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A Long, Strange Trip: Guantánamo and the Scarcity of International Law

Richard J. Wilson*

It was seven in the morning, October 3, 2005, and I was on the military ferry between the leeward and windward sides of the U.S. military base at Guantánamo Bay, Cuba. It had rained the night before, and it was a cool 75 degrees, according to the big digital clock on approach to the ferry landing. It had rained the night before, and my notes contain the only purely personal reference I can find anywhere. They indicate a “beautiful sunrise - heaven on the horizon, with rising sunlight bursting upwards from orange and red-tinted clouds.” My notes also sadly mention that our client hasn’t seen anything like this sunrise during much of his nearly four year stay at Guantánamo, most of which had been spent in isolation in Camp 5, the maximum security facility with opaque window slits as the only source of light.

I’m not alone on the ferry; there are other lawyers going to visit clients, some of whom have joined a recent hunger strike. The lawyers report that their clients have been brought to interviews on stretchers, some with force-feeding tubes hanging from their noses. On this particular trip to the base, one of about a dozen I have made over three years, I had a difficult mission. I was there to try to persuade our client not to drop us as his counsel, hoping that I could convince him that the American legal system and American lawyers could offer him some hope of justice – for him, the chance to go home and begin his life again. My last scribble on the page notes my own “empty-handed rage and helplessness” in making this pitch – again. It was not the first time he had lost hope,

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and it would not be the last. I did talk him into allowing us to continue on that occasion, but I could not dispel his hopelessness, and I cannot dispel my own sense of rage and helplessness.

In my thirty-five years of practicing law, this has been the single most difficult and complex case with which I have ever been involved. I read more background material and learned more new areas of law for this case, by a factor of ten, than I have in any other of the hundreds of cases with which I have been involved. More lawyers were involved in this case, and in the related cases of other detainees, than any other with which I have ever been involved. The legal and non-legal strategies employed in the case were broader than any other with which I had been involved, and included domestic – both Canada and the U.S. – and international litigation, legislative proposals in the United States, diplomatic interventions in both countries, and extensive and high-profile public education and advocacy in both Canada and the United States. The extraordinary security precautions taken around this litigation and the lawyers involved in it were like few others in U.S. history.

Our meetings with our client and his family were rife with cultural landmines, fraught with the possibility that it was impossible to know exactly why our client and his family sought or took particular courses of action, or whether our client's decisions regarding our legal course of action were a matter of free and rational choice, instead the result of impetuous youth or of the pathology inherent in the conditions of his capture and confinement at Guantánamo Bay. No other case or litigation has made more clear, to all of us involved, the extent to which naked politics dominate and control the invented, exceptional legal regime designed for Guantánamo, created by those in power in

Washington expressly to provide what is called a full and fair process, whether offered to justify indefinite detention or designed to determine guilt or innocence of invented war crimes. The fate of any detainee at Guantánamo, whether charged by military commission or not, can be and has been determined instantaneously, not through legal process but by the flick of a pen in the Pentagon and the White House.

The case in question is that of Omar Khadr, the only Canadian detained at Guantánamo, and one of the youngest there, having been captured in Afghanistan in July of 2002 at the age of fifteen. Omar was eventually charged before a military commission, and at the time of this writing, the government's appeal from dismissal of charges is pending on review by a special military commissions review panel, as well as in the United States Supreme Court, where, after all these years, Omar's is among the many cases consolidated for consideration, yet again, under the title of Boumediene, et al. v. Bush, U.S.S.C., No. 01-1195. Omar turned 21 in September of 2007, formally reaching adulthood and having passed most of his adolescence in isolation in the Cuban camps with little prospect of his release or return to Canada anytime in the near future. But Omar's case was not my first involvement in Guantánamo-focused litigation.

As early as February of 2002, just after the U.S. military began placing detainees in Cuba, I joined, in a volunteer and personal capacity, the Center for Constitutional Rights and other human rights organizations in filing a request to the Inter-American Commission on Human Rights, based in Washington, DC, seeking protection for all Guantánamo detainees, whose identities were withheld by the government, through a request that the United States take precautionary measures to assure them fair treatment and legal process under international humanitarian law and human rights norms made

obligatory on the United States by virtue of its participation in the Organization of American States.

The decision of the Commission was issued on March 12, 2002,¹ and was the first statement by any international body dealing with the legal situation of the detainees. It served to provide an international-law-based legal framework for the detainees' claims while forcing the United States government, for the first time, to articulate some rational and legal basis for the detentions. We have continued to submit periodic updates to the Commission regarding the situation of all detainees at Guantánamo, and the Commission has continued to call on the United States to comply with its obligations under international law.² That these decisions are uniformly ignored by U.S. courts (and by most lawyers representing detainees) speaks to my primary observation in this reflection, the almost total absence of judicial recognition of international legal obligations within the U.S. legal system. This failure is, in my view, one of the primary reasons why the international community looks with such scorn and disdain on the U.S. responses, legal and political, to Guantánamo, an ignominious national shame and scandal.

I first became involved in Omar Khadr's case in July of 2004, just after the U.S. Supreme Court had decided Rasul v. Bush, 542 U.S. 466 (2004), holding that the Guantánamo detainees had the right to access to the U.S. courts, and that venue lay in the federal district court of Washington, D.C., just down the street. After the decision, I again spoke to my friend and colleague at the Center for Constitutional Rights, Steven Watt,

¹ Annual Report of Inter-American Commission on Human Rights 2002, Precautionary measures granted or extended by the Commission during 2002, United States, at ¶ 80, OEA/Ser.L/V/II.117, Doc. 1 rev. 1 (7 March 2003), available at <http://www.cidh.org/annualrep/2002eng/chap.3g.htm>, visited on September 8, 2007.

² These decisions have been compiled and published by International Legal Materials, a publication of the American Society of International Law recognizing important judicial developments in international law. The initial decision, referred to in footnote 1, can be found at 41 I.L.M. 532 (2002), while several others can be found sequentially at 45 I.L.M. 669 (2006).

who had coordinated the earlier Guantánamo litigation, knowing that the Center had gathered a list of willing plaintiffs from the families and friends of detainees willing to take legal action. CCR immediately offered the Khadr case, noting that the Khadr family had Canadian counsel, but that the family lawyers recognized the limits imposed by U.S. security rules on their participation in U.S. legal proceedings. When I spoke to my faculty colleagues from the International Human Rights Law Clinic at American University to discuss the implications of taking the case, one of my fellow professors, Muneer Ahmad, asked to join me on the case, and we agreed that the two of us would take the case as part of our fall 2004 cases for student assignment within the clinic structure. I don't know what made us naively believe that this case would be like any other clinic case, and that it could be assigned to students as we normally do within our clinic structure, but we immediately learned that this case was different, and that it would require a good deal more faculty leadership and involvement than had been our traditional practice in clinic, where students are given exclusive but carefully supervised authority to make decisions regarding their cases and clients.

I've been a law school professor for more than twenty years. For the first five of those years, I taught at CUNY Law School in Queens, New York, the highly innovative public interest law school that made radical revisions to almost every aspect of the curricular organization, structure and mission of legal education. I came to teaching after almost a decade of practice as a public defender, first in Illinois and then in Washington, DC, where I directed the Defender Division of the National Legal Aid and Defender Association. My first years of teaching focused on criminal law and procedure, evidence and broad themes of public interest practice, frequently in the context of faculty-

supervised student externships throughout the city. When I moved to American University's Washington College of Law in 1989, I expected to be teaching criminal practice in a clinical context, where students represent real clients with serious criminal charges under the supervision of an experienced practitioner. During the first year there, I had an opportunity to develop and open a clinic focused on international human rights law, a subject that was in its infancy at most law schools, and one that had not been done at all in the clinical context. The clinic was an immense success, and the International Human Rights Law Clinic is now one of the largest (32 students and four faculty this year) in the country.

My new mid-career change took me deeply into the field of international law, and more particularly human rights law, a discipline I had not studied in law school, and one which has grown in importance and popularity in legal education in the recent decade. For fifteen years, I had fashioned arguments relying on treaties or international customary law, and had seen the gradual convergence of the fields of international human rights law, humanitarian law (the law of war), and international criminal law. While I had not had extensive exposure to the field of international humanitarian law, I felt that the situation of the detainees in Guantánamo cried out for application of that body of law as well as other international norms, if only because of the government's efforts to avoid that application through distorted analysis of extraterritorial jurisdiction, as well as substantive doctrines having to do with the status and detention of combatants during armed conflict, the limits on the use of torture or other cruel, inhuman or degrading treatment during interrogation, the irregular rendition of prisoners to countries where torture is practiced, and the use of pre-emptive or anticipatory force against nations

suspected of harboring or assisting terrorism, to name only a few. International precepts, in my view, seemed to have particular resonance in their application to children in armed conflict, the situation faced by our 15-year-old client when captured. I was, but should not have been, stunned to find how little knowledge or interest there was in international law, whether by the bench or by the very lawyers with whom we collaborated in the early, consolidated cases in the D.C. federal district.

Unlike many of the other lawyers in the Guantánamo litigation, we had three substantive decisions relating to legal claims of our client within the first year after our appearance as counsel. Two were unsuccessful and one was a partial win: none relied to any extent on international law arguments advanced by us. The first sought an emergency order for Omar Khadr's medical records and to provide him with outside medical evaluation. The motion was based on strong evidence that he had suffered serious injuries at the time of his capture in Afghanistan, as well as the extensive psychological damage he had suffered during detention, exacerbated by his status as a child. We argued that Omar was entitled to special protection under both human rights and humanitarian law by virtue of his status as a minor at the time of his arrival at Guantánamo. The court flatly denied our petition, holding, in the face of our international law arguments regarding his youth and Omar's current age of 18, that:

The analysis does not change because petitioner was a minor when he arrived at Guantánamo. Whatever additional rights, if any, petitioner may have enjoyed when he was a juvenile, he is now an adult, and petitioners seek only prospective relief in the form of a future medical assessment.³

Almost a year later, the same judge denied our request for a preliminary injunction to prevent Omar's ongoing torture or cruel, inhuman or degrading treatment,

³ *O.K. v. Bush*, 344 F.Supp.2d 44, 62, n.25 (D.D.C. 2004).

and to provide us with 30 day notice of the intent to transfer him to possible torture in a third country. Again, despite offering international law arguments on both the issue of torture and age, the court never addressed those issues.⁴

Finally, between these two decisions, in a case now consolidated on appeal for decision by the U.S. Supreme Court, another federal district judge decided several common issues raised by multiple petitioners including our own client.⁵ This was the most ambitious of the arguments regarding international law, and raised, as noted by the court, issues involving the Geneva Conventions as well as “the International Covenant on Civil and Political Rights (“ICCPR”); the American Declaration on the Rights and Duties of Man (“ADRDM”); the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; the International Labour Organization's Convention 182, Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; and customary international law.”⁶ At the conclusion of an exhaustive analysis of claims under the Fifth Amendment to the U.S. Constitution, the court dismissed the international law claims in cursory fashion, in a single sentence, without any substantive analysis other than that of certain limited provisions of the Geneva Conventions.⁷

My point, in conclusion, is simply to express my profound disappointment in the failure of these judges to fully engage the issues of international law presented to them. This judicial ducking of international law is all too typical of the U.S. Supreme Court as

⁴ *O.K. v. Bush*, 377 F.Supp.2d 102 (D.D.C. 2005) (noting, at 103, that the “petition states claims under the United States Constitution, several federal statutes and regulations, and *international law*”, without further mention of international law in the decision. Emphasis mine.)

⁵ *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005).

⁶ *Id.* at 453.

⁷ *Id.* at 480, 481, also finding that the customary law claims need not be reached because of disposition under the Fifth Amendment.

well, at least until its landmark decision in Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006), in which the Court more fully engaged with the issue of the application of Common Article 3 of the Geneva Conventions to all detainees, including those alleged to be affiliated with Al Qaeda. Even there, however, the Court failed to clearly articulate a basis for individual enforcement of treaty rights under the Geneva Conventions.

The saga of Omar Khadr is, sadly, far from over. His and other detainee's fates are still in the hands of the Supreme Court and the specially created appellate body reviewing decisions by military commissions. Political sentiment in Canada, which has been generally hostile to Omar and the rest of the Khadr family, is gradually shifting, as evidenced by the filing of a friend of court brief on Omar's behalf in the Supreme Court by several Canadian Parliamentarians and law professors. As has seemed to be the case in all of the releases from Guantánamo, the decision is political, not legal. Until the Canadian government chooses to stop playing lap-dog to the United States on issues regarding Guantánamo, Omar stands little chance of going home. Close Guantánamo!