Public

amnesty international

USA: Time for real change as Supreme Court rules on Guantánamo detentions

13 June 2008 **AI Index: AMR 51/061/2008**

The landmark judgment delivered on 12 June 2008 by the United States (US) Supreme Court in *Boumediene v. Bush* and *al Odah v. United States* ("*Boumediene"*) constitutes a significant step towards the restoration of the rule of law as a foundation for counter-terrorism measures by the United States of America (USA). In its ruling, the court unreservedly affirmed that the right to challenge the lawfulness of one's detention in a court of law must be given effect to the foreign nationals detained as "enemy combatants" in Guantánamo Bay, who currently number approximately 270 detainees of around 30 nationalities.

Amnesty International, joined by the Human Rights Institute of the International Bar Association, International Federation for Human Rights and the International Law Association, had provided an *amicus curiae* (friend of the court) brief to the Supreme Court in the proceedings, arguing that denial of the right of the Guantánamo detainees to challenge their detention judicially contravened international law.

The Supreme Court in *Boumediene* squarely affirmed that foreign nationals held at Guantánamo Bay are entitled, under the US Constitution, to effective means and procedures to challenge the legality of their detention before an independent and impartial court that has the power to order their release: the centuries old writ of *habeas corpus*. The Court resoundingly rejected the arguments put forth by the US administration that these men, as non-US nationals held outside the sovereign territory of the USA, are beyond the reach of this fundamental legal protection.

The Supreme Court declared as unconstitutional attempts by the administration and Congress (through the 2006 Military Commissions Act) to strip the detainees of their right to *habeas corpus*. The Court also dismissed as deficient the substitute scheme established by the administration and Congress to replace *habeas corpus* proceedings. That scheme consists of "Combatant Status Review Tribunals" (CSRTs), panels of three military officers empowered to review the detainee's "enemy combatant" status, with extremely limited judicial review of final CSRT decisions under the 2005 Detainee Treatment Act (DTA). The first CSRTs were not held

until more than two years after the detentions began. No judicial review of CSRT decisions had been undertaken at the time of the *Boumediene* decision.

The Supreme Court highlighted numerous inadequacies in the CSRT/DTA scheme that Amnesty International had raised in its own submission: restrictions (legal and practical) on a detainee's capacity to present evidence to counter the allegations against him; the authority and practice of keeping secret from the detainee evidence against him or purported grounds for his detention; deprivation of the assistance of legal counsel at critical stages of the process; the almost unbounded admissibility of out-of-court statements (hearsay); and restrictions imposed on the range of evidence the reviewing federal Court of Appeals can consider.

The Supreme Court ordered that the Guantánamo detainees, most of whom have been held in conditions of isolation and indefinite detention without charge for more than six years, be given access to a prompt *habeas corpus* hearing before the ordinary US courts. The Court affirmed that the detainees must be able effectively to challenge both the ultimate legality of the laws under which they are being held and the substance of the allegations against them.

The Supreme Court's judgment points the way for the US Government to begin to bring its detention policies and practices into compliance with its international legal obligations. Although the Court based its decision largely on US constitutional law and the principle of *habeas corpus* as applied historically in the USA and the United Kingdom, Amnesty International welcomes the ruling as consistent with an extensive body of international law and standards.

Under international human rights law, anyone who is deprived of liberty has the right to take proceedings before a court, in order that that court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful. This right is recognised in universal international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), to which the USA is party. The United Nations Human Rights Committee, acting under the ICCPR, has underscored that this right can never be restricted or departed from, even in states of emergency that may threaten the life of the nation.[1]

The Supreme Court reached its conclusions expressly cognizant of the challenges faced by governments in responding to the real dangers posed by the threat of terrorist attacks, and the role potentially to be played in that respect by intelligence agencies and military forces. Yet, strikingly, it emphasised equally that:

[1] See, e.g., General Comment 29 (2001), paragraph 16.

> Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.

The Court concluded that:

> The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The [Constitution's] Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

Detainees held at Guantánamo, many for more than six years, have been deprived of protections they were due under the Geneva Conventions and international human rights law; have been subjected to ill-treatment, including, in some cases torture; have been held in prolonged incommunicado detention, including in some cases in secret locations (a practice amounting to enforced disappearance). The right of access to effective *habeas corpus* is intended, under international law, to help prevent and redress these violations of human rights.

The judgment of the Supreme Court does not in itself *guarantee* that these men will finally have an opportunity to raise the abuses to some authority other than their captors. Nor does the judgment mandate that such abuses be properly investigated, examined, and remedied as international law requires. However, it removes a key obstacle to vindicating basic rights ending the lawless environment of isolation, enforced silence, invisibility, and unrestrained executive power in Guantánamo Bay.

President George W. Bush's immediate response to the judgment was to side with the four Justices who dissented from the majority opinion. The President stated that the dissenters had been concerned about national security, and that the administration would "study this opinion, and we'll do so with this in mind, to determine whether or not additional legislation might be appropriate, so that we can safely say, or truly say to the American people: We're doing everything we can to protect you." Amnesty International hopes that this response is not a signal the administration will not adequately address the substance of the Court's ruling and, as it has done with previous Supreme Court decisions relating to Guantánamo, contrive a means to circumvent the judgment. The Military Commissions Act, for example, was the hasty legislative response to the Supreme Court's June 2006 *Hamdan v. Rumsfeld* judgment, and was passed by Congress under pressure to prove its national security credentials.

The US Justice Department has also expressed its disappointment with the *Boumediene* decision. In a statement, the Department said that "The Court recognized that an adjustment to typical habeas proceedings may be appropriate, but required the hundreds of actions

challenging the detention of enemy combatants at Guantánamo to be moved to district court. The Department is reviewing the decision and its implications on the existing detainee litigation." Amnesty International notes that following the landmark Supreme Court ruling, *Rasul v. Bush,* in 2004, the administration pursued a litigation strategy that effectively kept the detainees in the legal limbo in which they had already been held for two years. The organization also notes that a common refrain from administration officials in seeking to block *habeas corpus* is that such proceedings place too great a burden on the authorities during a time of "war". Yet the Supreme Court in *Boumediene* noted that "The Government presents no credible arguments that the military mission at Guantánamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims".

Amnesty International regrets that the administration appears rigid in its pursuit of military commission trials at Guantánamo. The Justice Department statement of 12 June continues: "While we disagree with the ruling, it is important to note that the *Boumediene* case did not concern military commission trials... Military commission trials will therefore continue to go forward. To the extent that *Boumediene* addresses matters that could affect the commission trials, those matters will initially be litigated before the military commissions themselves..."

Amnesty International urges the administration to reconsider. The organization considers that the surest way to avoid further rebuke by the Supreme Court, is for the administration to end the serious and systematic violations of human rights that have been a hallmark of its detention programmes undertaken in the name of the "war on terror". The time is long overdue for the US government to bring its detention laws, policies and practices in line with international standards. It must stop all interference with the access of detainees at Guantánamo to civilian courts. It should close Guantánamo promptly, abandon the fundamentally unfair military commission proceedings and either release or charge and try detainees held there in US federal courts, without recourse to the death penalty.

See also:

USA: No substitute for *habeas corpus*: Six years without judicial review in Guantánamo, November 2007, http://www.amnesty.org/en/library/info/AMR51/163/2007/en

Field Code Ch

And Amnesty International (with others) *amicus curiae* brief in *Boumediene v. Bush*, http://www.mayerbrown.com/public_docs/probono_Amnesty_International.pdf

Field Code Ch