Volume 91 Number 873 March 2009

INTERNATIONAL REVIEW of the Red Cross

REPORTS AND DOCUMENTS

# National implementation of international humanitarian law

## Biannual update on national legislation and case law

## July–December 2008

: : : : : : : :

### A. Legislation

#### Ireland

The *Cluster Munitions and Anti-Personnel Mines Act 2008* was adopted on 2 December 2008.[1] The Act makes the use, development or production, acquisition, possession or transfer of cluster munitions and anti-personnel mines a criminal offence under Irish law, fulfilling Ireland's international obligations under the Convention on Cluster Munitions and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. According to the Act, a person guilty of such an offence will be found liable, on summary conviction, to a fine or imprisonment or both.

The Act also prohibits the investment of public moneys, directly or indirectly, in munitions companies. Should public moneys be directly invested in a company which is or becomes a munitions company, the investor should establish to its satisfaction that the company intends to cease its involvement in the manufacture of prohibited munitions or components, or, alternatively, divest itself of its investment in that company.

#### Norway

An amendment to the *Norwegian General Civil Penal Code*[2] was passed on 7 March 2008, entering into force on the same date, by which the crimes of genocide, crimes against humanity and war crimes were introduced. The provisions on the latter are divided into five sections: war crimes against the person (para. 103), war crimes

against property and civil rights (para. 104), war crimes against humanitarian operations and emblems (para. 105), war crimes consisting of the use of prohibited methods of warfare (para. 106), and war crimes consisting of the use of prohibited means of warfare (para. 107).

These sections mostly correspond with existing international humanitarian law. Paragraph 104 raises the minimum age of conscription of children from fifteen to eighteen. The provision in paragraph 104 stipulates that a person who, in connection with an armed conflict, conscripts or enlists children under the age of eighteen into the armed forces or uses them to participate actively in hostilities, may be punished for war crimes.

The amendment also awards a limited extraterritorial jurisdiction to Norwegian courts over non-Norwegian nationals alleged to have committed any of the above crimes abroad, subject to several cumulative requirements, such as the presence of the accused in Norwegian territory, double incrimination, that the offence is considered a crime under international law, and that prosecution should be in the public interest.

## South Africa

The Government of South Africa passed the *Prohibition or Restriction of Certain Conventional Weapons Act No. 18 of 2008*, on 13 October 2008.[3] The Act prohibits the use, stockpiling, production, development, acquisition and transfer of prohibited weapons, and explicitly outlines the procedure for the State's reporting compliance with the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (Conventional Weapons Convention).[4] It provides for the extraterritorial jurisdiction of South African courts, based on the *active personality* and *protected interest* principles. It would also allow for the exercise of jurisdiction based on the protective and universality principles, should the act or omission *affect or intend to affect a public body, business or any other person in the Republic*.[5] The Act prohibits, *inter alia*, the use, possession and manufacture of non-detectable fragments and blinding laser weapons. It restricts the use of mines, booby-traps and other devices, as well as incendiary weapons, in conformity with the Conventional Weapons Convention. Penalties may include a fine and imprisonment for a period not exceeding 15 years.

1 Cluster Munitions and Anti-Personnel Mines Act 2008, No. 20 of 2008, entered into force on 2 December 2008.
2 Amendment to the General Civil Penal Code, LOV-2005-05-20-28, entered into force on 7 March 2008.
3 Prohibition or Restriction of Certain Conventional Weapons Act No. 18 of 2008, was adopted on 13 October 2008. The Act shall enter into force upon publication of its regulations.
4 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980.
5 Article 3(2) of the Act.

## United States

The *Child Soldiers Accountability Act of 2008* was signed by the President on 3 October 2008.[6] The Act makes it a federal crime to knowingly recruit, enlist or conscript a person to serve in an armed force or group while such person is under 15 years of age. Alternatively it criminalizes using a person under 15 years of age to participate actively in hostilities. Regarding the modes of criminal liability, the Act penalizes the violation, attempted violation or conspiracy to commit the above offences with a fine, a term of imprisonment of no more than 20 years, or both. If the offence results in the death of a person, the offender shall be fined and imprisoned for any term of years or for life.

The Act allows for prosecution if the offender is a national of the United States, is an alien lawfully admitted for permanent residence in the United States, or is present in the United States irrespective of his or her nationality, or if the offence occurred in whole or in part within the United States. The prosecution, trial or punishment shall be subject to a statute of limitations unless the indictment or the information is filed not later than 10 years after the commission of the offence.

The Act also provides for a definition of the notion of 'active participation in hostilities', which is understood to mean 'taking part in … combat or military activities related to combat, including sabotage and serving as a decoy, a courier, or at a military checkpoint; or … direct support functions related to combat, including transporting supplies or providing other services'.

## Vietnam

The National Assembly of the Socialist Republic of Vietnam approved on 3 June 2008 the *Law on Red Cross Activities*.[7] The law entered into force on 1 January 2009. The Law regulates the activities of the Vietnamese Red Cross Society conducted individually or in collaboration with other institutions or individuals in the humanitarian field, including emergency relief, health care and primary first aid, the tracing of missing persons in the event of armed conflict and natural disasters, the dissemination of humanitarian values and disaster preparedness and response. The law regulates the use in Vietnam of the red cross emblem in accordance with the Geneva Conventions of 1949 and provides for the protection of the red cross, the red crescent and the red crystal. The law also defines the conditions of mobilization, receipt, management and use of resources by the Vietnamese Red Cross, as well as the principles governing the cooperation of the Vietnamese Red Cross with

6 S. 2135, '*An Act to prohibit the recruitment or use of child soldiers, to designate persons who recruit or use child soldiers as inadmissible aliens, to allow the deportation of persons who recruit or use child soldiers, and for other purposes*', passed by the House of Representatives on 8 September 2008, and signed by President George W. Bush on 3 October 2008.

7 No. 11/2008/QH12, passed by the National Assembly Legislature XIIth, Session 3, on 3 June 2008.

state agencies and with international organizations and other foreign institutions or individuals in the conduct of Red Cross activities.

As regards organizations belonging to the International Red Cross and Red Crescent Movement, Chapter V of the Law states that they shall comply with Vietnamese legislation, and shall be given favourable conditions by the state. The Act lastly allocates responsibilities among various ministries in guiding and supporting the Vietnamese Red Cross in the realization of its humanitarian activities.

## B. National Committees on International Humanitarian Law

### Ireland

On 29 April 2008 the government authorized the Minister of Foreign Affairs (MFA) to establish a National Committee on International Humanitarian Law.[8] Besides the MFA itself, the government invited the departments of Defence, of Education and Science, and of Justice, Equality and Law Reform, together with the Office of the Attorney General, the Defence Forces and the Irish Red Cross to take part in the work of the Committee.

The Committee, which meets two or three times a year, assists the government in the implementation and promotion of IHL, including in the development of new legislation or other measures that may be required and in preparations for the International Conferences of the Red Cross and Red Crescent. It also encourages greater knowledge and a broader dissemination of IHL within Ireland.

### Morocco

The *Moroccan National Commission for International Humanitarian Law* was officially established on 9 July 2008.[9] It is composed of representatives of the government and of other official institutions concerned with IHL, as well as of the Moroccan Advisory Council on Human Rights and of the Moroccan Red Crescent Society. Four additional members were appointed by the Prime Minister, including two university professors and 'associations most active in the field of IHL'. The permanent secretariat is held by the Ministry of Justice.

### Zambia

The Zambian government established a *National Committee on the Implementation of International Humanitarian Law*.[10] After holding its first meeting on 8 December

8 Although the National Committee is fully operational, legal basis for its creation has not been established yet and should be forthcoming in 2009.

9 Decree 2.07.231, published in the official gazette *Al-Jarida Al-Rasmiya*, issue 5646 on 10 July 2008.

10 The Committee was constituted by Cabinet Order No. MOJ/7/14/1.

2008, it agreed on its terms of reference, which include, among others, to review national legislation in order to identify amendments needed for the full implementation of the obligations arising from IHL; to encourage the dissemination of IHL to the armed forces and the general public; to consider the advisability of state adherence to international treaties and its participation in conferences related to IHL; and to monitor new developments in IHL and review its implications for the state.

The Committee's members include representatives from the Ministry of Justice and Ministry of Finance, the Zambia Air Force and Army and the Department of Development Cooperation and International Organizations from the Ministry of Foreign Affairs, as well as from the National Red Cross Society and the University of Zambia. It is currently chaired by the Director of International Law and Agreements of the Ministry of Justice.

## C. Case law

### Bosnia and Herzegovina

### Prosecutor v. Ivica Vrdoljak, *Court of Bosnia and Herzegovina, Section I for War Crimes, 10 July 2008*[11]

On 10 July 2008 the Court of Bosnia and Herzegovina (BiH), Section I for War Crimes, found the accused – a member of the 103rd Derventa Brigade of the Croat Defence Council (HVO), guilty of 'crimes against civilians', committed against persons of Serb ethnicity from the territory of Derventa and Bosanski Brod municipalities. The events occurred between late June and late July 1992. The accused was sentenced to five years' imprisonment.

The Court ruled that Mr Vrdoljak, acting contrary to international humanitarian law, in particular Article 3(1)(a) and (c) common to the four Geneva Conventions of 12 August 1949, inhumanely treated prisoners by mentally and physically abusing them, and inflicted great physical and mental suffering upon them. Under the Bosnian Criminal Code, the offences and mode of liability were found to violate Article 173(1)(c) and fall under Articles 29 (related to accomplices) and 180(1) (individual criminal responsibility).

The Court also found that the applicability to the case of the 2003 Criminal Code and its system of penalties – adopted after the commission of the crimes – did not violate the principle of legality. The Court pointed out that the crime for which the accused was found guilty constitutes a crime under international customary law and thus falls under 'general principles of international law' stipulated under Article 4a of the Law on Amendments to the Criminal Code

11 Court of Bosnia and Herzegovina, case of Vrdoljak Ivica for the criminal offence of crimes against civilians, Case No. X-KRZ-08/488, July 10 2008.

of BiH and 'general principles of law recognised by civilized nations' stipulated under Article 7(2) of the European Convention on Human Rights.

Further, the Court pointed out that the customary status of criminal responsibility for war crimes against civilians and individual responsibility for war crimes committed in 1992 was recognized by the UN Secretary-General and the International Law Commission, as well as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) jurisprudence. In its view, these institutions have established that criminal responsibility for war crimes against civilians constitutes a peremptory norm of international law or *jus cogens*. Such conclusion, according to the Court, was confirmed by the Study on Customary International Humanitarian Law conducted by the ICRC, namely its Rules 156, 151 and 158.

The Court also referred to UN General Assembly Resolution 95(I) from 1946 as well as to work by the International Law Commission referring to the Nuremberg Charter.

### *Appeals Decision,* Prosecutor v. Nikola Andrun*, Court of Bosnia and Herzegovina, Section I for War Crimes, Appellate Panel, 19 August 2008*[12]

The Appellate Panel of Section I for War Crimes of the Court of Bosnia and Herzegovina revoked the first-instance verdict against Mr Andrun, whereby he was found guilty of the criminal offence of war crimes against civilians and sentenced to 13 years' imprisonment, and on 19 August 2008 delivered the second-instance verdict, raising the sentence to 18 years' imprisonment.

The Appellate Court ruled that the accused – a former Deputy Camp Commander in the municipality of Capljina belonging to a brigade of the Croat Defence Council (HVO) – acted contrary to Article 3(1)(a) and (c) common to the four Geneva Conventions of 12 August 1949, committing the criminal offence of 'crimes against civilians'.

The Court then found the accused guilty of participating in killings and acts of torture and inhuman treatment at the Gabela camp, during the period from June to September 1993. Under the Bosnian Criminal Code, he committed the criminal offence of crimes against civilians in violation of Article 173(1)(c) in conjunction with Article 29 (which refers to accomplices).

The legal issues in this case included the legality of applying the 2003 Criminal Code and its system of penalties to acts committed in 1993. As in other cases, the Court dismissed the arguments, basing itself on the fact that the crimes constituted an offence under customary international law.

12 Court of Bosnia and Herzegovina, case of Andrun Nikola for the criminal offence of war crimes against civilians, Case No. X-KRZ-05/42, 19 August 2008.

### *Appeals Decision,* Prosecutor v. Radmilo Vukovic*, Court of Bosnia and Herzegovina, Section I for War Crimes, Appellate Panel, 13 August 2008*[13]

On 13 August 2008, the Appellate Panel of Section I for War Crimes acquitted the accused – a member of the military forces of the so-called Serb Republic of Bosnia and Herzegovina – of the charges of war crimes against civilians.

The first-instance Court had ruled that the accused, acting contrary to the rules of international humanitarian law, had forcibly had sexual relations with a detainee, violating Article 3(1)(a) and (c) and Article 27(2) of the 4th Geneva Convention of 12 August 1949, and Article 173(1)(c) and (e) of the Criminal Code of BiH. Mr Vukovic was then sentenced to five and a half years' imprisonment.

The Appellate Panel argued, in reversing the decision of the first-instance Court, first, that an armed conflict was under way when the act was committed, and that sexual intercourse had indeed taken place between the accused and the victim in the period between 10 June 1992 and late August 1992, in the Foca municipality. This had further resulted in pregnancy and childbirth. The accused was proved to be the biological father of the newborn child.

The Appellate Panel, however, then considered that there was not sufficient evidence to convict the accused of rape, questioning the validity of the alleged victim's testimony and that of her sister, arguing that they had imperilled their own credibility when some of their statements were found to be inconsistent. According to the Panel,

> the testimony of the injured party must not raise any suspicion as to its exactness and truthfulness, credibility and integrity of the witness exactly because the act of rape, as a rule, is never attended by a witness who might decisively support the testimony of the injured party … However, having carefully analysed the injured party's testimony, the Panel noted a whole range of unacceptable inconsistencies and lack of logic in her description of the event.'

Not convinced that the evidence and testimonies proved the charges beyond reasonable doubt, and in application of the principle of *in dubio pro reo*, Mr Vukovic was acquitted on all counts.

### Prosecutor v. Zrinko Picic*, Court of Bosnia and Herzegovina, Section I for War Crimes, 28 November 2008*[14]

On 28 November 2008 the Court of Bosnia and Herzegovina, Section I for War Crimes, found the accused – a member of the Croat Defence Council (HVO) in the

13 Court of Bosnia and Herzegovina, case of Radmilo Vukovic for the criminal offence of war crimes against civilians, Case No. X-KRZ-06/217, 13 August 2008.

14 Court of Bosnia and Herzegovina, Section I for War Crimes, case of Pincic Zrinko, for the criminal offence of war crimes against civilians, Case No. X-KR-08/502, 28 November 2008.

capacity of a secretary of Hrasnica HVO – guilty of 'crimes against civilians' committed against Serb civilians in the Konjic municipality from November 1992 to March 1993. Mr Pincic was sentenced to nine years' imprisonment.

The Court ruled that the accused, acting contrary to the rules of international humanitarian law, had violated Article 3(1)(a) and (c) and Article 27(2) of the 4th Geneva Convention of 12 August 1949, and Article 173(1)(e) of the Criminal Code of BiH, by coercing another person to have sexual intercourse by threat of immediate direct attack upon her body. The charge also referred to Article 180(1) of the code, on individual criminal responsibility.

The Court also found that the applicability of the Criminal Code and its system of penalties – although adopted after the commission of the crimes – did not violate the principle of legality. As with other similar cases, the Court based its decision on the fact that the crime for which the accused was found guilty constitutes a crime under international customary law and thus would fall under the wording 'general principles of international law' found in Article 4a of the Law on Amendments to the Criminal Code of BiH. Further, the Court pointed out that the customary status of criminal responsibility for war crimes against civilians and individual responsibility for war crimes committed in 1992 was recognized by reports from the UN Secretary-General and the International Law Commission, as well as ICTY and ICTR jurisprudence. In its view, these institutions have established that criminal responsibility for war crimes against civilians constitutes a peremptory norm of international law or *jus cogens*. Such conclusion, according to the Court, was confirmed by the Study on Customary International Humanitarian Law conducted by the ICRC, namely Rules 156, 151 and 158 of the Study.

## Prosecutor v. Sreten Lazarevic et al., *Court of Bosnia and Herzegovina, Section I for War Crimes, 29 September 2008*[15]

On 29 September 2008 the Court of Bosnia and Herzegovina found four Bosnian Serbs, members of the reserve police forces of the Zvornik Public Security Station, guilty of 'war crimes against civilians'. The Court ruled that the accused, in the period from May 1992 until March 1993, acted contrary to the rules of international humanitarian law, in particular Article 3 common to the four Geneva Conventions, when civilians from the Zvornik municipality were unlawfully detained and inhumanely treated in the premises of the Misdemeanour Court and the building of DP Izvor, causing them serious suffering and the violation of their bodily integrity.

According to the Court, Mr Lazarevic, as deputy warden of the prison, perpetrated, aided and abetted, and failed to prevent or punish the inhuman treatment of the unlawfully detained civilians, violating Article 173(1)(c), with a mode of liability falling under Articles 29 (referring to accomplices), 31 (accessory)

15 Court of Bosnia and Herzegovina, case of Sreten Lazarevic et al. for the criminal offence of war crimes against civilians, Case No. X-KR-06/243, 29 September 2008.

and 180(2) (command responsibility) of the Criminal Code of BiH. He was sentenced to ten years' imprisonment.

According to the Court, on several occasions he permitted unauthorized persons – groups of Serb soldiers called Gogicevci and others – to enter the prison grounds by unlocking the doors for them or by allowing other guards to do so without being punished, thus enabling these persons to torture and abuse the prisoners.

As for Mr Stanojevic, a guard in the prison, the Court found that he treated the detained civilians inhumanely, committing the criminal offence of 'war crimes against civilians' referred to in Article 173(1)(c), in conjunction with Article 29 (accomplices) of the Bosnian Criminal Code. He was sentenced to seven years' imprisonment.

Two of the accused (Mile Markovic and Slobodan Ostojic), also guards at the prison, were also found guilty of treating detained civilians inhumanely, and were each sentenced to five years' imprisonment.

In all cases, the Court reasoned that the charge of inhuman treatment as a violation of the laws and customs of war was based on Article 173 of the Criminal Code, in conjunction with common Article 3 of the Geneva Conventions, which sets forth a minimum core of mandatory rules and reflects the fundamental humanitarian principles. The trial panel also established that all the persons deprived of their liberty and imprisoned on the premises of the Misdemeanour Court and the building of DP Izvor, enjoyed protection under the Geneva Conventions at the time of their arrest.

## Norway

### Public Prosecutor v. Misrad Repak, *Oslo District Court, 2 December 2008*[16]

The District Court in Oslo convicted Mr Mirsad Repak, a Bosnian and Norwegian national, to five years in prison on eleven counts of unlawful detention of civilians, falling under Section 103(h) of the new Norwegian Criminal Code.[17] He was acquitted, however, of all charges of rape, aggravated assault and crimes against humanity, covered in Section 102. The accused, who fled to Norway after the Balkan wars and was granted Norwegian citizenship, had been a member of the Croatian Defence Forces (HOS) militia group that operated a prison camp in Dretelj, Bosnia and Herzegovina. He was ordered to pay US$57,000 in compensation and damages to eight plaintiffs.

As for reference to international humanitarian law, two issues were raised by the Court: first, whether there was an armed conflict going on at the time of the events, a necessary determination to link the conduct to the war and label it as a

16 *Public Prosecutor v. Misrad Repak*, Case Number: 08-018985MED-OTIR/08, 2 December 2008.
17 Adopted in March 2008. See above.

war crime; and, second, whether the victims would fall under the category of 'protected persons' as determined by the Geneva Conventions of 12 August 1949. After easily affirming the first issue, the Court then gave primary importance to the determination of the status of each of the victims named in each count, reaching a decision for each of them.

Consideration was also given to the principle of legality. With respect to counts involving the crimes against humanity found in Section 102 of the Criminal Code, the Court dismissed the charges because at the time the offences were committed (June–August 1992) there were no provisions in Norwegian legislation penalizing the conduct in the same terms as the current code. The Constitution of Norway prohibits legislation from having retroactive effect.

Regarding the war crimes for which Repak was convicted, however, the Court determined that provisions in Section 223 of the 1902 Penal Code, in force at the time of the events, protected the same interests reflected in the wording of Section 103(h) of the new legislation. This was interpreted to mean that the retroactive effect prohibited in the Constitution would not apply.

## United States

### *Appeals Decision,* Huzaifa Parhat v. Robert M. Gates, Secretary of Defense et al.*, US Court of Appeals for the District of Columbia Circuit, 20 June 2008*[18]

Acting as Court of Appeals for the Combatant Status Review Tribunal (CSRT), the US Court of Appeals for the District of Columbia Circuit was called upon to determine the legality of the CSRT's determination of the appellant in the case as an 'enemy combatant'. In concluding that the record upon which such a determination had been made was insufficient and not able to support the 'preponderance of the evidence' standard of proof required by the Detainee Treatment Act of 2005, the Court ordered the government either to release or to transfer the appellant, or expeditiously convene a new CSRT that could determine his status in a way consistent with the Court's opinion. It further established that, following the US Supreme Court's determination in *Boumedienne* v. *Bush*, its decision was without prejudice to the appellant's ability to seek release via a writ of habeas corpus.

The appellant in the case was an ethnic Uighur who fled to Afghanistan from his home in the People's Republic of China in May 2001 in opposition to the policies of the Chinese government. When their camp was destroyed by a US aerial strike, he and 17 other Uighurs crossed over to Pakistan. Around December 2001, he had been handed over to the US military by Pakistani officials and

18 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.

remained imprisoned in the US Naval Base at Guantánamo Bay, Cuba, since June 2002.

With regard to the evidence presented, the Court showed concern with the use of assertions of unidentified individuals, as well as with the government's contention that some of the evidence was reliable because it had been presented in at least three different intelligence documents. On the first count, the Court emphasized that, although it did not suggest that hearsay evidence would never be reliable, it would still be necessary to use it in a form that would permit the CSRT and the Court to test its reliability. As for the information being found in different documents, the Court held that there was no basis for concluding that the information found in them had come from independent sources.

The Court also denied the government's motion to protect from public disclosure all non-classified record information labelled as 'law enforcement sensitive', as well as the names and 'identifying information' of all US government personnel mentioned in the record. Although it did accept *a priori* that some of this information could need protection, the Court rejected the government's generic explanation of such a requirement as being equally applicable to all the detainees' cases pending before the Court. In the Court's opinion, this would effectively allow the government, and not a judicial body, to determine unilaterally whether information is protected. The judgment finally directed the government to file a renewed motion for protection, accompanied by a copy of the record identifying the specific information it seeks to designate and pleadings explaining why the protection of that specific information is required.

### *Rehearing* en banc, Ali Saleh Kahlah al-Marri v. Commander John Pucciarelli, *United States Court of Appeals for the Fourth Circuit, 15 July 2008*[19]

The Court of Appeals for the Fourth Circuit reversed and remanded for evidentiary proceedings in the case of Ali Saleh Kahlah al-Marri, in order to determine whether he qualifies as an 'enemy combatant' and thus may be subject to military detention. Mr al-Marri, a citizen of Qatar who lawfully entered the United States on 10 September 2001, was detained on 12 December 2001 as a material witness in the government's investigation of the 11 September 2001 attacks.

Although he was first charged with 'possession of unauthorized or counterfeit credit card numbers with the intent to fraud' and taken before federal district courts in New York and Illinois, on 23 June 2003 the US President signed an order determining that Mr al-Marri was an 'enemy combatant', thus ordering

19 United Status Court of Appeals for the Fourth Circuit, *Ali Saleh Kahlah Al-Marri v. Commander John Pucciarelli, USN Consolidated Naval Brig*, Docket No. 06-7427, argued on 31 October 2007 and decided on 15 July 2008.

the Attorney General to surrender the suspect to the Secretary of Defense. Since that time, he has been held in military custody at the Naval Consolidated Brig in South Carolina. On 8 July 2004, the counsel for Mr al-Marri filed a *habeas* petition before the District of South Carolina. First dismissed by the District Court, it was then granted on appeal (see *al-Marri v. Wright*, 4th Circuit, 2007). On the government's motion for rehearing, the Court of Appeals for the Fourth Circuit vacated the judgment, reconsidering the case *en banc*.

The parties presented two principal issues of contention: first, whether, assuming the government's allegations about Mr al-Marri to be true, Congress had empowered the President to detain Mr al-Marri as an enemy combatant; and, second, assuming Congress had empowered the President to detain al-Marri as an enemy combatant provided the government's allegations against him are true, whether Mr al-Marri had been afforded sufficient process to challenge his designation as an enemy combatant.

On the first count, the *en banc* court held, by 5 votes to 4, that Congress indeed had empowered the President to detain Mr al-Marri. On the second count, it held again by 5 votes to 4 that even assuming that the allegations against Mr al-Marri were true, he had not been afforded sufficient process to challenge his designation as an enemy combatant.

The decision revolved around the authority of the President to determine the status of Mr al-Marri as an 'enemy combatant', based on the Authorization for the Use of Military Force, passed by Congress following the 2001 attacks in New York. Seen as an exception to the 5th Amendment to the Constitution, the Court found that Congress could constitutionally authorize the President to order the military detention, without criminal process, of persons who qualify as 'enemy combatants', but would then be obliged to proffer evidence to demonstrate that the individual in question qualifies for such exceptional treatment. As Judge Diana Gribbon Motz stated in her opinion, the ruling will 'at least place the burden on the Government to make an initial showing that the normal due process protections available to all within this country are impractical or unduly burdensome in al-Marri's case and that the hearsay declaration that constitutes the Government's only evidence against al-Marri is the most reliable available evidence supporting the Government's allegations'.

## *Memorandum Order,* Lakhdar Boumediene et al. v. George W. Bush et al.*, United States District Court for the District of Columbia, 20 July 2008*[20]

Following the US Supreme Court's determination that persons being held at the US Naval Base at Guantánamo Bay, Cuba, were entitled to a prompt habeas corpus hearing, the US District Court for the District of Columbia ruled on 20 November

20 United Status 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.

2008 for the release of Lakhdar Boumediene and four other Algerian nationals, rejecting the government's contention that they are 'enemy combatants'. A sixth detainee, Mr Belkacem Bensayah, was found to be lawfully detained. The case was the first hearing on the government's evidence for holding detainees at Guantánamo.

The case required the Court to rule on two important issues: first, to determine the most appropriate definition of 'enemy combatant' to be used throughout the proceedings. This would then be followed by a decision on the government's burden of proving 'by a preponderance of the evidence', the lawfulness of the petitioner's detention', that is, whether or not the petitioners were, indeed, enemy combatants.

As for the first issue, the Federal Court filed an order on 27 October 2008, by which it stated that 'fortunately, there is a definition that was crafted by the Executive, not the courts, and blessed by Congress which in my judgment passes muster under both the Authorization for the Use of Military Force AUMF and Article II [of the Constitution]'. Such definition describes an 'enemy combatant' as 'an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces'.

Applied to the petitioners, the government contended that five of them were enemy combatants because they had planned to travel from Bosnia to Afghanistan, in order to take up arms against the US military. Such plan would constitute 'support' of Al Qaeda under the definition of 'enemy combatant'. As evidence, the respondents submitted information contained in a classified document from an unnamed source.

The judge, based on *Parhat* v. *Gates*, ruled that while the government had provided some information about the source of the information's credibility and reliability, it had not provided the Court with enough information adequately to evaluate the credibility and reliability of the source's information. Thus while such evidence would definitely serve the intelligence purposes for which it was prepared, 'to allow enemy combatancy to rest on so thin a reed would be inconsistent with this Court's obligation under the Supreme Court's decision in *Hamdi* to protect petitioners from the risk of erroneous detention'.

The same was not the case for Mr Bensayah. Evidence presented by the government in this regard included the same source as before, but supported by a series of intelligence reports based on a variety of sources and evidence, which convinced the judge. The Court concluded that the government had established by a preponderance of the evidence that it is more likely than not that Mr Bensayah not only planned to take up arms against the United States but also to facilitate the travel of unnamed others to do the same. Such activities were considered sufficient to constitute 'direct support to Al Qaeda in furtherance of its objectives' and thus 'support' within the meaning of the 'enemy combatant' definition.

## United States of America v. Salim Ahmed Hamdan, *Military Commissions at Guantánamo Base, 06 August 2008*

The first verdict by a military commission for war crimes established by the Military Commissions Act (passed by Congress in 2006) was made public on 6 August 2008, convicting Mr Salim Ahmed Hamdan, a former driver for Osama bin Laden, of the charge of providing material support for terrorism. The panel, composed of six military officers, also found Mr Hamdan not guilty of conspiracy and sentenced him to 66 months' imprisonment.

The charge of conspiracy was based on two specifications: one asserting that Mr Hamdan was part of a larger conspiracy with senior Al Qaeda leaders and shared responsibility for the attack on the World Trade Center in September 2001 and other incidents, the other, that Mr Hamdan was part of a conspiracy to kill Americans in Afghanistan in 2001. Both were rejected.

The Commission's sentence was lower than the prosecution's request for no less than 30 years. The judge duly informed the panel that he would credit Hamdan for the 60 months he had already been held at the military prison in Cuba. On 30 October 2008 the judge refused a government motion that he reassemble the panel and tell them that Hamdan was entitled to no credit for time already served. The government also argued that, the military commission's sentence notwithstanding, it could choose to hold Mr Hamdan in detention indefinitely due to his status as an 'enemy combatant'. Mr Hamdan was transferred from Guantánamo in November 2008 to complete his sentence in Yemen.