Justice 12/07/04

Supreme non-decision

By Paul Greenberg

Once upon a clearer time, prisoners captured on the battlefield could be held for the war's duration. But what is the duration of the 'war on terror'? The US Supreme Court doesn't say

HAVING given a number of prisoners detained in the War on Terror access to the US judicial system, the Supreme Court solemnly ruled last week that such prisoners should have access to the country's judicial system.

Is this a decision or a tautology?

This much is clear: The Supreme Court rejected the executive branch's blanket claim to hold combatants, or at least anyone it deems a combatant, for the duration of this war - that is, approximately forever. After all, as Associate Justice Antonin Scalia pointed out, the writ of habeas corpus has not been suspended - as it was during the Civil War. And even then, a number of lawyers, not to mention whole armed divisions, thought Abraham Lincoln was doing entirely too much to save the Union.

So will every GI sent into battle now have to be accompanied by a lawyer qualified to represent the enemy as soon as said enemy is shot, captured or otherwise hindered? Let's hope that's not what this decision says. But it isn't easy to tell.

Yes, the Justice Sandra Day O'Connor has written another one of her wispy decisions for the majority - or maybe just plurality - that doesn't decide very much. To win agreement, she tends to cloud over any differences in legal fog. Who says there's no place for mysticism in the law of the land?

The canyon-sized gaps in her opinions are filled in with high-sounding platitudes. For example: "History and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." (Especially when history can't think of anything to teach but crashing banalities.)

Does Justice O'Connor want some court somewhere to determine an enemy combatant is really an enemy combatant? That shouldn't be too difficult. But one suspects she wants much more. Just how much more isn't clear. That is why justices take refuge in the cloudbanks of law.

Is each detainee held in the War on Terror - which now encompasses Afghanistan, Iraq and other points unforeseeable - a plaintiff until some court somewhere declares him an enemy combatant? Just how and when and by whom is his legal status determined? The Supreme Court doesn't say.

Maybe we should be grateful the court still allows the US armed forces to take prisoners - a practice that, when you think about it, severely limits their liberty, pursuit of happiness, and other rights appertaining thereto.

Once upon a clearer time, prisoners captured on the battlefield could be held for the war's duration, but what's the duration of this new world war in which the World Trade Centre became a battlefield? The court doesn't say. Surely the court doesn't intend simply to loose the hundreds of prisoners now being held at Gitmo on a vulnerable world. At least, let's hope it doesn't.

Justice Antonin Scalia, in one of his standard stinging rebukes to those who would replace the law with vague truisms, raised the spectre of reducing prisoner-of-war camps into only holding rooms for the criminal courts, with the 600 prisoners at Guantanamo being just the first in a long, long line:

"From this point forward, federal courts will entertain petitions from these prisoners, and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the executive's conduct of a foreign war."

Note the long-running, open-ended circus of a trial now being afforded Zacarias Moussaoui - who was either the designated 20th bomber on September 11, 2001, or engaged in an entirely different barbarity. Could this spectacle be merely the precursor of farces galore?

Let's hope it isn't. One hint of wisdom to emerge from the murk of the court's decision is Justice O'Connor's concession that "there remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." The government has set up military tribunals for such cases but has studiously neglected to use them. Only now, almost three years after September 11, are the first military trials getting under way.

Military tribunals offer one way out of all this confusion. The administration should seize it. If it had done so in the first place, they might never have had to be non-decided by this Supreme Court.

COURTESY WASHINGTON TIMES

Justice 8/7/04

Now to implement the World Court 'wall' ruling

By Chibli Mallat

Now that the ICJ has ruled Israel's security fence illegal, the imperative rests with ensuring the practical implementation of the court's decision

THE "wall ruling," or what is officially known as "the advisory opinion" of the International Court of Justice on "the legal consequences of the construction of a wall in occupied Palestinian territory" has established five important principles by a majority of 14 judges (against one):

1. The court is competent in the matter raised by the General Assembly.
2. The separation wall violates international law.
3. Israel must immediately stop building the wall, and proceed with its dismantlement.
4. Israel must compensate those who were harmed by the wall.
5. The General Assembly and the Security Council must take the measures needed to end the legal violation established by the building of the wall.

The court, by a majority of 13, further established a sixth legal principle:

6. It is the duty of all states to abide by the ruling, refuse any recognition of the wall or assistance in perpetuating it, and it is a further duty incumbent on all parties to the Fourth Geneva Convention to ensure that Israel abide by international humanitarian law as established by the convention.

There will be little dissent internationally on the signal victory achieved for Palestinian rights, as well as the difficulty of implementing it considering the disregard of successive Israeli governments to international law since the state's inception, and the blind support of the US government. One should therefore look to ways of following up on practical measures which the Israeli government will be unable to

The search is on for the opinion's practical implementation in view of its likely ignorance by Israel - save for the possible destruction of parts of the wall in accordance with the request of the extremely limited obligations put upon the obligations by the decision of the Israeli High Court last week - and its systematic work to prevent any application of the ICJ ruling.

Thus it is important for the victims of the wall, as identified by the ruling, to be effective in claiming the compensation decided by the court, and to seek ways to bring Israel to account in courts abroad. This is not easy for various reasons, including matters of immunity and the large number of claimants. Such work is by nature collective and requires a high degree of professionalism that focuses on technical details and avoids political rhetoric.

Follow-up by claimants will no doubt be at the centre of international legal work in the coming months.

A first reading of the opinion opens up two significant additional possibilities. First is the confirmation by the court that the Israeli government "must ensure freedom of access to the holy places that came under its control following the 1967 war." The opinion noted some of these places lie within West Jerusalem, but the restriction to East Jerusalem will nonetheless open the way to a strengthened right of

of forced Judaisation of the city that has proceeded apace since 1967, this will be particularly useful for Jerusalemites, but the right of access is consecrated for all. Exiled Palestinians should be able to avail of it, and this clear acknowledgment by the ICJ is worth a closer study on the way to implement the right of return by way of freedom of movement, seen here from the perspective of "right of access to the holy places" accorded to all by the ICJ under international law.

So the opinion opens up two avenues of eminent practicality, compensation and right of access to Jerusalem, especially for Palestinian refugees. There is a third important dimension raised by the opinion, which is the court's characteristic acknowledgment of the responsibility of the Israeli state for its severe violations of international humanitarian law. This should widen the possibility for Palestinian victims to claim the civil and criminal responsibility of Israeli officials before outside judicial fora, especially European courts. This is a major development that needs careful study, for it will help constrain the travel and activities of many Israeli officials because of their egregious violations of the Fourth Geneva Convention as underlined by the ICJ. COURTESY DAILY STAR

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The writer is a lawyer and EU Jean Monnet

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