

REPORTS AND DOCUMENTS

National implementation of international humanitarian law

Biannual update on national legislation and case law January–July 2009

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A. Legislation

Australia

Defence Legislation (Miscellaneous Amendments) Act 2009

The *Defence Legislation (Miscellaneous Amendments) Act 2009* (No. 18, 2009) was published on 3 April 2009. The Amendment inserts into the Geneva Conventions Act 1957 (mainly into *Part IV – Abuse of the Red Cross and other emblems, signs, signals, identity cards, insignia and uniforms*, paragraph 15) the appropriate reference required to add the emblem of a red frame in the shape of a square on edge on a white ground (also known as the red crystal) as an additional distinctive emblem granting protection under international humanitarian law. The law was adopted as a means of implementing the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), adopted by the Diplomatic Conference of States Parties to the Geneva Conventions on 8 December 2005. The 2009 amendments, currently attached to the Geneva Conventions Act as a note, shall enter into force one month after Australia ratifies Additional Protocol III.

Democratic Republic of Congo

Law No. 09/001, 10 January 2009, on the protection of the child (Loi No. 09/001 du 10 Janvier 2009 portant sur le protection de l'enfant)

The Law No. 09/001 on the protection of the child was adopted on 10 January 2009, and published in the Official Journal on 12 January 2009. Among provisions for the general protection and well-being of children, the law defines 'child in an exceptional situation' as any person below 18 years of age that is found in a situation of armed conflict, tensions or civil troubles, natural catastrophes or a situation of appreciable and prolonged degradation of socio-economic conditions.¹ Similarly, it provides for 'exceptional protection', by which it prohibits the enlisting or using of children in the armed forces or armed groups. It also places a duty on the State to assure that children enlisted or used by forces or armed groups are reintegrated into their family or community.² The State should also guarantee the protection and education of children affected by armed conflict, as well as their re-adaptation.³ In terms of penal repression, Article 187 specifies that the enlistment or use of children below 18 years of age in the armed forces or armed groups shall be punishable by imprisonment for 10–20 years.

East Timor

New Penal Code of East Timor, Law No. 19/2009, 8 April 2009

On 30 March 2009, a new penal code was adopted by East Timor, which was published on 8 April 2009 and entered into force 60 days later. It incorporates the crimes of genocide, crimes against humanity and war crimes into domestic legislation,⁴ in some cases following the definitions found in international instruments such as the Rome Statute of the International Criminal Court. In the case of genocide, Article 123 includes, *inter alia*, murder and serious bodily or mental harm as underlying offences, followed also by 'prohibition of certain commercial, industrial or professional activities to members of the group'.⁵ With regard to crimes against humanity, the definition adopted the underlying offences found in the ICC Statute, although without mentioning the need for the act to have been committed 'in knowledge of the attack', as stated in the international text. Sentencing for both offences is set at 15–30 years imprisonment.

As for war crimes, Article 125 expressly provides for several of these in the context of either an international or non-international armed conflict (such

1 Article 2(5).

2 Article 71.

3 Article 73.

4 Book II (Special Part), Title I, Chapter I.

5 Article 123 (1)(h).

as the following acts committed against a 'person protected by international humanitarian law': murder, torture, rape, taking of hostages, unjustified destruction of high-value patrimonial goods). Other acts, on the other hand, are only criminalized in the case of an international conflict (e.g. an occupying power's direct or indirect transfer of part of its own population into occupied territory; forcing prisoners of war to fight for the armed forces of an enemy power; unjustified delay in the repatriation of prisoners of war). Additionally, Article 126 prohibits certain methods of warfare in all types of conflict, such as perfidy, or launching an indiscriminate attack against a civilian population in the knowledge that such an attack would cause excessive civilian casualties. Article 127 explicitly prohibits means of warfare such as the use of poisonous or toxic gases, anti-personnel mines, chemical weapons and others defined by international law. Article 128 provides for war crimes committed against goods protected by distinctive emblems, while Article 129 refers to war crimes against property. Sentences attached to each war crime range from 5 to 30 years imprisonment.

In terms of jurisdiction, Article 8 establishes that the provisions on international crimes shall be applicable to acts committed outside the territory of East Timor if the suspect is found in East Timor and cannot be extradited, or if a decision is made against his/her surrender. The law shall also be applicable when the crime is committed against East Timor nationals, or in cases where the State is under a duty to prosecute under conventional or customary international law.

El Salvador

Law on the Protection of the Emblem and the Name of the Red Cross and Red Crescent, Amendment, Decree No. 808, 13 February 2009

A decree to amend the *Law on the Protection of the Emblem* was adopted on 11 February 2009, and entered into force ten days later, with the objectives of delimiting the use of the emblem and name of the Red Cross and Red Crescent domestically, and determining the conditions under which they may be employed, the persons and institutions authorized to use it and the authorities in charge of its regulation.

Article 1 as amended includes the red cross, red crescent and red crystal as emblems, and specifies that they may only be used as determined in the 1949 Geneva Conventions and the Additional Protocols, i.e. to mark personnel, transport units, material and establishments belonging to the medical or religious services of the armed forces, the El Salvador National Society, the ICRC and the International Federation of the Red Cross and Red Crescent.

A new chapter was included in the law to deal exclusively with the third Additional Protocol to the Geneva Conventions. It states that the armed forces may temporarily use the red crystal emblem where its employment strengthens protection. The National Society may also use it under State authorization.

The new Article 15 of the law recalls that the misuse of the emblem shall be punished according to the penal laws in force. Use of the signs for commercial purposes also remains prohibited.

Guatemala

Law on weapons and munitions, Decree No. 15-2009, 21 April 2009

The law regulates ownership, import and export, holding, storage, trafficking and all other services related to arms and munitions. It prohibits the use, by individuals or by the armed forces, of those arms and munitions specified as prohibited in international treaties to which Guatemala is a party. The decree regulates all types of firearms, arms using compressed gases, light arms, explosives, chemical and biological weapons, atomic weapons, missiles, traps, experimental weapons and any other arms. It also creates a General Office for the Control of Arms and Munitions, whose functions shall include registration and authorization of all arms and munitions in the territory of Guatemala, inspection of warehouses, denunciation of violations to the competent authorities, and collaboration in halting arms smuggling and trafficking.

Article 82 prohibits the fabrication, import, export, holding and use of any chemical or biological weapons, atomic weapons and any experimental arms by individuals, as defined in the law. Article 98 prohibits all transfer, import or export of all types of weapons, pieces or components to countries which systematically violate human rights, or in cases where there is reason to believe that the weapons or pieces shall be used for acts of genocide, crimes against humanity, violations of international law, or support of irregular armed groups.

With regard to penal repression, unlawful import or export of chemical or biological weapons (amongst others) shall be punished with 6–12 years imprisonment. Ownership, holding or transport of these weapons may be punished with 10–15 years imprisonment.

Ghana

Geneva Conventions Act 2009, 708th Act of Parliament, 6 January 2009

The *Geneva Conventions Act 2009* was adopted and published on 6 January 2009. The Act provides for the repression of grave breaches found in the four 1949 Geneva Conventions and Additional Protocol I, by making a general reference to Articles 50, 51, 130 and 147 of the four Geneva Conventions respectively, as well as Articles 11 and 85 of Additional Protocol I, with sentencing ranging from 14 years imprisonment to the death penalty.

The Act also provides that any offence ‘other than that specified’ under the provisions on grave breaches, but which otherwise contravenes any of the Conventions or Protocol, is punishable by a sentence of up to 14 years in prison.

In terms of jurisdiction, indictments may be issued against any person ‘of whatever nationality’ who commits an offence ‘whether within or outside this country’ (Article 1). The Act also establishes the provision of judicial guarantees for indicted persons, including specifically those applicable to the trial of a prisoner of war or protected internee. Legal representation is compulsory for a trial to proceed, although no mention is made of whether such representation should be of the accused’s own choosing. The Act also protects the red cross and red crescent emblems, as well as the heraldic emblem of the Swiss Confederation, the red lion and sun, and other distinctive signs. Misuse of the emblems may be punished by a fine or imprisonment of no more than 3 months.

Jordan

Amended Law of the Jordan Red Crescent Society for the Year 2009, No. 3/2009, 4 January 2009

The *Amended Law of the Jordan Red Crescent Society for the Year 2009*, internally known as the Emblem Law, was published in the official gazette No. 4945 on 4 January 2009, under law No. 3/2009. The amendment, which modifies Law No. 3 of 1969 (referred to as the Original Law), broadens the definition of ‘emblem’ to mean the red crescent or red cross, ‘as well as any other emblem that may be adopted based on an international convention effective in the Kingdom’.⁶ It also penalizes the deliberate or ‘unrightful’ use or naming of the emblem, or deliberately placing the emblem on the boards of shops, stickers, publicity or commercials, with a penalty of a minimum of 3 months and a maximum of 3 years imprisonment.⁷ In addition, anyone who uses or orders the use of the emblem with ‘deceptive intentions in times of war and armed conflict’ in a manner that leads to serious damage to the physical integrity of people, may be sentenced to hard labour for up to 10 years.⁸ If the act leads to death, the penalty may rise to hard labour for life.

Kenya

Act No. 16 of 2008, International Crimes Act 2008, 1 January 2009

The *International Crimes Act 2008* came into operation on 29 May 2009, by notice published in the official gazette. Its commencement date, as found in the legislation, is set at 1 January 2009.

The Act gives the force of law to almost the entirety of the Rome Statute in Kenya, including the parts dealing with the relevant crimes, jurisdiction and

6 Article 2, Clause B.

7 Article 2, Clause C.

8 Article 2, Clause D.

admissibility (Part 2) and with international co-operation and judicial assistance (Part 9). With regard to the penalization of conduct, the Act makes reference to the definitions of genocide, crimes against humanity and war crimes found in the relevant articles of the Rome Statute, and provides for sentences of imprisonment for life for all offences involving intentional killing, and lesser terms (to be determined in court) in any other case. In terms of jurisdiction to prosecute, the Act establishes that a person may be tried if the act or omission is committed in Kenya or, at the time of the offence, the suspected offender was a Kenyan citizen, employed by the Government of Kenya, a citizen of a State engaged in armed conflict against Kenya, or employed by such State. The offence may also be prosecuted if the victim was a Kenyan citizen, or if the suspected offender is present in Kenya after commission of the offence.

The Act also provides for co-operation with the International Criminal Court: if a request for arrest and surrender is received from the ICC, and the Executive is satisfied that the request is supported by the information and documents required by Article 91 of the Rome Statute, the Executive shall notify a judge of the High Court in order for an arrest warrant to be issued. The arrest warrant may be issued if the judge is satisfied that, *inter alia*, the person is present in Kenya, suspected of being in Kenya, or may go to Kenya.

Kiribati

Anti-Personnel Mines (Prohibition) Act 2008, 23 December 2008

The Anti-Personnel Mines (Prohibition) Act 2008 was adopted on 23 December 2008, with the stated purpose of implementing Kiribati's obligations under the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. In this regard, the Act prohibits the use, acquisition, development, possession or transfer of anti-personnel mines with a fine and/or imprisonment not exceeding 10 years, in the case of individuals, and a fine not exceeding 500,000 Australian dollars (approximately 250,000 US\$) when dealing with bodies corporate.

With regard to jurisdiction, the offence must have been committed in the territory of Kiribati, or if abroad, by a Kiribati national or a body corporate incorporated under the laws of Kiribati. The Act also allows for members of fact-finding missions, acting under Article 8 of the Convention, to enter the country and 'collect information relevant to an alleged compliance issue',⁹ and to enter any premises and inspect, examine or conduct any tests concerning anything on the premises that relates to an anti-personnel mine.

⁹ Article 14(1).

United States

Executive Order 'Ensuring Lawful Interrogations', 22 January 2009

This executive order was issued by the President of the United States of America on 22 January 2009, with the force of law, revoking past Executive Order No. 13440 and all other orders or regulations issued to or by the Central Intelligence Agency. Its purpose is to improve 'the effectiveness of human intelligence gathering, to promote the safe, lawful, and humane treatment of individuals in United States custody and of United States personnel who are detained in armed conflicts, to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions [...]'.

The Order establishes that Article 3 Common to the 1949 Geneva Conventions shall provide the minimum standards of treatment for any person detained in connection with an armed conflict, namely that they should 'in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity'. It also states that persons shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, which is not authorized by and listed in Army Field Manual 2 22.3. In the conduct of interrogations, it is prohibited to rely on any interpretation of laws dealing with interrogation (including the Convention Against Torture and Article 3 Common) issued by the Department of Justice between 11 September 2001 and 20 January 2009.

In addition, the Order demands the CIA to close 'as expeditiously as possible' all detention facilities under its control, and requires all departments and agencies of the Federal Government to provide the International Committee of the Red Cross with notification of, and timely access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the United States Government.

Executive Order 'Review And Disposition Of Individuals Detained At The Guantánamo Bay Naval Base And Closure Of Detention Facilities', 22 January 2009

The Executive Order, passed on 22 January 2009, was signed by the President of the United States of America with the objective to 'effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base (Guantánamo) and promptly to close detention facilities at Guantánamo'.

Acknowledging that some 300 detainees remained detained at the Naval Base, and that most have been held for more than 4 years, the Order establishes that in the interests of the United States, the executive branch take 'prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued

detention is in the national security and foreign policy interests of the United States and in the interests of justice'. Particular mention is made of those who have been charged with offences before military commissions pursuant to the Military Commissions Act of 2006, Public Law 109-366, and the military commission process in general.

The Order states that the detention review should determine whether it is possible to transfer or release the individuals in a manner consistent with the national security and foreign policy interests of the United States. In addition, it underscores that no individual currently detained at Guantánamo should be held in detention except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The text requires the Secretary of Defense to immediately undertake a review of the conditions of detention at Guantánamo to ensure full compliance.

Finally, the order states that such reviews should commence immediately, while establishing that the base be closed 'as soon as practicable', but no later than 22 January 2010.

B. Case Law

Bosnia and Herzegovina

Prosecutor v. Novak Dukic, Court of Bosnia and Herzegovina, Section I, Case X-KR-07/394, 12 June 2009

Mr Novak Dukic, commander of the Ozren Tactical Group of the Army Republika Srpska, was sentenced to 25 years imprisonment by the Court of Bosnia and Herzegovina (Section I) after being found guilty of war crimes against civilians (as defined in Article 173(1) of the Bosnian Criminal Code). According to the Court, on 25 May 1995 Mr Dukic – in his capacity as Commander – ordered his unit to fire an artillery projectile at a location in the immediate centre of Tuzla, known as Kapija. Seventy-one people were killed and approximately 130 injured as a result of the operation, in a zone that had been declared a safe area by Resolution 824 of the United Nations Security Council. The panel concluded that his actions constituted a direct and indiscriminate attack on civilians, in violation of international humanitarian law.

Mr Dukic had also been accused of ordering the artillery platoon to shell Tuzla with nine artillery projectiles, but was acquitted on this second charge owing to a lack of evidence.

Prosecutor v. Ferid Hodzic, Court of Bosnia and Herzegovina, Section I, Case X-KR-07/430, 29 June 2009

On 29 June 2009, the Court of Bosnia and Herzegovina (Section I) acquitted Mr Ferid Hodzic on charges of war crimes against civilians and prisoners of war in

the hamlet of Rovasi (near Cerska) in the municipality of Vlasenica, in violation of the criminal code of Bosnia and the 1949 Geneva Conventions. The acts in question were committed between May 1992 and January 1993.

Mr Hodzic was charged with ordering ethnic Serb civilians and prisoners of war to be unlawfully detained and treated inhumanely for months – particularly through very harsh conditions of detention, little food and water, no electricity or access to restrooms, no differentiation between male and female detainees, and constant beatings by Bosnian soldiers. Mr Hodzic was also accused of the death of a civilian held in custody, apparently from the injuries resulting from these beatings. He was charged under command responsibility, specifically for failing to prevent the murder or punish the perpetrators.

In its judgement, the Court found that the prisoners had indeed suffered frequent beatings and insults, and were held in detention conditions amounting to cruel treatment under the 1949 Geneva Conventions and inhuman treatment under the Criminal Code of Bosnia. However, the Court heard no evidence to hold that Mr Hodzic had ordered the commission of such acts. Further, the Court found it impossible to assert who or what authority was responsible for the detention of the prisoners and civilians, as much of the information was either incomplete or contradictory. In effect, no finding was made of a military command or chain of command for the area, leaving the Court with no choice but to acquit the suspect of all charges in the indictment.

Canada

Her Majesty the Queen v. Désiré Munyaneza, Superior Court, Criminal Division, No. 500-73-002500-052, 22 May 2009

On 22 May 2009, the Superior Court of the Province of Quebec, District of Montreal, found Mr Désiré Munyaneza – a Rwandan citizen arrested in Canada – guilty of seven counts of genocide, crimes against humanity and war crimes. These crimes were committed against members of the Tutsi ethnic group in the Prefecture of Butare, Rwanda, in April 1994. Based mostly on witnesses' and victims' testimonies, the judge found that through his social status and his determination, the accused participated actively in the plan of what was to become genocide. The Court also found Mr Munyaneza to have intentionally murdered many Tutsi, knowing that his acts were part of a widespread and systematic attack encouraged and supported by the government, making him guilty of crimes against humanity. As for the classification of certain acts as war crimes, the Court first accepted as proven and uncontested the International Criminal Tribunal for Rwanda (ICTR)'s finding in *Prosecutor v. Akayesu* that a non-international armed conflict occurred in Rwanda between 1 April and 31 July 1994. It then established that 'while [such] an armed national conflict raged in Rwanda between the RAF (Rwandan Armed Forces) and the RPF (Rwandan Patriotic Front), Désiré Munyaneza intentionally killed dozens of people in Butare and the surrounding communes who were not participating directly in the conflict, sexually assaulted

dozens of people and looted the homes and businesses of individuals who had nothing to do with the armed conflict' (par. 2087).

The case against Mr Munyaneza is the first to have successfully indicted and prosecuted a suspect based on the conditions for jurisdiction and definitions of international crimes found in the *Crimes Against Humanity and War Crimes Act 2000*, which came into force on 23 October 2000. The Act allows for the prosecution of genocide, crimes against humanity and war crimes as defined by international law (in particular, the Statute of the International Criminal Court and customary law). It also allows for the prosecution of crimes committed outside Canada, regardless of the nationality of the perpetrator or the victims, provided that the Attorney-General consents and conducts the proceedings. As for the requirement that the accused be present in the territory of the forum State, Section 9(2) of the Act provides that 'the provisions of the Criminal Code relating to requirements that an accused appear at and be present during proceedings (and any exceptions to those requirements) [shall] apply.'¹⁰

Chile

Prosecutor v. Augusto Pinochet, Ariosto Lapostol Orrego, Fernando Polanco Gallardo, Luis Fernandez Monjes, Hector Vallejos Birtolo. Plaintiff: Ernesto Lejderman Avalos. Supreme Court of Chile, 696-2008, 25 May 2009

On 25 May 2009, the Second Chamber of the Supreme Court of Chile revoked previous decisions on the murder of Bernardo Lejderman and his wife by three members of the Chilean military in December 1973. The military officers were sentenced to 5 years and 1 day in prison, without benefits. The civil claim, however, was dismissed by the Court.

Although the Court sentenced the former military officers for murder, it also established that at the time of the relevant events, the country was immersed in a non-international armed conflict as defined in Article 3 common to the 1949 Geneva Conventions. Thus, certain treaty provisions became 'exceptionally applicable'. Citing Article 146 of the third Geneva Convention, the Court underscored Chile's obligations to guarantee the safety of persons deprived of their liberty in times of armed conflict within its territory, and to ensure that there is no impunity for those committing offences against such persons. In this vein, it confirmed the inapplicability of amnesty laws or statutes of limitations to offences committed during the period in question, giving primacy to conventional and customary international law over the domestic law of Chile. Further, it confirmed statements made in previous Supreme Court cases that the non-applicability of statutes of limitations was a universal principle already considered to be customary law at the time of the crimes.

¹⁰ Part XX, Section 650 of the Criminal Code.

Israel

Physicians for Human Rights et al. v. Prime Minister of Israel et al., Supreme Court acting as High Court of Justice 201/09, 19 January 2009; Gisha Legal Centre for Freedom of Movement et al. v. Minister of Defence, HCJ 248/09, 19 January 2009

The Supreme Court of Justice of Israel, acting as High Court, denied in a joint decision the granting of relief to the organizations Physicians for Human Rights and the Gisha Legal Centre for Freedom of Movement, in respect of claims filed during a large-scale military operation conducted by Israel in December 2008–January 2009 in the Gaza Strip. The first organization claimed that the Israeli Defence Forces (IDF) were attacking ambulances and medical personnel, and causing delays in the evacuation of the wounded to hospitals in the Gaza Strip. The latter claimed the shortage of electricity in Gaza was preventing hospitals, clinics, the water system and the sewage system from functioning properly – a situation which, according to the claim, was directly caused by the IDF.

In its judgement, the Court re-stated that the IDF's combat operations are governed by international humanitarian law, and thus protected civilians must be treated humanely and protected against acts of violence. Similarly, medical facilities and personnel may not be attacked unless they are being exploited for military purposes. Evacuation and treatment of the wounded, as well as access for humanitarian relief convoys, should be allowed.

The respondents, representing the State, did not dispute their responsibility under humanitarian law. They accepted that the army has the duty to respect the humanitarian needs of the civilian population even during hostilities, and that preparations for this should be made in advance. With regard to the provision of humanitarian assistance, the respondents explained that various mechanisms had been adopted before the initiation of hostilities in order to respond as adequately as possible to the needs of the population, such as increased human and material resources destined for humanitarian assistance work, both at co-ordination centres and at ground level. They also argued that the general rule was to refrain from attacking medical personnel and ambulances, except in cases where it became clear that they were being exploited for the purpose of fighting the IDF. With regard to the electricity cuts, the State argued that given the ongoing combat operations, it was not possible to ensure there would be no damage to the electricity network, but that efforts were continuously being made to repair any damages to the lines.

In its legal reasoning, the Court first determined that applicable legal norms in customary international law, treaties to which Israel is a party, as well as domestic law, provide rules and principles that apply in times of war. This demands that steps be taken to implement them during the course of hostilities, including performing judicial review of military operations. The court then resolved to classify the conflict between Israel and Hamas, stating that the normative arrangements 'revolve around the international laws relating to an international armed conflict', and that in addition, the laws of belligerent occupation could also

apply. On this issue, as well as the question of which specific provisions of IHL were applicable to the case, the Court found no disagreement between the parties.

As for the circumstances of the specific claims at hand, the Court evaluated the measures taken by the respondents, as well as the difficulties encountered in the battlefield. It found that, in light of the establishment and enhancement of the humanitarian mechanisms (including the setting up of a clinic and statements made towards doubling humanitarian assistance efforts), the Court saw no further reason to grant relief. A similar conclusion was reached regarding the electricity network; thus, both claims were rejected.

The Netherlands

Prosecutor v. Joseph Mpambara, The Hague District Court, LJN: BI2444, 09/750009-06 and 09/750007-07, 23 March 2009

On 23 March 2009, the Dutch District Court sitting in The Hague sentenced Joseph Mpambara, a Rwandan citizen, to 20 years imprisonment for the fatal torture of two women and at least four of their children in Rwanda in 1994. The Court acquitted Mr Mpambara of war crimes, however, as no nexus could be established between his acts and the armed conflict going on at the time between the Rwandan government and Tutsi rebel groups. Key to this decision was the fact that he was not a public official or part of the military.

Mr Mpambara was arrested in the Netherlands after applying for asylum there. Under the International Crimes Act, courts in the Netherlands may only seize themselves of cases without a traditional link to the country (i.e. when the crime was not committed in Dutch territory, or by or against Dutch nationals) in cases of genocide, war crimes, crimes against humanity or torture, and if the suspect is present in the country.

Prosecutor v. Frans van Anraat, Dutch Supreme Court, LJN: BG4822, 07/10742, 30 June 2009

On 30 June 2009, the Dutch Supreme Court upheld a war crimes conviction against Mr Frans van Anraat, a Dutch businessman who had been accused of selling chemicals for the production of poison gas to Saddam Hussein's government during the Iran–Iraq war.

Mr van Anraat was found guilty of complicity in violations of the laws and customs of war by the District Court of The Hague on 23 December 2005, and sentenced to 15 years imprisonment (but acquitted of complicity to commit genocide). The ruling was confirmed in May 2007 by the Court of Appeals at The Hague, which increased the sentence to 17 years.

The District Court found that Mr van Anraat, as the sole supplier of a gas called TDG, knew that the chemical was being used for the production of mustard gas, which would be used in the Iran–Iraq war. As such, the decision confirmed the District Court's opinion that Mr van Anraat '... consciously and solely acting in

pursuit of gain, has made an essential contribution to the chemical warfare programme of Iraq during the 1980s. His contribution has enabled, or at least facilitated, a great number of attacks with mustard gas on defenseless civilians. These attacks represent very serious war crimes ...'.¹¹

Although the civil claims brought by 16 victims were dismissed for requiring extensive analysis of Iraqi and Iranian law, the judgement left open the possibility of pursuing compensation through the Dutch civil courts. As for sentencing, the Supreme Court reduced Mr van Anraat's time in prison by 6 months, in consideration of the lengthy proceedings endured.

United States

Ra'ed Ibrahim Mohamad Matar et al. v. Avraham Dichter,
United States Court of Appeals for the Second Circuit,
Docket No. 07-2579-cv, 16 April 2009

The United States Court of Appeals for the Second Circuit dismissed an appeal filed against Avraham Dichter, former Director of Israel's general Security Service, by survivors of an Israeli military attack on a residential apartment building in Gaza City. The appellants sought damages for alleged war crimes and violations of international humanitarian law. The claim was based on the *Alien Tort Claims Act* and the *Torture Victim Protection Act*, which provide US courts with extra-territorial jurisdiction over international crimes.

The claim had already been dismissed in first instance by the US District Court for the Southern District of New York, which held that Mr Dichter was immune from suit under the *Foreign Sovereign Immunities Act of 1976* (FSIA); in the alternative, the suit presented a non-justiciable political question. In the Court of Appeals, the appellants claimed Mr Dichter should not enjoy immunities, as he was no longer a public official at the time the suit was filed, and that 'the agency status of an individual, like the instrumentality status of a corporation, should be determined at the time suit is filed'.¹² They further argued that FSIA is silent with regard to former foreign government officials, indicating the legislature's intention to strip former officials of the immunity enjoyed under the common law.

The Court rejected this argument, holding that it was common law practice for courts to decline jurisdiction over a suit involving foreign officials when the Executive Branch so requested, acting under a 'traditional rule of deference to such Executive determinations'. Also, the Court held that even if it was agreed that the FSIA did not apply to former foreign officials (something which was not decided upon by the Court), it did not follow that these officials would lack immunity, as 'the FSIA is a statute that "invaded the common law" and accordingly must be

11 *Public Prosecutor v. van Anraat*, Judgement, District Court of The Hague, LJN: AX6406, 09/751003-04, Section 17.

12 Judgement, p. 9.

“read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident”¹³. Claiming that common law does indeed recognize the immunity of former officials, and that the Executive had indeed urged the Court to decline jurisdiction, it upheld Mr Dichter’s immunity from suit.

Having dismissed the claim on jurisdictional grounds, the Court found it unnecessary to discuss further issues.

*Jamal Kiyemba, Next Friend et al. v. Barack Obama et al.,
United States Court of Appeals for the District of Columbia Circuit,
No. 08-5424, 18 February 2009*

On 18 February 2009, the US Court of Appeals for the District of Columbia Circuit quashed a District Court decision to release seventeen Chinese citizens – members of the Uighur community who were being held in Guantánamo Bay Naval Base – into US territory. After granting their writs of *habeas corpus*,¹⁴ the lower court had ruled that the government no longer had any authority to hold them in detention, and that, given the ‘exceptional circumstances of this case and the need to safeguard “an individual’s liberty from unbridled executive fiat”, [it was] justified [to] grant the petitioners’ motion’¹⁵ to be released into the US.

On rejecting the District Court’s decision, the Court of Appeals argued that ‘for more than a century, the Supreme Court has recognized the power to exclude aliens as “inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers – a power to be exercised exclusively by the political branches of government”’.¹⁶ As a result, it would not be within the province of any court to review the determination of the political branch of the Government to exclude a given alien. Although an argument had been posed by the petitioners along the lines of deserving to be released into the US after all they had endured, the Court insisted that ‘such sentiments, however high-minded, do not represent a legal basis for upsetting settled law and overriding the prerogatives of the political branches ... Nor does their detention at Guantánamo for many years entitle them to enter the United States. Whatever the scope of *habeas corpus*, the writ has never been compensatory in nature’.¹⁷ The Court concluded by accepting the Government’s assertion that it is continuing diplomatic attempts to find an appropriate country willing to admit the petitioners.

13 Judgement, p. 12.

14 See United States Court of Appeals for the District of Columbia Circuit, *Huzaifa Parhat v. Robert M. Gates, Secretary of Defense et al.*, Docket No. 06-1397, argued on 4 April 2008, decided on 20 June 2008.

15 Judgement, p. 5.

16 *Idem.*, p. 6.

17 *Idem.*, p. 13.

Fadi Al Maqaleh et al. v. Robert Gates et al.; Haji Wazir et al. v. Robert Gates et al.; Amin Bakri et al. v. Barack Obama et al.; Redha Al-Najar et al. v. Robert Gates et al.; joint decision, United States District Court for the District of Columbia, Civil Actions No. 06-1669, No. 06-1697, No. 08-1307, No. 08-2142, respectively, 2 April 2009

The petitioners in this case were internees who were held for more than six years in the Bagram Theater Internment Facility at Bagram Airfield, Afghanistan. The US District Court for the District of Columbia decided on 2 April 2009 to recognize the right of three of the petitioners to submit writs of *habeas corpus*. The Court reached its decision based almost exclusively on the grounds previously established by the Supreme Court in the case *Boumediene v. Bush*,¹⁸ arguing that ‘the detainees themselves as well as the rationale for detention are essentially the same’. A similar claim filed by a fourth petitioner of Afghan nationality, was rejected.

With regard to the first three, five elements were considered by the Court when comparing the petitioners’ case with that of *Boumediene*. First, the Court noted that the petitioners were non-US citizens, who were apprehended outside the US and later brought to a third country (Afghanistan) for detention. Secondly, as in *Boumediene*, the petitioners were also determined by US authorities to be ‘enemy combatants’, a status the petitioners contested. Further, the Court found that the process by which the petitioners were qualified as enemy combatants was inadequate, and significantly more so than in the Guantánamo detainees’ case (thus making the *Boumediene* decision even more justly applicable to the case before the Court). Fourthly, although the two contexts are not identical, the Court argued that the objective degree of control asserted by the United States at Bagram is not appreciably different than that at Guantánamo. Finally, the Court acknowledged that although the practical obstacles to determining a Bagram detainee’s entitlement to *habeas corpus* were greater than in the case of Guantánamo (the former being located within an active theatre of war), such obstacles were ‘not as great as the respondents claim, and certainly are not insurmountable’.¹⁹ Furthermore, the fact that the petitioners were held in Bagram and not elsewhere was an option largely of the Government’s choosing.

As for the fourth petitioner, the Court argued that ‘When a Bagram detainee has either been apprehended in Afghanistan or is a citizen of that country, the balance of factors may change. Although it may seem odd that different conclusions can be reached for different detainees at Bagram, in this Court’s view that is the predictable outcome of the functional, multi-factor, detainee-by-detainee test the Supreme Court has mandated in *Boumediene*’.²⁰ In that sense, the Court rejected the claim based on ‘practical obstacles in the form of friction with the “host” country’.

18 See United States District Court for the District of Columbia, *Lakhdar Boumediene et al. v. George W. Bush, et al.*, Civil Case No. 04-116 (RJL), Memorandum Order of 20 November 2008.

19 Judgement, p. 4

20 Judgement, p. 5.

Hedi Hammamy v. Barack Obama et al., United States District Court for the District of Columbia, Civil Case No. 05-429, 2 April 2009

On 2 April 2009, the United States District Court for the District of Columbia rejected petitioner Hedi Hammamy's writ of *habeas corpus*, by which he sought release from detention at the US Naval Base at Guantánamo Bay, Cuba. Basing itself on the parameters set by the Supreme Court in *Boumediene v. Bush*, the Court found that Hammamy's qualification as enemy combatant was justified, and thus his detention lawful.

The Court established that the question posed was whether the Government could show, by a preponderance of the evidence, that petitioner Hammamy was an enemy combatant, i.e. 'an individual who was part of or supporting Taliban or Al Qaeda forces that are engaged in hostilities against the United States or its coalition partners... includ[ing] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.'²¹

To satisfy its burden of proof, the Government contended that Mr Hammamy fought with Taliban or Al Qaeda forces against US forces during the battle of Tora Bora, and was a member of a terrorist cell based in Italy that provided support to various Islamic terrorist groups. The Government based such contention on intelligence reports from various government law enforcement and intelligence services. Key in the Government's case was also the finding of the petitioner's identity papers in an Al Qaeda cave complex after the battle of Tora Bora.

Although the petitioner denied all involvement with the terrorist cell in Italy and argued he had not participated in the battle of Tora Bora and had never attended military training camps in Afghanistan, the Court found that 'based on the evidence presented by the Government described above and all reasonable inferences drawn therefrom, ... petitioner Hammamy is being lawfully detained as an enemy combatant because it is more probable than not that he was part of or supporting Taliban or Al Qaeda forces both prior to and after the initiation of US hostilities in October 2001.'²²

21 *Boumediene v. Bush*, as cited by the Court, p. 5.

22 Judgment, p. 9.