GUANTÁNAMO CHECKED

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From *Rasul v. Bush* to *Hamdam v. Rumseld*

On 2004 victory in *Rasul v. Bush*, the US Supreme Court ruled that the prisoners held by the US government at Guantánamo Bay on suspicion of being terrorists, had the right to take their cases to U.S. Courts and to contest the legality of their imprisonment. Although the affirmation of US federal jurisdiction was based on a more technical argument, the political point comes across clearly in the statement by Justice John Paul Stevens, the author of the majority opinion: he said that since King John and Runnymede "pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land", "executive imprisonment has been considered oppressive and lawless." The Supreme Court decision came in response to a suit filed by the Centre for Constitutional Rights (CCR) and pro bono lawyers on behalf of around 200 Guantánamo detainees, which claimed that the imprisonment of the people held at Guantánamo Bay was illegal, violating the US Constitution and international treaties, and that prisoners had a legal right to take their cases to the Washington DC Federal District Court under "habeas corpus" provisions. More recently, in June 2006, in another suit filed by the CCR together with Human Rights First and the FIDH, the Supreme Court ruled in *Hamdan v. Rumsfeld* that Guantánamo Bay detainees have a right to file suit in US federal courts. As reported by CCR President Michael Ratner: "The game is up. There is no way for President Bush to continue hiding behind a purported lack of judicial guidance to avoid addressing the illegal and immoral prison in Guantánamo Bay. Significantly,

the Court decided that the Geneva Conventions apply to the so-called 'War on Terror' - people must be treated humanely and the administration cannot put itself above the law."

These cases do not signal the end of the denial of rights of Guantánamo detainees. Indeed, in July, the Defense Department (DoD) announced that a further nine prisoners would be tried by military commission and that cases would be reviewed by military tribunals, in an attempt to bypass the regular courts. However, the Supreme Court decision can be seen as a vindication of a rights based society – and of US constitutionalism – and as a crucial condemnation of the lawless policy of the US administration in its "War on Terrorism."

The Arguments

Transnational Legal Activism: Costs and Benefits

It is interesting to cite the minority opinion in Rasul v. Bush authored by Justice Antonin Scalia, as it highlights some of the problems of extending or "universalising" jurisdiction. Justice Scalia stated that the ruling represented a "wrenching departure from precedent," "boldly extend[ing] the scope of the habeas statute to the four corners of the earth," such that it made it possible for "an alien captured in a foreign theater of active combat to petition the Secretary of Defense." Scalia adds: "Departure from our rule of stare decisis in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation's conduct of a war. The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs […] The fact that extraterritorially located detainees lack the district of detention that the statute

requires has been converted from a factor that precludes their ability to bring a petition at all into a factor that frees them to petition wherever they wish—and, as a result, to forum shop. For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort. I dissent."[1]

Human rights transnational legal activism has become a powerful if uneven force for justice over the last 20 years "across borders." Prosecution efforts against human rights violators have been advanced by mixed transnational coalitions, and NGOs and their allies are playing a growing role in international litigation, participating in the proceedings of permanent international courts, as *amicus curiae*, contributing to the solidity of the jurisprudence of court decisions. Litigation has increased in all international courts, particularly human rights cases. NGO pressure has been crucial in pushing US federal courts to pursue civil suits against human rights violators since the 1980s in accordance with the provisions of the 1793 Alien Tort Claims Act and the 1992 Torture Victims Protection Act. Individuals accused of grave human rights violations from various Latin American and other countries have been tried and millions of dollars awarded in damages. In Europe, since the early 1990s, courts have criminally pursued Rwandans, Bosnian Serbs and former Latin American military officers and government officials for human rights crimes.[2] The Pinochet case is perhaps the most famous of these cases. It boosted the notion that in the absence of a working ICC, the courts of any country can legitimately try the subject of any other country for crimes against humanity and other gross human rights violations. Although the general was

[1] (Slip Opinion) October Term, 2003 1 Syllabus: Supreme Court of the United States. Syllabus Rasul et al *v.* Bush, President of the United States, et al. Certiorari to the United States Court of Appeals for the District of Columbia, Circuit No. 03–334. Argued April 20, 2004—Decided June 28, 2004.

[2] See: Naomi Roht-Arriaza, 'The Role of International Actors in National Accountability Processes', in: Alexandra Barahona de Brito, et al., (eds.), *The Politics of Memory: Transitional Justice in Democratising Societies*. (Oxford: Oxford University Press, 2001), pp. 40-64.

returned to Chile and was not judged there, the affirmation of extra-territorial jurisdiction against arguments of sovereignty, the denial of immunity to a former head of state, and the acceptance of broad definitions of genocide and terrorism by the Spanish courts were of crucial importance.[3]

This phenomenon is largely positive, but it does raise important questions as well. First, the authority of the judiciary has spilled out beyond national frontiers and is challenging that of national executives in the international arena. The fact that judiciaries may affect foreign policy decisions is a cause of worry for executives governing democratic polities. One of the fundamental characteristics of democracies is the separation of powers. As the executors of policy in democratic nations, national executives cannot but accept judicial independence. Yet their authority as the classic representatives of 'the national interest' in a world where inter-state relations unfold between sovereign states is weakened. How legitimate the new role being played by national courts? How much power should be granted to courts and individuals pursuing transnational justice for human rights violations? Should countries become subject to the jurisprudence and rules of procedure of the courts of other countries? Should not national prosecution efforts in such cases be centralised in the hands of Supreme Courts to ensure consistency? More fundamentally, how legitimate or credible are judicial decisions on human rights cases by courts with different views and in countries where jurisprudence is made on a case-by-case basis?

Second there are various obstacles to establishing consistent and effective avenues for the *fair* (ie. equal) pursuit of justice. First, there is the fact that access to international justice or compensatory action to victims of violations are deeply unequal and, indeed, largely unavailable, to individuals around the globe. This is a

[3] Ibid.

result of the cumbersome, politicised and inadequate international institutional framework and financial clout of the UN and regional human rights bodies to pursue justice, and the inability for transnational networks to address all past crimes against humanity. Transnational prosecutions in national courts are also open to the charge of hypocritical selectivity and instrumentalisation of law by the "powerful." Why Pinochet and not others? And there is a highly problematic relationship between a more interventionist ethos to fulfill a wider conception of justice and the way that the international system is structured today, as has been most recently highlighted by the intervention in Iraq. There is the fact of inequality among states in the international system, the potential instability caused by the weakening of the principles of sovereignty and non-intervention in such a context, and the tension between self-interest and equanimity or consistency when determining the grounds for interventionism.

Implications for the US and Beyond

The Supreme Court decision may go some way to reestablish the credibilty of American democracy abroad: it shows that US rule of law rights based democracy is not a figment of the imagination but a reality that is possible thanks to an independent judiciary that bases its decision on a long-established foundation of classical liberal rights. It also shows that what has gone rotten in the US is not the political system as a whole, but an extremely ideological executive branch that has attempted to sidestep the usual checks and balances operating in foreign and domestic decision-making processes.

However, it will not be easy to rub out the mark of Guantánamo and its sister scandals – torture at Abu Ghraib and a policy of disappearances. According to the first extensive primary reports based account of the use of torture at Guantánamo published in July 2006 by the CCR, prisoners have been "subjected to

solitary confinement for periods exceeding a year; deprived of sleep for days and weeks and, in at least one case, months; exposed to prolonged temperature extremes; beaten; threatened with transfer to a foreign country, for torture; tortured in foreign countries or at U.S. military bases abroad before transfer to Guantánamo; sexually harassed and raped or threatened with rape; deprived of medical treatment for serious conditions, or allowed treatment only on the condition that they "cooperate" with interrogators; and routinely "short-shackled" (wrists and ankles bound together and to the floor) for hours and even days during interrogations."[4] As the report details, "by rejecting the Geneva Conventions and other protections, the United States sought to exempt itself from any limits on interrogation methods for individuals detained in the "war on terrorism."

The implications of Guantánamo for the US and other liberal democracies which have taken a "hardline" position on the "War on Terror" is clear: a loss of credibility as representatives of a culture of liberal democratic, rule of law and human rights based societies with a concomitant legitimacy to "spread" the benefits of a similar regime to other less fortunate parts of the world (and the Arab world in particular). To be an empire, however informal, one must have a Gramscian capacity for hegemony. And if in the case of the US its ideological hegemony was based on a widespread faith in its ultimate (albeit not always consistent) adherence to certain fundamental rights and freedoms, that capacity to persuade/dominate by example, the image of the US as a liberator, has been irreparably damaged, and not just in the Arab world.

[4] *Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba*, at: www.ccr.org