proliferation of weapons of mass destruction and their

1 Loi n° 2011-260 du 14 mars 2011 relative à la lutte contre la prolifération des armes de destruction massive et de leurs vecteurs (1), published in the *Official Gazette*, No. 0062, 15 March 2011, p. 4577, text no. 1.

means of delivery. It was published on the next day in the *Official Gazette* of the French Republic. The law comprehensively amends and incorporates numerous provisions into the Code of Defence, the Penal Code, the Code of Criminal Procedure, and the Code of Customs, under the following categories: the fight against proliferation of weapons of mass destruction (WMDs), subdivided in Title I into Nuclear (Chapter I), Biological (Chapter II) and Chemical (Chapter III). Title II refers specifically to the fight against proliferation of the means of delivery of WMDs. Title III covers the manipulation of goods with more than one use ('double-use goods'). Title IV deals specifically with amendments to the procedure applicable to crimes related to proliferation of WMDs, including jurisdictional issues. Titles V and VI include additional miscellaneous amendments.

Among the numerous changes, the law amends the list of prohibited conduct related to biological agents and toxins, now including transportation, acquisition, transfer, import, export, trading, brokerage, and financing of these activities. For chemical weapons, financing activities are also criminalized and punished. The penalties for violations have been aligned to those applicable for chemical weapons: imprisonment of up to twenty years, or thirty if committed as part of a terrorist activity.

Regarding the means of delivery of WMDs, the law provides for offences related to the manufacture, trade, acquisition, possession, carriage, transportation, disposal, and import of military equipment when such offences involve delivering WMDs. In these cases the penalty is increased to fifteen years' imprisonment, or twenty if committed by an organized group. The means of delivery of WMDs are defined as missiles, rockets, and other unmanned systems capable of delivering nuclear, chemical, or biological weapons that are specifically designed for such purpose. Financing acts of this new offence is also criminalized and punished, as well as resorting by fraudulent means to an authorization or approval as required by the Code of Defence to perform an activity in connection with war material when such permits or approval includes means of delivery of WMDs. Criminal liability of legal persons is also provided.

Finally, the new law supplements laws on anti-terrorism by listing crimes that might be described as terrorist acts.

Paraguay

Presidential Decree No. 5.684 on the establishment of a National Information Bureau in case of Armed Conflict

The President of Paraguay signed Presidential Decree No. 5.684 on 22 December 2010, effectively assigning the functions and responsibilities of a National Information Bureau, in the terms specified in the 1949 Geneva Conventions, to the Office for Legal Affairs, Human Rights and International Humanitarian Law, under the Ministry of Defence. According to international treaties, the Bureau should, upon outbreak of an armed conflict and in all cases of occupation, collect all relevant information regarding prisoners of war and protected persons in the power

of Paraguay, and forward such information to the powers involved, in order to inform the concerned next of kin.

The Decree takes into due consideration a request by the Ministry of Defence stressing the importance of setting up the said Bureau in time of peace, to comply quickly and effectively with the treaty obligations binding Paraguay in the case of an armed conflict. Apart from members of the Office for Legal Affairs, the Bureau includes representatives from the Ministries of Foreign Affairs, the Interior, Justice and Work, and Health, as well as a representative from the Commander in Chief for the Armed Forces, and the National Police.

Article 3 authorizes the Minister for National Defence to propose all necessary measures, courses of action, and legal amendments to allow for the Bureau's operation. The Office shall also collect any useful data and information from all relevant public offices in order to fulfil its mandate.

B. National Committees on International Humanitarian Law

Cook Islands

The Government of the Cook Islands approved Memorandum No. CM (11) 072, on 1 March 2011 establishing the Cook Islands International Humanitarian Law Committee. The committee shall have as its main objectives the identification of IHL of relevance to the Cook Islands, the identification of legal deficiencies and/or vacuums in existing legislation, and the promotion of and respect for humanitarian law.

The Committee shall be comprised of Crown Law, the Ministries of Health, Finance and Economic Management, Justice, Police, the Ombudsman Office and the Cook Islands Red Cross. It shall be chaired by the Ministry of Foreign Affairs and Immigration.

C. Case law

Bosnia and Herzegovina

Prosecutor *v.* Šefik Alić, *Case No. X-KR-06/294, Appellate Chamber of the War Crimes Court of Bosnia and Herzegovina, 21 January 2011*

The Appellate Chamber of the Court of Bosnia and Herzegovina pronounced Mr. Šefik Alić, former member of the Fifth Corps with the Army of Bosnia and Herzegovina, guilty of violating Article 175(a) of the Criminal Code, for 'participating in the inhuman treatment of prisoners of war and, knowing that the prisoners would be killed, in the capacity of the Assistant Commander for Security, failing to take the necessary and reasonable measures to prevent that' (p. 5). Mr. Alić was sentenced on 21 January 2011 to ten years' imprisonment.

The four prisoners, members of the Serbian Krajina Army, were killed by an irregular member of the Fifth Corps. The court ruled, however, that Alić must have known that this member represented a threat to the lives of those prisoners and that his duty as Assistant Commander for Security was to prevent harm. It was held that Alić was present when the four were captured and that he participated in their questioning. His personal attitude during the course of the examination of these prisoners, including while the irregular member of the Fifth Corps acted in a threatening and aggressive manner, demonstrated his readiness to deprive these persons of their lives. Not only did Alić fail to prevent the abuse and beating of the prisoners, but he also personally joined in on two occasions. The Appellate Chamber held that the fact the member of the Fifth Corps was 'an irregular soldier' did not relieve Alić of his responsibility, but rather accentuated his obligation to protect the prisoners. He had further breached his duties by not informing about the crime.

In reaching its decision on the ten-year prison sentence, the Appellate Chamber Chairman said that the Chamber considered Alić's young age at the time when the crime was committed and the fact that he had just been appointed an assistant commander for security as mitigating circumstances.

Prosecutor *v.* Stipo Žulj*, Supreme Court of the Federation of Bosnia and Herzegovina, 11 April 2011*

On 11 April 2011, the Supreme Court of the Federation of Bosnia and Herzegovina confirmed a verdict of not guilty for Mr. Stipo Žulj for a charge of war crimes allegedly committed in the Kupres area. Mr. Žulj had been acquitted by the Cantonal Court in Livno on 17 March 2010 of killing a soldier in the Olovo village on 3 November 1994, as a member of the Special Unit with the Ministry of Internal Affairs of the then Croatian Community of Herceg-Bosna. The Cantonal Prosecution in Livno appealed the verdict over what it said were violations of the criminal proceeding, as well as wrongly and incompletely determined facts, and asked the Court to revoke the verdict.

The Defence in turn called on the Court to reject the Cantonal Prosecution's appeal as groundless, given that it had not been proved that the accused committed the actions described in the indictment, adding that it considered that the facts had been correctly determined and that the Court had made a correct decision. The acquittal was upheld.

Prosecutor *v.* Miodrag Marković*, Case No. X-KR-09/948, Trial Chamber of the War Crimes Court of Bosnia and Herzegovina, 15 April 2011*

On 15 April 2011, the Court of Bosnia and Herzegovina sentenced Mr. Miodrag Marković on to seven years in prison for an offence, committed in Dragalovci village, Doboj municipality, on 11 July 1992, of taking an underage girl from her

family house, raping her, and threatening to rape her again and kill her family. The accused was found individually criminally responsible for War Crimes Against Civilians pursuant to Article 173(1)(e) of the Criminal Code, which penalizes rape.

The Court found that Mr. Marković banged on the door, demanding it be opened or he would kill those inside. After he fired a bullet, the mother opened the door and was told to hand her daughter over to him. He dragged the daughter to a haystack in a meadow, ordered her to strip, and raped her. Marković then threatened the victim, who was 17 years old at the time, by telling her not to tell anyone about what happened or else he would rape her again and kill her family members.

The Chamber held that the allegations against Marković, a former member of the Republika Srpska Army, were proved beyond reasonable doubt by the detailed and convincing testimonies provided by the victim, witnesses, and court experts.

Prosecutor *v.* Dalibor Ponorac and Marko Marić, *Supreme Court of Republika Srpska, Bosnia and Herzegovina, 21 April 2011*

On 21 April 2011, the Supreme Court of Republika Srpska confirmed the guilty verdict handed down by the District Court in Banja Luka in October 2010 for war crimes against Mr. Marko Marić and Mr. Dalibor Ponorac, sentencing the two men to thirteen and eight years' imprisonment respectively.

According to the verdict, the accused approached Vrbanja, Banja Luka on 29 December 1993, met two individuals, forced them into a building, and killed them. Later Mr. Marić shot and killed a third person, who had been walking alongside the road. The Supreme Court rejected all arguments from the Defence and confirmed the initial verdict.

Prosecutor *v.* Nedeljko Šikman, *Cantonal Court in Bihać, Bosnia and Herzegovina, 21 April 2011*

On 21 April 2011, the Cantonal Court in Bihać found Mr. Nedeljko Šikman guilty of war crimes committed in Ključ and sentenced him to seven and a half years in prison. Šikman was sentenced after the Trial Chamber of the Cantonal Court in Bihać accepted a guilty plea agreement concluded between the accused and the Office of the Una-Sana Cantonal Prosecution.

Šikman admitted to strangling a 69-year-old woman in Biljani village, Ključ municipality on 30 October 1994. According to the facts of the case, Šikman pulled her out through the window, took a kerchief off her head, tied it around her neck, and strangled her. He then dragged her to a nearby stable, where her neighbours found her dead the next day. He expressed regret for having committed the crime, stressing that he was young and drunk. He agreed to co-operate with the investigative bodies in revealing the perpetrators of other

crimes committed in the Ključ area. The son of the victim consented to the plea agreement.

Prosecutor *v.* Darko Dolić, *Trial Chamber of the War Crimes Court of Bosnia and Herzegovina, 28 April 2011*

The Trial Chamber of the Court of Bosnia and Herzegovina found Mr. Darko Dolić, a former member of the Croatian Defence Council (HVO), not guilty of War Crimes Against Civilians on 26 April 2011. The Prosecutor's Office had charged Dolić with a violation of Article 173(1) paragraphs (c), (e) and (f) of the Criminal Code, related to torture and inhumane treatment, rape, and pillaging, for allegedly taking part in the torture of detained Bosniak civilians in Družinovići village, near Prozor in July and August 1993.

The Trial Chamber stated that the Prosecution's Office had failed to provide sufficient evidence on the identity of the perpetrator, not proving beyond reasonable doubt that it had been Dolić who committed the offences. The Court also acquitted Dolić of the charges that he raped three people in the summer of 1993.

Statements given by Prosecution witnesses mentioned a person named Mario Dolić as the perpetrator of the crimes committed in Družinovići. This led the Court to consider some Prosecution witnesses' statements as disputable with regards to Mr. Darko Dolić's involvement. Further, in explaining the acquittal for the charges of rape allegedly committed in August 1993, the Trial Chamber argued that the Defence had proved that Dolić had been assigned to the front line, away from the area of the crime, in July and August 1993.

Prosecutor *v.* Lazar Ristić and Predrag Dević, *Cantonal Court in Bihać, Bosnia and Herzegovina, 28 April 2011*

The Cantonal Court in Bihać found Mr. Lazar Ristić and Mr. Predrag Dević guilty of the murder of fifteen Bosniak civilians in the locality of Sanski Most in October 1995, sentencing them to twenty and twelve years' imprisonment respectively. The first instance verdict was handed down on 28 April 2011.

According to the Court, the prosecution proved beyond reasonable doubt that fifteen Bosniak men escorted by soldiers of the Republika Srpska were killed after the car transporting them was stopped by Mr. Ristić and Mr. Dević and a third party called Petar Arsenić. The Bosniak men were returning home after having performed their civil duty. Key witnesses, members of the Republika Srpska Army who escorted the victims, provided clear and decisive testimonies. The Court also relied on the statement given by Mr. Arsenić, who admitted the killings and expressed regret. Arsenić provided a detailed description of the crimes and of Mr. Ristić and Dević's participation in their commission.

The sentence against Mr. Ristić took into account a previous sentence against him pronounced by the Cantonal Court in Bihać, for the murder of two Bosniak women in Sanski Most in 1992.

Germany

Prosecutor *v.* John Demjanjuk, *Munich District Court II, 12 May 2011*

Mr. John Demjanjuk, a Ukrainian-born retired autoworker, was found guilty on 12 May 2011 by the Munich District Court II for being an accessory to the killing of approximately 28,000 prisoners at the Sobidor death camp in 1943. He was sentenced to five years in prison. Mr. Demjanjuk was allowed to remain at liberty awaiting appeal; he died on 12 March 2012, at the age of 91.

The case and reasoning of the Court has been criticized by the Defence on several counts. First, it was argued that the there was a manifest lack of jurisdiction to try Mr. Demjanjuk, since he was never a German citizen, Sobibor is in Poland, and the victims killed at the camp were Dutch. The Defence also criticized the fact that Polish prosecutors had already decided to drop the case, for lack of evidence, in 2007. Criticism has further come from the fact that the only documentary piece of evidence regarding Mr. Demjanjuk's presence in the Sobidor camp was a document of identity that was suspected of having been forged by the Soviet KGB.

Finally, the Defence criticized the fact that Mr. Demjanjuk was convicted for being an accessory to murder without further evidence regarding his involvement than the fact that he was present at the camp, labouring as a camp guard. No evidence of actual participation in the killings was produced during the proceedings.

Norway

Prosecutor *v.* Mirsad Repak, *Supreme Court of the Kingdom of Norway, 14 April 2011*

The Supreme Court of the Kingdom of Norway sentenced Mr. Mirsad Repak, a former member of the Croatian Defence Forces, to eight years in prison for crimes committed against civilians detained at the Dretelj camp, Bosnia and Herzegovina. The Court thus upheld a guilty verdict handed down by the Oslo Court of Appeals, but increased the sentence. Repak was first arrested in May 2007. Under a first instance verdict he was found guilty and sentenced to five years in prison for crimes committed against Serb civilians in the Dretelj detention camp, near Capljina. On appeal, the Appellate Court in Oslo reduced the sentence against Repak to four and a half years in prison. The Supreme Court found Repak guilty of breaching Section 223(1) and (2) of the 1905 Norwegian Penal Code, on the unlawful deprivation of liberty. The Code, now derogated, was found to be applicable to the events in question for being in force at the time the offences were committed.

Mr. Repak was found guilty on thirteen counts. The indictment charged him with taking part in depriving civilians of liberty and detaining them at the Dretelj detention camp, near Capljina, and severe mistreatment of detainees, including sexual abuse, brutal violence, intimidation and humiliation, and deprivation of

adequate access to food. Analysing Mr. Repak's participation, the Court concluded that he had acted with intent or complicity in the offences, or alternatively could have foreseen the consequences regarding the atrocities suffered by the victims, a level sufficient to find guilt under Section 43 of the Penal Code. According to the sentencing Judge, Mr. Repak 'played a central role in allowing the extensive and sometimes extremely brutal atrocities against the 13 victims to take place'.

In sentencing, the Supreme Court found it necessary to point to the fact that the crimes in question were extremely grievous and committed against defenceless people. While it refused to 'go into the question whether the crimes satisfied the requirements for war crimes as laid down in international law', they would 'clearly be contrary to the rules that apply in wartime'. The Court also rejected the notion that the passage of time since the crimes were committed – nineteen years – could serve as reason for a lighter sentence. Most importantly, it rejected the argument that the Parliament of Bosnia and Herzegovina had passed a law on amnesty in 1999, by which, according to the Defence, Mr. Repak would have been barred from being prosecuted. In view of the Court, the Penal Code of 1905 did not require double criminality, making it possible to prosecute in Norway even if the acts had not constituted crimes in Bosnia. Finally, the Court attempted to find guidance in the sentences of the International Criminal Tribunal for the former Yugoslavia (ICTY), but found them to be of limited significance, primarily because they dealt with war crimes and not with 'deprivation of liberty committed in time of war, without applying the aggravating term war crime'.

Serbia

Prosecutor *v.* Agush Memishi, et al., *Trial Chamber of the War Crimes Department, Higher Court in Belgrade, 21 January 2011*

On 21 January 2011, the Trial Chamber of the War Crimes Department – part of the Higher Court in Belgrade – convicted Mr. Agush Memishi and eight other officers belonging to the Kosovo Liberation Army for War Crimes Against Civilians, committed in the area of Gnjilane from early June to late December 1999.

The Court found that the accused tortured their victims by stabbing them and suffocating them with plastic bags, and later killed them and disposed of their bodies in a lake. This resulted in the killings of 32 Serb and non-Albanian civilians and 153 cases of people being arrested, detained, tortured, and later released. Mr. Memishi and two others received a sentence of fifteen years' imprisonment; four others received ten years, and the last two eight years.

Sweden

Stockholm Tingsrätt (Stockholm District Court), B 382-10, 2011-04-08

The Stockholm District Court found Mr. Ahmet Makitan, a Bosnian-born Swedish national, guilty of having participated in the abuse of twenty-one Serb civilians from

May to August 1992 in Dretelj detention camp, near Čapljina, and sentenced him to five years in prison. He was also ordered to pay Krona 1.5 million (KM 324,000 or €165,900) as compensation to victims.

Mr. Makitan was arrested in January 2010, following an investigation by the Swedish National War Crimes Commission (Rikskriminalpolisens krigsbrottskommission) carried out with the help of the United Nations International War Crimes Tribunal in The Hague. A former soldier with the Croatian Defence Forces (HOS), Makitan was charged with 'aggravated war crimes and abduction', and was accused of torturing Serb prisoners, including civilians, between May and August 1992. Makitan helped imprison civilians without due process and held them hostage with the aim of using them for prisoner exchanges.

As an HOS guard at the camp, he was also accused of inflicting serious injury on prisoners, depriving them of food, water, and sufficient medical attention, and making them do forced labour.

United States of America

Mashour Abdullah Muqbel Alsabri, et al. v. Barack Obama et al., *United States District Court for the District of Columbia, Civil Action No. 06-1767 (RMU), 3 February 2011*

On 3 February 2011, the United States District Court for the District of Columbia denied a petition for a writ of habeas corpus to Mr. Mashour Abdullah Muqbel Alsabri, a Yemeni national detained in the US Naval Station at Guantánamo Bay, Cuba. The Court found that the Government had established, by a preponderance of the evidence, that

> the petitioner travelled from Yemen to Afghanistan in 2000 to fight with the Taliban, al-Qaida or associated forces, stayed in Taliban and al-Qaida guesthouses, sought out and received military-style training from the Taliban or al-Qaida, travelled to the battle lines in Afghanistan as part of the Taliban or al-Qaida and remained part of those forces at the time of his capture in early 2002.

Based on the totality of the evidence, the Court stated that it was compelled to conclude that the petitioner was 'part of the Taliban, al-Qaida or associated forces', and therefore lawfully detained.

Federal district courts have jurisdiction over habeas corpus petitions filed by individuals detained at Guantánamo, as determined by the Supreme Court resolution of *Boumediene* v. *Bush* (2008), where it established that such individuals were indeed entitled to the privilege of habeas corpus to challenge the legality of their detention.

In finding the detention of Mr. Alsabri lawful, the District Court restated the Government's authority to detain, for the duration of hostilities, individuals who were proved, under the standard of 'more likely than not by the preponderance of

the evidence', to be 'part of' forces associated with Al Qaeda or the Taliban, as well as those individuals who purposefully and materially support such forces in hostilities against the United States. Such authority stems from the Authorization for the Use of Military Force (AUMF) Act.

Regarding the use of hearsay evidence, the Court also restated its own criteria, stating that 'although hearsay evidence is always admissible in these habeas proceedings, the court must make individualized determinations about the reliability and accuracy of that evidence and the weight it is to be afforded' (p. 9). In this case in particular, the Court agreed with the Government, in that it would presume the authenticity of but not the accuracy of the Government's intelligence and interrogation reports.

Uthman Abdul Rahim Mohammed Uthman, Detainee, Camp Delta *v.* Barack Obama, President of the United States, et al., *No. 10-5235, United States Court Of Appeals for the District Of Columbia Circuit, 29 March 2011*

On 29 March 2011, the US Court of Appeals for the District of Columbia Circuit overturned a decision to grant a petition for habeas corpus filed by Mr. Uthman Abdul Rahim Mohammed Uthman, a Yemeni national captured in Afghanistan and detained in the US Naval Base at Guantánamo Bay, Cuba, since January 2002. The District Court had granted release in 2004.

In reaching its decision, the Court of Appeals recalled its rejection, already stated in previous cases, of a formal 'command structure' test: that is, one where the key question is 'whether an individual received and executed orders from the enemy force's combat apparatus' in order to determine whether an individual was 'part of' Al Qaeda or other organizations. Such a test had been used for this case during the first instance proceedings.

According to the Court of Appeals, 'the determination . . . must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization'. As such, while demonstrating that someone is part of Al Qaeda's command structure would be *sufficient* to show that that person is 'part of' Al Qaeda, it would not be *necessary*, giving credit as well to other indicia that a particular individual is sufficiently involved with the organization as to be deemed part of it, even if the person never formally received or executed any orders.

Regarding the facts of the case, the Court considered, *inter alia*, that Mr. Uthman was captured in the vicinity of Tora Bora, an area where Al Qaeda forces gathered to fight the US; that he was captured travelling with two Al Qaeda members and one Taliban fighter; and that he lied to hide the fact that someone else paid for his travel to Afghanistan, relevant to the case in that 'false exculpatory statements are evidence – often strong evidence – of guilt' (p. 11). In concluding Uthman's account of the facts, the Court argued that he piled 'coincidence upon coincidence upon coincidence', and, while it remained possible that Uthman was 'innocently going about his business and just happened to show up in a variety of

extraordinary places – a kind of Forrest Gump in the war against al Qaeda', the far more likely explanation was that he was indeed part of Al Qaeda.

Hussein Salem Mohammed Almerfedi *v.* Barack Obama, et al., *US Court of Appeals for the District of Columbia Circuit, 10 June 2011*

The US Court of Appeals for the District of Columbia Circuit overturned a first instance decision to release Mr. Hussein Mohammed Almerfedi, a Yemeni national detained at the US Naval Base in Guantánamo Bay, Cuba. Mr. Almerfedi had been granted a writ of habeas corpus by the District Court after finding that the Government had failed to demonstrate, by a preponderance of the evidence, that he was a 'part of' Al Qaeda. The Government appealed the decision, arguing that the lower court had erred when finding certain evidence unreliable, 'thereby improperly excluding it from consideration, and failed to give sufficient weight to the reliable evidence it did consider'. The Court of Appeals agreed.

The evidence presented by the Government was based on two sources: Mr. Almerfedi's own admissions and the statements provided by another Guantánamo detainee. With this in mind, the petitioner compared such evidence to two standards: the evidence produced by the Government in other cases involving Guantánamo detainees, and the burden of proof necessary for a criminal conviction – that is, beyond reasonable doubt. The Court rejected both comparisons, stating first that, even if the Government's evidence for other cases had been stronger, this was irrelevant, in that all the evidence supporting the Government in those cases was listed 'without needing to consider the minimum amount of evidence that would establish a preponderance'.

The Court also rejected the comparison to a criminal case, stating that that was not the analytical framework called for by the preponderance of evidence standard used in civil cases, which is the standard applicable to the current habeas corpus petitions. It would only require a court to 'make a comparative judgment about the evidence' and 'determine whether a proposition is more likely true than not true based on the evidence in the record'. Certainty would not be necessary, nor the absolute absence of any reasonable doubt.

US *v.* Justin Cannon and Christopher Drotleff, *US District Court for the Eastern District of Virginia, 14 March 2011*

On 14 March 2011, the US District Court for the Eastern District of Virginia found Mr. Justin Cannon and Mr. Christopher Drotleff, two former Blackwater contractors operating in Afghanistan, guilty of involuntary manslaughter, for the killing of two Afghan nationals and the wounding of a third. They were sentenced to thirty and thirty-seven months' imprisonment respectively.

Cannon and Drotleff were working for a subsidiary of Blackwater under a Defense Department sub-contract when their two-vehicle convoy became involved in a traffic accident in Kabul, on 5 May 2009. They then opened fire on a car

departing from the scene, resulting in the death of one of the passengers. A second civilian, walking past the scene, was also killed in the incident. Prosecutors argued against any sentence reduction for Mr. Cannon, on the basis that he behaved recklessly, failed to report the incident promptly, and told an Afghan interpreter to lie about his alleged drinking earlier in the evening.