

Two Roads to Guantanamo: The Canadian and United States Supreme Courts' Approaches to the Extraterritorial Application of Fundamental Rights

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I. Introduction

Following Catherine Kellogg's engagement with Hannah Arendt's question of whether there are modes of non-nationalist belonging, I begin with the recognition that the moment when the "nation-state ... will nullify itself as such" still lies far in the future, if it ever occurs at all. Real (as opposed to ideal) history happens through incremental, fragile evolutionary change, not through sudden leaps from one fundamental paradigm to another. If the ideal of the self-nullifying nation-state is an intellectual fantasy, however, it is also an ideal in the Kantian sense, one that can motivate and orient political action. Indeed, it is precisely the contingency of actual history that makes space for real-world political movements of groups and individuals that change paradigms from within.

For example, while nation-state sovereignty continues to provide the structuring concept for contemporary understandings of law and right, that concept is not identical to the one that Arendt analyzed so cogently in the mid-20th century. In fact, the globalization of our socio-political life is reflected in contemporary international law and modifications of the standard legal paradigm purely because of the actions of individual political actors, including (as I will suggest here) the actions of lawyers and their clients acting within the standard paradigm.

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Those actions, I suggest, have already stretched the concept and exercise of sovereign state authority beyond their traditional territorial limits.

As a way of illustrating these changes, I focus on one of the legal actions brought by Omar Khadr, the Canadian citizen and former Guantanamo Bay detainee, to vindicate his rights under the *Canadian Charter of Rights and Freedoms* (“*Charter*”). The indefinite detention of individuals at Guantanamo Bay is often condemned as the leading contemporary example of Arendt’s “uprooted, superfluous and rightless subject,” and for good reason — the camp was conceived with exactly that purpose in mind. Nevertheless, to treat Guantanamo detainees as simply rightless subjects is to miss how their political and legal struggles have in fact forced the sovereignty paradigm to evolve in the direction of transnational human rights. Not surprisingly, these changes have happened differently under different sovereigns: here, Canada and the United States. I elucidate this comparative perspective by focusing on an opinion by the Supreme Court of Canada¹ in one of the *Khadr* cases, and by contrasting this case with key aspects of the jurisprudential landscape in the US.

In particular, the *Khadr* cases suggest that under Canadian law today, sovereignty is not the privileged, foundational rule of the international law regime that Arendt assumed it to be 70 years ago, but an ordinary, non-foundational rule of international law that can come into conflict with other rules of international law — including international human rights law — and lose. Moreover, a comparison of the legal logic of the *Khadr* cases with the United States Supreme Court’s own Guantanamo jurisprudence reveals a fundamental difference in how the extraterritorial application of rights is conceived under the Canadian and United States constitutional regimes.²

I will skip over most of the facts of Khadr’s Guantanamo ordeal, except to say that while many of these facts are contested by the United States, there is no dispute that his treatment was horrendous or that the United States subjected him to deliberate and systematic abuse as a 15 year-old child.³ In contrast to that ordeal, the aspects of his case that I discuss here are legalistic, technical, and esoteric (although his abuse was unquestionably an important background to the legal rulings).

In brief: in 2003, during Khadr’s interrogations by the United States military at Guantanamo Bay, Canada requested the opportunity to question him as well. In anticipation of the Canadian interviews, Joint Task Force Guantanamo (or JTF-GTMO, the GTMO military prison guard force) “softened Khadr up” by subjecting him to their so-called “frequent-flyer program” (that is, deliberate periods of extended sleep deprivation). The Canadian agents

1 *Canada v Khadr*, 2008 SCC 28, [2008] 2 SCR 125 [*Khadr* 2008]; see also *Canada v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 [*Khadr* 2010].

2 For a more detailed analysis that reviews much of the same comparative Canadian and United States legal ground covered here (and includes the United Kingdom as well), see Maria L Banda, “On the Water’s Edge? A Comparative Study of the Influence of International Law and the Extraterritorial Reach of Domestic Laws in the War on Terror Jurisprudence” (2010) 41 *Geo J Int’l L* 525.

3 For a brief summary of Khadr’s brutal treatment, see “Omar Khadr’s ‘Guilty’ Plea”, *The Atlantic* (October 26, 2010), online: <<https://www.theatlantic.com/daily-dish/archive/2010/10/omar-khadrs-guilty-plea/180762/>>. For accounts of Khadr’s experience set in broader context, see Janice Williamson, *Omar Khadr, Oh Canada* (Montreal: McGill-Queen’s University Press, 2012).

were aware of this treatment — which at a minimum constituted cruel, inhumane, or degrading treatment within the meaning of international law — at the time of the interviews.

While Khadr was not actually charged in the military commissions at the time, there was little doubt that the United States would charge him eventually because he was accused of killing an American soldier (indeed, the presumption that he would be prosecuted played a key part in the Supreme Court of Canada's holdings). Khadr was in fact formally charged in 2005, but those criminal proceedings were halted in 2006 after the United States Supreme Court decided in the case of *Hamdan v Rumsfeld* that the original military commissions system under which Khadr was charged was itself illegal.⁴ Following the passage of the *Military Commissions Act* of 2006 (enacted in an effort to fix the earlier system's legal problems identified in *Hamdan*), Khadr was charged again in 2007. He eventually pleaded guilty to the new charges as part of a plea agreement that also included repatriation to Canada to serve the remainder of his sentence. He was released from Canadian prison on bail in 2015 and a Canadian judge ruled that his sentence had expired in March 2019.⁵ Meanwhile, Khadr's plea-bargained conviction remains on appeal in the United States military commissions system.

The facts relevant to my point here are less dramatic. After charges were brought under the original military commissions system (which was declared illegal by the United States Supreme Court in *Hamdan*), Khadr's defense lawyer asked the Canadian government for the records of his Canadian-led Guantanamo interrogations. Canada, however, refused to provide these records. Thereafter Khadr's lawyers brought suit in Canadian court asking for an order to allow him access to the interviews as a matter of right under the Canadian *Charter*. The government lost but appealed to the Supreme Court of Canada ("SCC").

Under earlier cases, it was clear that had the Khadr prosecution been brought on Canadian territory, the *Charter* would have entitled Khadr to the interviews.⁶ However, the SCC had recently held in *Canada v Hape*⁷ that *Charter* rights generally do not apply to the acts of Canadian agents on foreign territory, because the legality of those acts in the first instance is a matter of the territorial sovereign's foreign law. Undergirding this rule were two fundamental tenets of the post-Westphalian international order, the doctrine of sovereign equality and the related "principle of comity,"⁸ which expresses the deference owed to the territorial sovereign's laws in determining the legality of acts in its own territory. In general, that deference includes acts by another sovereign's agents against that other sovereign's own citizens. As the Court put it:

As a general rule, Canadian officers can participate in investigations abroad, but must do so under the laws of the foreign state. The permissive rule that allows Canadian officers to participate even when there is no obligation to do so derives from the principle of comity; the rule that foreign law governs derives from the principles of sovereign equality and non-intervention.⁹

4 *Hamdan v Rumsfeld*, 548 US 557 (2006) [*Hamdan*].

5 Canadian Broadcast Corporation, "Omar Khadr's war crimes sentence is finished, Alberta judge rules," *CBC News* (March 25, 2019), online: <<https://www.cbc.ca/news/canada/edmonton/khadr-war-crimes-expired-1.5068610>>.

6 *Canada v Stinchcombe*, [1991] 3 SCR 326.

7 *Canada v Hape*, [2007] 2 SCR 292, 2007 SCC 26 [*Hape*].

8 On the principle of comity and its relation to international law, see e.g. William Dodge, "International Comity in American Law" (2015) 115 *Colum L Rev* 2071.

9 *Hape*, *supra* note 7 at para 101.

That was precisely the situation in *Khadr*: Canadian agents interrogated Canadian citizen Khadr in circumstances that would have entitled him to the interrogation records as a matter of the *Charter*'s criminal procedural rights, *if* the interrogation had occurred on Canadian territory. Here, however, the interrogations took place in Cuba.

Notwithstanding the general rule of comity, the SCC declined to apply it under the circumstances presented in *Khadr*.¹⁰ In this regard, the Court reasoned first that comity is itself a principle of international law that derives its authority from international law. From this it drew the further conclusion that where an extraterritorial act by Canadian agents is illegal under international law, the international law comity principles that would otherwise shield the act from accountability under the *Charter* would not apply. That is, where the sovereign's extraterritorial act violates international law as well as the *Charter*, the sovereign (here, Canada) cannot avail itself of international law — in the form of the principle of comity — to immunize itself from its own otherwise applicable law (the *Charter*).¹¹ In finding that this exception applied in Khadr's case, the SCC relied on the fact that the US Supreme Court had ruled two years earlier in *Hamdan* that the military commissions system (in which Khadr would eventually be tried) violated international law — specifically, the requirement of Common Article 3 of the Geneva Conventions that prisoners not be subject to “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹²

Notwithstanding its significance, the *Khadr* opinion leaves numerous critical questions unanswered, including, for example, the questions of whether the *Charter* would still have applied to the interrogations if Khadr was not a Canadian citizen, and whether the SCC would have independently found that the military commissions system violated international law if the US Supreme Court had not already done so.¹³ Nevertheless, what *Khadr* makes clear is not

10 For an extended analysis of the *Hape* Court's reliance on the traditional sovereign-supremacy model and a more limited discussion of the *Khadr* cases' apparent divergence from that model, see Kerry Sun, “International Comity and the Construction of the *Charter*'s Limits: *Hape* Revisited” (2019) 45:1 Queen's LJ 115 [Sun].

11 *Khadr* 2008, *supra* note 1 at para 2: “The principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law, do not extend to participation in processes that violate Canada's international human rights obligations.” See also *ibid* at paras 15-26. In fact, the Canadian Supreme Court had already recognized this exception to the general rule in *Hape* itself: “But the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights. In such circumstances, the permissive rule might no longer apply and Canadian officers might be prohibited from participating.” *Hape*, *supra* note 7 at para 101.

12 *Hamdan*, *supra* note 4 at 627-633.

13 Notably, *Hamdan*, which was decided in 2006, found the military commission system in violation of Common Article 3 only *after* Khadr was interrogated by the Canadian agents in 2003. Moreover, Khadr was not formally charged until November 2005 — again, after the Canadian agents' conduct. Thus, at the time of the agents' violation of Khadr's human rights in 2003-2004, there were no formal criminal charges laid against him, a precondition of the *Stinchcombe* right of disclosure. Even apart from the question of whether the *Stinchcombe* *Charter* right applied at all, there were no authoritative judicial holdings in either Canadian or United States courts that could have put the Canadian agents on notice of the illegality of the (then-hypothetical) charges that ostensibly justified Khadr's detention. The Supreme Court of Canada itself implicitly recognized this tangle of fundamental questions when it noted that “[i]ssues may arise about

only the importance of international law to the *Charter's* jurisprudence, but the recognition that the primacy of sovereignty (embodied in the principle of comity) would at least sometimes be subordinate to international human rights.

It is also clear that international law has no such import in the United States' own constitutional jurisprudence. To take one pertinent example, while the *Khadr* Court was not wrong to say that the US Supreme Court had held that the military commissions system violated international law, it is also true that international law was not actually the reason why *Hamdan* overturned that system. To be clear on this point: *Hamdan* did not throw out the original military commissions system because it *violated* Common Article 3; rather, it threw out the system because it was inconsistent with a domestic statute that *incorporated Common Article 3 into domestic law* by reference.¹⁴ That is, *Hamdan* actually held that the system violated a domestic statute, not international law. It was for precisely that reason that Congress was able to come back the very same year and pass the *Military Commissions Act* of 2006, a statute that included most of the vices of the overturned system (one domestic statute can always be overridden by a later-passed statute).

Of course, even a later domestic statute must comply with the requirements of the United States Constitution. While the constitutionality of the military commissions was not at issue in *Hamdan*, shortly thereafter, in *Boumediene v Bush*,¹⁵ the Supreme Court did address a constitutional challenge to one provision of the 2006 *Military Commissions Act*, the provision that purported to strip federal courts of their jurisdiction over Guantanamo detainees' habeas corpus cases.¹⁶ Decided in 2008, the same year that *Khadr* was decided, in *Boumediene* the US Supreme Court found a path to extraterritorial application of fundamental rights very different from the one taken by the Supreme Court of Canada, a path based purely on domestic (constitutional) law with no recourse to international law. Confronted with the question of whether the US Constitution's Suspension Clause — which prohibits suspension of the writ of habeas corpus other than in certain exceptional circumstances — applied to detainees imprisoned at Guantanamo Bay, the Court held that the extraterritorial application of the constitutional provision turned on “whether judicial enforcement of the provision would be ‘impracticable and anomalous.’”¹⁷ That is, to be more specific, whether “judicial enforce-

whether it is appropriate for a Canadian court to pronounce on the legality of the process at Guantanamo Bay under which Mr Khadr was held at the time that Canadian officials participated in that process.” *Khadr* 2010, *supra* note 1 at para 21. The Court found it unnecessary to address those questions, however, because of the US Supreme Court's 2006 ruling that the 2005 charges were illegal. Whether the Canadian Supreme Court would itself have found that the military commission charges against Khadr violated his human rights if there were no intervening US Supreme Court decision, or — alternatively — whether it would have deferred to the military commission proceeding as a matter of comity is thus unknown. Had that possibility come to pass, the case would have tested the extent of Canadian courts' adherence to what Kerry Sun calls the “sovereignist model of the Constitution.” See Sun, *supra* note 10 at 147.

14 “[R]egardless of the nature of the rights conferred on Hamdan [directly by the Geneva Conventions] ... they are, as the Government does not dispute, part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 [of the Laws of War, 10 USC § 821] is granted.” *Hamdan*, *supra* note 4 at 628.

15 *Boumediene v Bush*, 553 US 723 (2008) [*Boumediene*].

16 *Hamdan v Rumsfeld*, the case that overturned the original military commissions, was brought as an action in habeas corpus. See *Hamdan*, *supra* note 4.

17 *Boumediene*, *supra* note 15 at 759 (quoting *Reid v Covert*, 354 US 1, 74-75 (1957) (Harlan, J, concurring)).

ment” by *United States* courts and *United States* law enforcement would be “impracticable” or “anomalous” for the United States. *Boumediene’s* test for extraterritorial application of US constitutional rights thus remains very firmly ensconced within the paradigm of the supremacy of the sovereign’s fundamental law (as another case decided on the same date by the same Court, *Munaf v Geren*, illustrates).¹⁸

To return to where I began, my point is not that the Canadian courts’ route through international law in achieving extraterritorial application of fundamental *Charter* rights is superior to the US Supreme Court’s self-limitation to a domestic law route (although I think it is). Rather, the point is that there are different roads to the kind of extraterritorial protections that would at least begin to alleviate the legal dilemmas of refugees and other ostensibly “stateless” persons. If neither the Canadian nor the American examples ultimately promise to free us entirely from the tyranny of “national modes of belonging,” they at least show that under the right circumstances, nationalist legal regimes can be made to extend their protections beyond citizenship, nationality, territoriality, and the other classical attributes of sovereignty. And, I would add, that those extensions are worth fighting for.

18 *Munaf v Geren*, 553 US 674 (2008). In *Munaf*, the US Supreme Court put an exclamation point on its commitment to the sovereignty paradigm by prohibiting federal courts from hearing the habeas petition of American citizens held by American forces in Iraq who were asking for an injunction against being turned over to the Iraqi government for criminal prosecution. Specifically, the Court held that “Iraq has a sovereign right to prosecute [habeas petitioners] for crimes committed on its soil ... whether or not the pertinent criminal process comes with all the rights guaranteed by our Constitution.” *Ibid* at 694-695.