

National implementation of international humanitarian law

Biannual update on national legislation and case law January–June 2008

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A. Legislation

Austria

The *Federal Law on the Recognition of the Austrian Red Cross and the Protection of the Red Cross Emblem (Red Cross Law – RKG)*¹ was adopted on 6 December 2007 and entered into force on 1 February 2008. The law replaces the Red Cross Protection Act of 1962. Its aims are to define the legal status of the Austrian Red Cross and to regulate the use and the protection of the distinctive emblems as defined in the four Geneva Conventions of 1949 and their three Additional Protocols of 1977 and 2005. The law protects the emblems of the red cross, red crescent, red lion and sun, red crystal and their names in all languages, and the arms of the Swiss Confederation, as well as other emblems, signs and signals defined in Article 38 and Annex I of Additional Protocol I. Under the new law, the registration as a trademark of the figurative designs and names of the emblems are subject to authorization from the Austrian Red Cross, and any misuse of the emblems is subject to administrative fines without prejudice to other sanctions of a penal or disciplinary character.

Canada

The *Geneva Conventions Amendment Act*² was approved on 22 June 2007 and entered into force on 31 January 2008. The act amends the Canadian Geneva Conventions Act in accordance with Protocol III additional to the Geneva

Conventions of 12 August 1949 and relating to the adoption of an additional distinctive emblem. The act extends the criminalization of perfidious misuse of the distinctive emblems of the red cross, red crescent, and red lion and sun pursuant to Article 85(3)(f) of Additional Protocol I to the third Protocol emblem, the red crystal. It further revises the Act to incorporate the Canadian Red Cross Society to provide for punishment of commercial misuse of the red crystal emblem and name. The Trade Marks Act is also amended by inserting a reference to the red crystal as a trademark of which unauthorized use is prohibited.

Fiji

The *Geneva Conventions Promulgation Act*, No. 52 of 2007,³ was adopted on 13 December 2007 and entered into force on 1 January 2008. The act gives effect to the four Geneva Conventions as well as to their three Additional Protocols of 1977 and 2005. The law provides for the punishment of grave breaches of the Conventions and of Additional Protocol I based on the principles of territoriality and active personality. It also provides for the protection of the red cross and other distinctive emblems, signs and signals and establishes prison terms and financial penalties in the event of misuse. The Minister of Home Affairs has the authority to make regulations in implementation of the act.

Mauritania

*Law No. 2008-06 on the Prohibition of Anti-personnel Mines in Mauritania*⁴ was adopted on 16 March 2007 and entered into force on 2 January 2008. This law gives effect to the provisions of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction.⁵ The law incorporates into Mauritanian law the prohibitions on anti-personnel landmines as set out in the Ottawa Convention. It also specifies the number and types of stockpiled mines retained for training purposes in accordance with the Convention and provides for the creation of a national committee responsible for applying the law and for designing an action plan in implementation

1 Bundesgesetz über die Anerkennung des Österreichischen Roten Kreuzes und den Schutz des Zeichens des Roten Kreuzes (Rotkreuzgesetz – RKG). Officially published on 11 January 2008 in 351 der Beilagen XXIII. GP – Ausschussbericht NR – Gesetzestext.

2 Bill C-61, an Act to Amend the Geneva Conventions Act, an Act to incorporate the Canadian Red Cross Society and the Trade-marks Act. Officially published on 20 February 2008 in the *Canada Gazette*, Vol. 142, No. 4.

3 An Act to Enable Effect to be given to Certain Conventions done at Geneva on 12 August 1949 and to the Protocols Additional to those Conventions done at Geneva on 8 June 1977, and 8 December 2005, and for Related Purposes. Officially published on 29 December 2007 in the *Republic of Fiji Islands Government Gazette*, Vol. 7, No. 100.

4 Loi No. 2008-06 relative à l'interdiction des mines antipersonnel en Mauritanie. Officially published on 30 April 2008 in the *Journal Officielle de la Mauritanie*, No. 1116 (pp. 533–6).

5 The Islamic Republic of Mauritania ratified the Ottawa Convention by Law No. 99-07 of 20 January 1999.

of the National Humanitarian Mine-clearance Programme for Development. Further, the law establishes administrative and penal sanctions should its provisions be violated.

Nicaragua

*Law No. 641, Penal Code of the Republic of Nicaragua*⁶ was approved by the National Assembly on 13 November 2007 and promulgated by the President on 16 November 2007. It entered into force on 8 July 2008. The new Nicaraguan Penal Code includes a new title 'Crimes against the International Order', which incorporates specific chapters defining the crimes of genocide, crimes against humanity and crimes against objects and persons protected during armed conflict. This last chapter reflects the definitions of war crimes found in Article 8 of the Rome Statute of the International Criminal Court, and provides for the criminalization of such offences irrespective of whether the situation in which they occur is categorized as an international or non-international armed conflict. The code also includes detailed provisions for the prohibition of certain weapons deemed to cause superfluous injury and unnecessary suffering, including asphyxiating gases, chemical, biological and atomic weapons, anti-personnel mines, booby traps and other devices, as well as weapons the primary effect of which is to injure by fragments which are undetectable by X-rays. The code provides for the jurisdiction of national courts over those international crimes based on the principle of universal jurisdiction in accordance with international treaties to which Nicaragua is a state party. The code further provides for the responsibility of superiors and prescribes that war crimes proceedings and sentences may not be subject to any statute of limitations.

Peru

*Law No. 29248 on Military Service*⁷ was adopted on 6 June 2008 and will enter into force on 1 January 2009. The law regulates voluntary military service and provides for its operation in conformity with the national constitution and Peru's international obligations deriving from international treaties to which it is a state party. In particular, the law recognizes that military service is 'an activity of a personal character' and that all Peruvians may exercise their constitutional right and duty to participate in national defence from the time they have reached the age of 18. The law further regulates the organization of military service, including the procedures for registration, the conditions for forced mobilization, and the disciplinary sanctions applicable to offences committed in the course of military service.

The *Law No. 2939 on Control Mechanisms for Substances susceptible to use for the*

6 Ley No. 641, Código Penal. Officially published on 9 May 2008.

7 Ley No. 29248 del Servicio Militar. Officially published on 28 June 2008 in the *Diario Oficial 'El Peruano'* (pp. 374974–84). This Law derogate the previous Law on the Military Service of 14 September 1999 (Ley No. 27178 del Servicio Militar).

*Production of Chemical Weapons*⁸ was adopted on 20 May 2008. This law establishes mechanisms for compliance with the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. The law defines the types of chemical substances subject to control and outlines activities for which the use of these chemicals is not prohibited under the Convention. The law provides for the establishment of the National Inter-ministerial Council for the Prohibition of Chemical Weapons to implement Peru's obligations under the Convention, to disseminate information about the Convention and the law, and to promote international co-operation in the realization of the Convention's aims. The law also provides, for controls and confidence-building measures, such as the creation of a registry of users of toxic chemical substances and their precursors, and of a technical secretariat to monitor the application of the law's prohibitions on the national territory. The law stipulates that violations of its provisions constitute punishable administrative offences, without prejudice to civil responsibility or penal sanctions under the Peruvian Criminal Code.

Slovakia

The *Slovak Red Cross and Protection of the Emblem and Name of the Red Cross and on Amendment and Supplement to Certain Acts' Act*⁹ was adopted on 20 September 2007 and entered into force on 1 January 2008. The first part of the act recognizes the independent status of the Slovak Red Cross as well as its role as an auxiliary to the public authorities in the humanitarian field. It sets forth the tasks of the Slovak Red Cross, *inter alia* to assist the medical services of the armed forces, to participate in civil defence tasks and to provide tracing services pursuant to the 1949 Geneva Conventions and their Additional Protocols of 1977. The act also defines the organizational structure of the National Society. The second part of the act regulates the use of the red cross and red crescent emblems. It identifies the natural and legal persons entitled to use the emblems and their names and establishes penalties in the event of misuse both in time of armed conflict and in peacetime.

Sri Lanka

The *Chemical Weapons Convention Act*, No. 58 of 2007¹⁰ was certified on 20 November 2007 and entered into force on 15 April 2008. The act provides for

8 Ley N° 2939 sobre medidas de control de sustancias químicas susceptibles de empleo para las fabricación de armas químicas. Officially published on 29 May 2008 in the *Diario Oficial 'El Peruano'* (pp. 372974–9).

9 Officially published in Zbierka zákonov c. 460/2007, Ciastka 195, Strana 3281 (Act No. 460/2007 Coll., section 195, p. 3281).

10 An Act to Provide for the Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and their Destruction and to Provide for Matters

the implementation of the 1993 Chemical Weapons Convention and its prohibitions on the use, development, production, acquisition, stockpiling or retention, or transfer of chemical weapons. The act includes as a schedule a list of prohibited toxic chemicals and their precursors and provides for the establishment of a national authority on chemical weapons to be chaired by the ministry in charge of the industries sector. The act provides for a range of penalties ranging from fines to imprisonment for a period not exceeding twenty years in the event of violations of its provisions. The act details the modalities of registration of persons engaged in the production, processing and transfer of toxic chemicals or their precursors and outlines the procedures for verification, inspection and forfeiture in implementation of the law's prohibitions.

B. National committees on international humanitarian law

Algeria

The *Algerian Committee on International Humanitarian Law* was established by Presidential Decree No. 08-163 of 4 June 2008.¹¹ The Committee's mandate includes advising and preparing recommendations for the government on all matters relating to the promotion and national implementation of international humanitarian law, including the evaluation of domestic law and practice. The Committee is chaired by the Minister of Justice and composed of representatives of the ministries of Foreign Affairs, Justice, National Defence, Interior, Finance, Energy and Mines, Water Resources, Industry, Religious Affairs and *Awkaf*, Environment and Tourism, National Education, Health, Culture, Information, Training and Professional Education, Higher Education, Labour and Social Insurance, National Solidarity, Youth and Sports, as well as of the General Directorate for National Security, the general command of the National Gendarmerie, and the Algerian Red Crescent, the Islamic Algerian Scouts and the National Consultative Commission for the Promotion and Protection of Human Rights. Confirmed experts in the field of IHL and various organizations may also be invited to take part in the Committee's work.

Madagascar

The Internal Regulations of Madagascar's *National Committee on International Humanitarian Law* were adopted on 29 February 2008¹² and complement Decree No. 2006-435 of 27 June 2006 establishing the Committee. The regulations confer

Connected Therewith or Incidental Thereto. Officially published on November 23, 2007 as a Supplement to Part II of the *Gazette of the Democratic Socialist Republic of Sri Lanka*.

11 Published in the *Official Gazette*, issue No. 29 of 4 June 2008, pp. 16–17.

12 Règlement intérieur de la Commission Nationale du Droit International Humanitaire (CONADIH). Registered at the Primature on 29 February 2008 under No. 5255/2008.

on the Committee the task of overseeing the application, national implementation and promotion of IHL and of advising the government in these fields. They stipulate that the Committee must submit an annual report to the government and prime minister on its activities and achievements. The regulations lay down the Committee's structure and organization and stipulate that its various organs shall include a chairman, a general assembly, a series of sub-committees and a permanent secretary. The Ministry of Justice holds the chairmanship.

C. Case law

Canada

*Supreme Court of Canada, Canada (Justice) v. Khadr, 23 May 2008*¹³

The case concerned a Canadian national who had been detained by US forces in Guantánamo Bay since 2002, where he faced charges of murder and terrorism against US and coalition forces. On several occasions Canadian officials had questioned the respondent on matters related to the charges he was facing and had shared the records of those interviews with United States authorities. The respondent sought disclosure of all documents related to the charges laid against him in possession of the Canadian government, including the records of the interviews with Canadian officials. His request was first rejected in the lower federal courts, but allowed by the Court of Appeal, which issued an order that all relevant documents be produced before federal courts for review. The Minister of Justice appealed against the Court of Appeal's decision before the Supreme Court, asking that the order be set aside.

On 23 May 2008 the Supreme Court of Canada dismissed the appeal lodged by the Ministry of Justice. The court held that section 7 of the Canadian Charter of Rights and Freedoms imposed a duty on Canada to disclose materials in its possession arising from its participation in a foreign process of detention and trial determined to be contrary to international law and to jeopardize the liberty of a Canadian citizen. Although the court did not pronounce itself on the legality of the US procedures in Guantánamo Bay, it based itself on several US Supreme Court cases, including *Rasul v. Bush* and *Hamdan v. Rumsfeld*, in deciding that the detention regimes and trial procedures applicable to the respondent at the time of his interviews with Canadian officials constituted a violation of Canada's international human rights obligations and of the Charter of Rights and Freedoms.

¹³ Supreme Court of Canada, *Canada (Justice) v. Khadr*, 2008 SCC 285, 23 May 2008, Docket 32147, *Minister of Justice, Attorney General of Canada, Minister of Foreign Affairs, Director of the Canadian Security Intelligence Service and Commissioner of the Royal Canadian Mounted Police (Appellants) v. Omar Ahmed Khadr (Respondent)*, available at <http://csc.lexum.umontreal.ca/en/2008/2008scc28/2008scc28.pdf>.

The Supreme Court consequently upheld the Court of Appeal's order that all relevant documents be produced before the federal court and affirmed the respondent's right to a remedy under the Charter.

Israel

*Supreme Court of Israel sitting as the Court of Criminal Appeals, A and B v. State of Israel, 11 June 2008*¹⁴

On 11 June 2008 the Supreme Court of Israel rendered a decision concerning the constitutionality of Israel's Internment of Unlawful Combatants Law (5760-2002) (hereafter the internment law). The case concerned two inhabitants of Gaza who had been detained respectively since 2002 and 2003 under the internment law on the grounds that they were 'unlawful combatants', that they were associated with the Hezbollah organization and that they had committed hostile acts against Israel. The detainees in the case had appealed against decisions by the District Court approving their continued internment and upholding the constitutionality of the internment law upon which their detention was based.

The appellants claimed that their continued internment violated their right to liberty and dignity under Israel's Basic Law and argued that the internment law was unconstitutional and inconsistent with Israel's obligations deriving from international law. They further argued that under the Fourth Geneva Convention of 1949, Israel could no longer detain them since it no longer exercised military rule in the Gaza Strip. Lastly, the appellants contested the factual findings of the first instance court, according to which they were members of the Hezbollah organization and their release would harm Israel's security. The government, for its part, contended that the internment orders had been made lawfully and that the internment law had a legitimate purpose and involved a proportionate violation of personal liberties.

In its ruling the Supreme Court examined the background of the internment law and provided an interpretation of the statutory definition of 'unlawful combatant' as referring to any 'foreign party who belongs to a terrorist organization that operates against the security of Israel'. In response to the appellants' argument that international humanitarian law did not recognize the existence of a separate category of 'unlawful combatant', the Supreme Court recalled that it had already ruled on this issue in its *Public Committee against Torture in Israel v. Government of Israel* decision, in which it had determined that the term 'unlawful combatant' was a 'sub-category of "civilians"' from the viewpoint of international law. The Court of Criminal Appeals further rejected the appellants' assertion that the Fourth Geneva Convention was not applicable to them because they were detained in the Gaza Strip rather than Israel. The court stated that although Israeli

14 The Supreme Court of Israel, No. 6659/06, heard on 5 March 2007, decided on 11 June 2008. Available at http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf.

military rule over the Gaza Strip had ended at the time the appellants were detained, the hostilities between Israel and the Hezbollah organization continued. With respect to the alleged violation of the constitutional right to liberty under the Basic Law, the court stated that, because administrative detention constituted an unusual and extreme measure, the state was required to demonstrate by clear and convincing evidence that a sufficient security threat existed to warrant its use. The court held that that there must be more than a single piece of evidence from an isolated event to establish that, even if the detainee did not take a direct or indirect part in hostilities against Israel, he nonetheless belonged to a terrorist organization and took part in the ‘cycle of hostilities’.

The Supreme Court applied the limitations clause under the Basic Law and its constituent tests in order to pronounce on the internment law’s constitutionality and concluded that the internment law had a ‘proper purpose’ in that it was meant to prevent individuals who threaten the security of Israel from returning to the ‘cycle of hostilities’. The court also concluded that the internment law did not constitute a violation of constitutional rights which was excessive or incommensurate with the social benefits arising from its application. Consequently the Supreme Court concluded that the internment law satisfied the test of constitutionality under the Basic Law and denied the appeals.

United States

*United States’ Court of Appeals for the Second Circuit, Vietnam Association for Victims of Agent Orange/Dioxin v. Dow Chemical Co., 2nd Cir., 22 February 2008*¹⁵

On 22 February 2008 the US Court of Appeals for the Second Circuit confirmed a judgment of the US District Court for the Eastern District of New York, which had denied the claim for injunctive relief brought by Vietnamese nationals against several US-registered companies. The appellants’ claim concerned injuries they had allegedly sustained from their exposure to Agent Orange and other herbicides manufactured by the defendants as contractors of the US government and used by the US armed forces during the Vietnam War.

As foreign nationals, the plaintiffs sought monetary damages and relief under the Alien Tort Statute, which grants US district courts jurisdiction over any civil action by an alien claiming damages for a tort committed in violation of an international treaty to which the United States is party. They also asserted claims grounded in domestic tort law. The defendants argued that the plaintiffs had failed to make a claim under the Alien Tort Statute because they had not alleged a violation of any well-defined and universally accepted rule of international law

15 United States Court of Appeals for the Second Circuit, *Vietnam Association for Victims of Agent Orange/Dioxin v. Dow Chemical Co.*, Docket No. 05-1953-cv, argued 18 June 2007, decided 22 February 2008, available at <http://caselaw.lp.findlaw.com/data2/circs/2nd/051760p.pdf>.

and that their claims were both non-justiciable and barred under applicable statutes of limitations. Following the dismissal of their claims by the district court, the plaintiffs appealed, contending that the defendants had violated customary international law prohibiting the use of 'poisoned weapons' and the infliction of unnecessary suffering.

In its ruling the Court of Appeals recalled that in order for a norm of international law to form the basis of a claim under the Alien Tort Statute, it had to be both defined with a specificity comparable to the torts corresponding to the eighteenth-century paradigm which informed the legislation and based on a norm of international character accepted by the civilized world.

The court decided that the international sources relied on by the plaintiffs, such as in particular the 1907 Hague Regulations, the Annex to the 1907 Hague Convention (IV), the 1925 Geneva Gas Protocol and the 1949 Fourth Geneva Convention, did not support a universally accepted norm which would have prohibited the use of Agent Orange during the war in Vietnam. The court further held that it could not find consensus on whether the prohibition against the use of poison would apply to defoliants with possible unintended toxic side effects, as opposed to chemicals intended to kill combatants. With regard to the allegation that the use of Agent Orange violated the norm prohibiting unnecessary suffering, the court found that norms containing wording like 'great suffering' or 'serious injury' (such as the grave breach listed in Article 147 of the Fourth Geneva Convention) are too imprecise and that their application must be analysed case by case in order to balance competing interests. As to the purported violation of the principle of proportionality, the Court of Appeals felt that the *mens rea* element inherent in this principle was not satisfied, considering that Agent Orange had been used by the US military as a defoliant to prevent US troops from being ambushed, rather than intentionally as a 'weapon of war against human populations'.

The court therefore concluded that the plaintiffs had failed to satisfy the standard for recognition of a tort cognizable under the Alien Tort Statute and declared itself without jurisdiction to consider the claim.

*Supreme Court of the United States, Boumediene et al. v. Bush, President of the United States, et al., 12 June 2008*¹⁶

On 12 June 2008 the Supreme Court rendered a decision determining that detainees at Guantánamo Bay enjoy a constitutional right to habeas corpus before federal courts without having to seek prior review of their determination as an 'enemy combatant' by a combatant status review tribunal (CSRT). In its ruling the Supreme Court stated its opinion that the Military Commissions Act of

16 Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Case No. 06–1195, argued 5 December 2007, decided 12 June 2008. This case was decided together with No. 06–1196, *Al Odah, next friend of Al Odah, et al. v. United States et al.*, also on certiorari to the United States Court of Appeals for the District of Columbia Circuit, available at www.supremecourtus.gov/opinions/07pdf/06-1195.pdf.

2006 (MCA) represents an unconstitutional suspension of the habeas corpus privilege, because under the US constitution habeas corpus can only be suspended ‘when public safety requires it in times of rebellion or invasion’, which was neither asserted in the MCA, nor argued before the court by the US government. The Court further concluded that the procedures in place to review detentions in Guantánamo, in particular the CSRTs and the limited right to appeal under the Detainee Treatment Act of 2005 (DTA) do not constitute a sufficient substitute for habeas corpus proceedings.

The case related to petitions brought by non-US citizens captured outside the United States and detained in Guantánamo Bay as ‘enemy combatants’. The detainees had unsuccessfully petitioned for a writ of habeas corpus in the US District Court for the District of Columbia. The Court of Appeals had confirmed the lower court’s decision, determining that paragraph 7 of the MCA stripped federal courts from jurisdiction to review the detainees’ habeas corpus applications. The petitioners applied for a writ of certiorari to determine whether they enjoyed a constitutional privilege of habeas corpus, which could only be withdrawn in accordance with the Suspension Clause under the US Constitution.

In its decision the majority examined the question of the reach of the right to habeas corpus under the constitution and whether the protections under the Suspension Clause should apply to detainees at Guantánamo Bay.

The Court concluded in this regard that three factors were central to such a determination: the citizenship and status of the detainees and the adequacy of the process through which that status determination was made, the nature of the sites where apprehension and then detention took place, and the practical obstacles inherent in resolving the prisoner’s entitlement to the writ. While recalling the history of the writ, the Court first concluded that in common law a petitioner’s status as an alien is not a categorical bar to habeas corpus relief and stated that the CSRT hearing fell well short of the procedure and adversarial mechanisms that would eliminate the need for a habeas corpus review. As to whether the location of the petitioners in Guantánamo Bay affected their right to habeas corpus, the Court adopted a functional approach to the reach of habeas corpus rights, stating that ‘questions of extraterritoriality turn on objective factors and practical concerns, not formalism’. The Court thus opined that the Guantánamo Bay detention facility was not a transient possession of the United States and that, in every practical sense, it was not located abroad, since the United States maintains complete and total control and de facto sovereignty over the territory. Finally, the Court felt that there were no credible arguments that the military mission at Guantánamo Bay would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims. The Court thus concluded that the suspension clause under Article 1, Section 9 of the constitution has full effect in Guantánamo Bay and that, if the right to habeas corpus was to be denied detainees held there, such a decision should be in conformity with the clause.

Noting that the detainees should not be harmed by further delay in the consideration of their petitions, the Court proceeded with an examination of whether existing review processes for detention at Guantánamo Bay – notably the

CSRT and the limited civilian court review under the DTA – provide an adequate replacement for habeas corpus. The Court defined the minimum requisites for an adequate substitute for habeas corpus, namely those of offering the detainee a ‘meaningful opportunity’ to demonstrate that he was being erroneously held and that ‘conditional release’ must be one of the possible outcomes of the process. The Court determined that neither the CSRTs nor the DTA represented adequate substitutes. The Court notably held that the petitioners had met their burden of demonstrating that the DTA review process is on the face of it an inadequate replacement for habeas corpus as it does not, *inter alia*, allow the petitioners to challenge the authority of the president under the Authorization for Use of Military Force to detain them indefinitely or for the consideration of newly discovered evidence or evidence outside the CSRT records. The Court concluded that paragraph 7 of the MCA results in an unconstitutional suspension of the writ of habeas corpus.

The Supreme Court reversed the determination of the Court of Appeals, according to which the suspension clause is inapplicable to the petitioners, and ordered the cases to be remanded for further proceedings.

*Supreme Court of the United States, Munaf et al. v. Geren, Secretary of the Army, et al., 12 June 2008*¹⁷

On 12 June 2008 the US Supreme Court issued a unanimous decision affirming the jurisdiction of US federal courts to grant habeas corpus to US citizens arrested and detained in Iraq since October 2004 by US military forces operating as part of the Multinational Force – Iraq. The Court did not, however, recognize the authority of federal district courts under the habeas corpus clause to order the United States to refrain from transferring US citizens alleged to have committed crimes and detained in a foreign state to that state for criminal prosecution. The court therefore denied the petitioners’ claim.

The petitioner in the case had, following his arrest by the Multinational Force – Iraq, been transferred to Iraqi custody and charged with kidnapping by the Central Criminal Court of Iraq. A petition for a writ of habeas corpus was filed on his behalf before the District Court for the District of Columbia. The District Court had dismissed the application on the grounds that the petitioner had been convicted in a foreign court and that US federal courts consequently no longer enjoyed habeas corpus jurisdiction.

The Court of Appeals confirmed this decision. The Supreme Court granted certiorari and consolidated the petition with that brought in another case (*Geren, Secretary of the Army, et al. v. Omar et al.*).

17 Supreme Court of the United States, *Munaf et al. v. Geren, Secretary of the Army, et al.* Certiorari to the United States Court of Appeals for the District of Columbia Circuit, No. 06-1666, argued 25 March 2008, decided 12 June 2008. Decided together with case No. 07-394, *Geren, Secretary of the Army, et al. v. Omar et al.*, also on certiorari to the United States Court of Appeals for the District of Columbia Circuit. Available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=06-1666>.

In its decision the Supreme Court began by stating its opinion that the habeas corpus statute extends to US citizens held overseas by US forces operating under a US chain of command, and rejected the government's arguments that federal courts lacked jurisdiction in the case on the grounds that US forces holding the petitioners had operated as part of a multinational force.

The Court nevertheless denied the petitioners' claim that they enjoyed a 'legally enforceable right' not to be transferred for criminal prosecution to the Iraqi authority under both the Due Process Clause and the Foreign Affairs and Restructuring Act of 1998 and that they were 'innocent civilians unlawfully detained by the government'. It concluded that the petitioners had failed to state grounds on which relief could be granted. While emphasizing that habeas corpus is governed by equitable principles and that prudential concerns may require federal courts not to exercise their habeas corpus authority, the Court held that no injunction could be entered prohibiting the government from transferring the petitioners to Iraqi custody, since the petitioners' requests would interfere with Iraq's sovereign right to 'punish offences against its laws committed within its borders'. Regarding the petitioners' allegation that they would be likely to face torture if they were released to Iraqi custody, the Court, while stressing that this represented a matter of serious concern, concluded that it was an issue to be addressed by the political branches of government rather than by the judiciary. It noted that the State Department had determined that the Iraqi Justice Ministry, under whose authority the petitioners and its detention facilities were placed, generally met international standards regarding the basic needs of prisoners.

In a concurring opinion, Justice Souter emphasized that the specific circumstances of the case were key to the Court's determination and that the Supreme Court reserved judgment in an 'extreme case in which the Executive has determined that a detainee [in US custody] is likely to be tortured but decides to transfer him anyway', or where 'the probability of torture is well-documented, even if the Executive fails to acknowledge it'.