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USA: Federal judge orders release of five of six Guantánamo detainees seized in Bosnia in 2002

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This news is very encouraging. We've waited so many years. I call on the Bosnian authorities to fix the mistake that was made seven years ago and urgently call for the return of all six men to Bosnia.

Nadja Dizdarević, wife of Boudella El Hadj, 20 November 2008

On 20 November 2008, Judge Richard Leon of the US District Court for the District of Columbia (DC) ordered five of six men seized in Bosnia and Herzegovina (BiH) in January 2002 and taken to the US naval base in Guantánamo Bay, Cuba, where they have been held without charge or trial ever since, to be released. The government could keep the sixth in detention, Judge Leon ruled.

Lawyers for the sixth man, Belkacem Bensayah, have said he will appeal. Amnesty International does not yet know if the government will appeal in the other five cases. The organization considers that in any event the assertion of laws of war, as opposed to criminal law, as the grounds for the detention of these men is inconsistent with international law, and that all six should be released now unless they are to be immediately charged with criminal offences for trial in ordinary US federal court.

The six men become the first of the approximately 230 men still held in Guantánamo and labelled by the USA as so-called "enemy combatants" to have their habeas corpus petitions ruled on following the US Supreme Court's judgment in June 2008 that the Guantánamo detainees have the right to challenge the lawfulness of their detention. Following that decision, the cases were remanded to the District Court for habeas corpus proceedings.

While the Supreme Court ruling was a crucial step towards bringing the rule of law to the Guantánamo prison camp, no one should lose sight of the bigger picture. Here that picture is one of six men not "captured" on any "battlefield", but arrested by civilian police on territory of an allied government far from any armed conflict. The authorities there quickly handed them over to US military forces, fearing negative diplomatic and other consequences, including to the country's peace process, if it refused to do so, according to its former Foreign Minister, Prime Minister and High Representative.¹ Not long before, President George W. Bush had put countries on warning that "either you are with us, or you are with the terrorists. From

this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.”²

The men were handed over to the USA despite a ruling by the Federation of Bosnia and Herzegovina (FBiH) Supreme Court that there was no basis for their detention and an order from the Human Rights Chamber of Bosnia and Herzegovina against their removal from the country. Since being handed over, the human rights of Mustafa Ait Idir, Belkacem Bensayah, Lakhdar Boumediene, Boudella El Hadj, Nechla Mohamed and Saber Lahmar Mahfoud have been systematically violated by the USA, including rights they should have received as part of the ordinary criminal process that would normally apply in their situation, including the presumption of innocence. Justice and remedy are years overdue.

The question considered by District Court Judge Richard Leon was whether the US government had justified the six men’s continued detention as “enemy combatants”. “Enemy combatant” is a label used and abused by the USA in the “war on terror” as part of its manipulation of the law of war and its disregard of international human rights law. These six men should from day one have been treated as criminal suspects, subject to international human rights law and principles of criminal law. It is now past day 2,500 of their detention.

The government had a relatively low standard of proof to meet: it needed only to show that there was a factual basis, relating to a lawful ground of detention, on “a preponderance of the evidence”. The government filed classified and unclassified information with the court in support of its bid to keep the men in Guantánamo. The classified evidence was heard in closed hearings. Even under these circumstances, Judge Leon found that five of the six men should be released.

US officials have undermined the presumption of innocence in relation to the Guantánamo detainees, including by repeatedly branding them as “terrorists”. In this case, a few days after the six men were seized in Bosnia, President Bush referred to them in his State of the Union address as “terrorists who were plotting to bomb our embassy” in Sarajevo. In normal criminal cases, this kind of public condemnation before any trial is avoided as it risks prejudicing any jury and so compromising the integrity of the criminal trial. The USA used the same allegation to justify their detention without charge or trial for the subsequent six years that it managed to keep the detentions from judicial review. In the proceedings before Judge Leon in recent weeks, the government dropped that accusation. Instead it has taken to vaguer allegations of the men’s “association” with “al-Qa’ida and other suspected terrorists” and of their alleged attempt “to travel to Afghanistan to engage US forces” in seeking to justify their detention as “enemy combatants”. In the case of Belkacem Bensayah, the US government alleged that he “is an al-Qaida member [and] was the primary al-Qaida facilitator and financier in Bosnia and Herzegovina”.

In the unclassified portion of its briefing to Judge Leon, the government maintained that the six men “are lawfully subject to detention pursuant to, among other things, the President’s powers as Commander in Chief and the Authorization for the Use of Military Force” (AUMF). The former power has been used to justify a range of human rights violations by the USA in the “war on terror”. The latter, a broadly worded resolution passed by Congress in the immediate wake of the 9/11 attacks, has also repeatedly been exploited by the administration to justify violations of the USA’s international obligations.³ Relying on either of these as a purported

legal basis to detain these men in these circumstances is not consistent with the prohibition of arbitrary detention under international law.

Throughout the “war on terror” the US administration has sought to maintain executive control over the detainees it designates as “enemy combatants”, and has shown itself willing to exploit public fear, litigation and secrecy and to manipulate individual cases, to that end. Its machinations over the past seven years have damaged the rule of law and respect for basic human rights principles. It can begin to repair the damage wrought by this particular case by bringing these men to fair trial in federal court or releasing them back to their families.

Background information

Mustafa Aït Idir, Belkacem Bensayah, Lakhdar Boumediene, Boudella El Hadj, Nechla Mohamed and Saber Lahmar Mahfoud, all married with children, were arrested in October 2001 by FBiH police on suspicion of involvement in a plot to attack the US and UK embassies in Sarajevo. On 17 January 2002 the FBiH Supreme Court, finding there was no basis to hold the men, ordered their release and shortly afterwards the Sarajevo prison authorities freed them. The same day the Human Rights Chamber of Bosnia and Herzegovina issued an interim order for provisional measures to be taken to prevent the deportation, expulsion or extradition of four of the men. Despite this, FBiH police seized all six men on the day of their release and handed them over to US authorities, and they were subsequently transported to the US naval base at Guantánamo Bay, Cuba.

The six have been held at Guantánamo for nearly seven years without charge. Their US lawyers say that all have been subjected to torture or other cruel, inhuman or degrading treatment, including by extended periods in solitary confinement, exposure to extreme temperatures, sleep deprivation, and inadequate opportunity for exercise. The men are also said to have suffered from various medical conditions caused or exacerbated by the conditions of detention.

In *Boumediene v. Bush* on 12 June 2008, a case brought on behalf of Guantánamo detainees, including these six men, the US Supreme Court declared as unconstitutional attempts by the US administration and Congress, through the 2006 Military Commissions Act (MCA), to strip the detainees of their right to habeas corpus. Neither their designation as “enemy combatants” nor their presence at Guantánamo, the Court said, erased the fact that they were “entitled to the privilege of habeas corpus to challenge the legality of their detention”. At the time of the *Boumediene* ruling, there were approximately 200 habeas corpus petitions pending before the District Court, blocked from review until that point.

Following the *Boumediene* decision, the Guantánamo cases were remanded to the District Court for “proceedings consistent with this opinion”. The *Boumediene* ruling left open the details of what process and remedies the detainees were due, however. It said that it was “uncontroversial” that “the habeas privilege entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law”, and it said that “to function as an effective and meaningful remedy in this context, the court conducting the collateral proceeding must have some ability to correct any errors, to assess the sufficiency of the Government’s evidence, and to admit and consider relevant exculpatory evidence”. However, it also said that it was not addressing whether the President had the authority to detain the Guantánamo detainees or the “content of the law that governs petitioners’ detention.” These and other questions were “yet to be determined”, in the first instance by the District Court. On the question of remedy, the Supreme Court said that

“the habeas court must have the power to order the conditional release of an individual unlawfully detained”, although it did not indicate what such conditions might be.

In the District Court, it was decided that a single judge, Senior District Judge Thomas Hogan, would develop and coordinate procedures and issues common to the cases before transferring them to the various judges to hear the merits of each individual’s challenge to his detention. Judge Richard Leon was one of two judges who declined to allow the cases over which he was presiding to be included in that process of coordination (the other being Judge Emmet Sullivan). On 6 November 2008, Judge Hogan set the rules that will govern the 113 habeas corpus petitions, involving about 200 detainees, that are before him. On 18 November, the administration challenged these rules, asserting among other things that it would be forced to reveal too much classified information.

Amnesty International has not yet seen a transcript of Judge Leon’s ruling, which was made orally from the bench. His ruling is non-binding on any other judge on the District Court.

Judge Leon’s ruling is the first on the merits of cases of individuals the government maintains are “enemy combatants”. A ruling in October 2008 by Judge Ricardo Urbina, ordering the government to release into the USA 17 Uighurs held at Guantánamo, concerned the cases of men whom the USA does not consider “enemy combatants” but seeks to continue to hold at Guantánamo.⁴

There are approximately 250 men still held in Guantánamo. Approximately 520 detainees have been released from Guantánamo, none by judicial order, all by executive decision.

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¹ Declaration of Zlatko Lagumdžija (“[The Deputy US Ambassador] made clear that if Bosnia did not comply with a US demand that the men... be arrested, the US would withdraw its Embassy staff and its support for BiH... I believed in such a scenario the United States would fulfil its threat and would withdraw support for further state-building in Bosnia, which would have had unforeseeable negative consequences for this country”). Declaration of Alija Behmen (“The representatives of the US Embassy made it unequivocally clear that unless the authorities of Bosnia and Herzegovina arrested the persons whom the US suspected, the United States would withdraw all Embassy personnel and would stop any further US support to Bosnia and Herzegovina. I remember that [the Deputy US Ambassador] told me then something like ‘and then let God protect Bosnia and Herzegovina’”). Declaration of Wolfgang Petritsch (“The United States’ threat to withdraw from the Bosnian peace process, if carried out, would have endangered the entire peace process in Bosnia”). *Boumediene v. Bush*, Petitioners’ public traverse to the government’s returns to the petition for habeas corpus, US District Court for DC, 17 October 2008.

² Address to a joint session of Congress and the American people, 20 September 2001.

³ See, for example, USA: Many words, no justice: Federal court divided on Ali al-Marri, mainland ‘enemy combatant’, 4 August 2008, <http://www.amnesty.org/en/library/info/AMR51/087/2008/en>.

⁴ See USA: Justice Years Overdue: Federal court hearing for Uighur detainees in Guantánamo, 7 October 2008, <http://www.amnesty.org/en/library/info/AMR51/110/2008/en>; USA: Federal judge orders release of Uighurs held at Guantánamo, government appeals, 8 October 2008, <http://www.amnesty.org/en/library/info/AMR51/111/2008/en>; USA: US Court of Appeals blocks release of Guantánamo Uighurs as government resorts to ‘scare tactics’, 10 October 2008, <http://www.amnesty.org/en/library/info/AMR51/113/2008/en>; and USA: Indefinite detention by litigation: ‘Monstrous absurdity’ continues as Uighurs remain in Guantánamo, 12 November 2008, <http://www.amnesty.org/en/library/info/AMR51/136/2008/en>.