

Rasul: The US Constitution or International Humanitarian Law?

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Focus

In reaction to this decision, on 7 July 2004, the Department of Defense issued an "Order establishing combatant status review tribunal". We will see how this procedure meets the requirements of GC III, Art 5.

Al Odah, the companion case to Rasul: The petitioner brought a claim under the Alien Tort Statute. The Court concluded that the US courts are open to such claims by non-resident aliens. "[...] 28 USC sec 1350 explicitly confers the privilege of suing for an actionable "tort [...] committed in violation of the law of nations or a treaty of the US [...]". This opens up a path to review US compliance with GC III and IV. Will the Court march down this path?

On 28 June 2004 the Supreme Court of the United States decided the companion cases of *Rasul v. Bush* and *Al Odah v. US*, as well as the *Hamdi* and *Padilla* (see Bofax 276E) cases. This bofax focuses on the *Rasul* case.

Lacking the intense 'ping-pong' of the *Hamdi* case (see Bofax 237E), this case has followed a normal progression through the US judicial system, having been heard and decided by the United States District Court and the US Court of Appeals for the District of Columbia Circuit.

The relationship to IHL? Geneva Convention III regarding Prisoners of War, Articles 4 and 5 treat of those entitled to POW status and how doubt about a detainee's status should be resolved. Additional protocol II, Article 43-45 contain similar and expanded provisions. The Supreme Court has not often dealt with matters relating to these provisions but did refer to GC III in *Hamdi*.

The case was decided by a vote of 6 to 3. The majority opinion was written by Justice Stevens, joined in by four justices and a concurring opinion written by Justice Kennedy. A concurring opinion means that the author agrees with the result of the majority opinion but disagrees with its reasoning and wishes to express different reasoning. There is a dissenting opinion written by Justice Scalia and joined in by two Justices.

The decision brings to the fore the process of the common law system of law, as practiced in the US, versus the civil law system present in most European countries. The reasoning of the majority opinion points out the difficulties in stretching reasoning under the process of *stare decisis*. The Court struggles at length with the decisions of *Quirin* (1942), *Eisentrager* (1950), *Ahrens* (1948), and *Braden* (1973), among others, in attempts to distinguish them so that they do not have to be followed or specifically overruled.

The central issue of the case is "whether US courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." The lower courts had ruled that the US courts lacked jurisdiction because the detainees were aliens (non-US citizens) held outside the sovereign territory of the US. The US controls the base at Guantanamo pursuant to a 1903 lease agreement with Cuba and a treaty of 1934. These documents concede that the U.S. has complete jurisdiction and control over the area but that Cuba has residual sovereignty. Based on these terms the lower courts had held that the courts lacked jurisdiction to consider *habeas corpus* claims by the detainees.

The Supreme Court reversed the decision of the Court of Appeals.

The lower court had relied on *Eisentrager* to hold that it lacked jurisdiction. The Supreme Court's decision is a study in the common law process of distinguishing without overruling an earlier decision. If it does neither, it is obligated to follow the earlier decision. The Court pointed out that *Eisentrager* contained six criteria determined to be crucial in its decision that it lacked jurisdiction in that 1950 case. It reasoned that three of these criteria were missing in the instant case and so the present decision of the Court was not determined by the earlier decision. There are: 1. the detainees at Guantanamo are not nationals of countries at war with the US (in *Eisentrager*, the petitioners were German Nationals); 2. the detainees had never had access to any tribunal, much less charged or convicted (contra in *Eisentrager*); 3. for more than two years the detainees have been imprisoned in territory over which the US exercises exclusive jurisdiction and control (again, contra *Eisentrager*). Based on these fundamental differences in the underlying facts, the Court found that *Eisentrager* was not controlling.

Another very important part of the decision of the Court involves the issue of the *habeas corpus* statute and the absence of the detainee from the physical jurisdiction of the lower court. Again, the Court had to make a lengthy analysis of an earlier decision, *Braden* (1973). In a very important holding, the Court found that physical presence of the detainee was not required. The writ of *habeas corpus* "acts upon the person holding the prisoner, not the prisoner himself." In this analysis, the Court went back to the origin of the right to the writ of *habeas corpus* with King John of England at Runnymede in 1215 and the first judiciary act under the US constitution, that of 1789. The Court found that the control that the US maintained over Guantanamo was sufficient to invoke the jurisdictional basis of the *habeas corpus* statute: "We therefore hold that sec. 2241 confers on the district Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base."

However, the concurring opinion of Justice Kennedy is perhaps better reasoned than that of the majority. He concurs in the judgment but bases his conclusion solely on *Eisentrager* and the examination of the criteria as done above. He also adds a vital criterion, that "[f]rom a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the US [...]. The second critical set of facts is that the detainees [...] are being held indefinitely and without benefit of any legal proceeding to determine their status." (Again drawing a distinction from *Eisentrager*.) "In light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees, I would hold that federal-court jurisdiction is permitted in these cases".

In conclusion, a very welcome decision of the Court.

Responsibility

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