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Jurisdiction and Responsibility: Community and the Force of Law Between Khadr and Amnesty

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PRESENTATION NOTES & HAND-OUT

Jurisdiction and Responsibility: Community and the Force of Law Between *Khadr* and *Amnesty*

Craig Scott*

The following are presentation notes that were handed out to participants at the 2008 Constitutional Cases conference:

It is useful to begin with a quotation that situates the current Charter territorial application discussion within the understanding of the Canadian criminal law jurisdiction set out in the 1985 landmark *Libman* case by La Forest J. for the Court:

67. This country has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here, (as in *Peters*, for example). Indeed, from an early period the English courts have recognized such an interest in other countries.. The protection of the public in this country is widely acknowledged to be a legitimate purpose of criminal law, and one moreover that another nation could not easily say offended the dictates of comity.

68. But the courts did not confine themselves to taking jurisdiction over transnational offences whose impact was felt within the country. As early as 1883...they also took jurisdiction in cases where the victim and hence the impact was abroad. In the early cases, there was a tendency to justify this in terms of the links that connected the act to the jurisdiction. In doing so they foreshadowed modern academic writing on the subject, which points out that a similar approach prevails in both public and private international law...

71.For in considering that question we must, in my view, take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence. One must then consider whether there is anything in those facts that offends international comity.

72. Apart from this, though the criminal law is undoubtedly intended for the protection of the public, it does not do so solely by the simple expedient of directly protecting the public from harm. Rather, in conformity with its major purpose, it attempts to underline the fundamental values of our society.. It would be a sad commentary on our law if it was limited to underlining society's values by the prosecution of minor offenders while permitting more seasoned practitioners to operate on a world-wide scale from a Canadian base by the simple manipulation of a technicality of the law's own making. What would be

* Professor of Law & Director, Nathanson Centre on Transnational Human Rights, Crime and Security, Osgoode Hall Law School. Cite as Craig Scott, “Jurisdiction and Responsibility: Community and the Force of Law Between *Khadr* and *Amnesty*”, Panel Presentation, 2008 Constitutional Cases Conference: 12th Annual Analysis of the Constitutional Decisions of the Supreme Court of Canada, 17 April 2009, Professional Development Centre of Osgoode Hall Law School, Toronto. Typos, grammatical mistakes and some unclear referents have been corrected since the version handed out at the time of the presentation itself; as well, some clarifications have been added to reflect parts of the oral presentation that were not in the original hand-out, including the use of parts of the extracts from the *Libman* case.

underlined in the public's mind by allowing criminals to go free simply because their operations have grown to international proportions, I shall not attempt to expound.

74.As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test well-known in public and private international law...

76. Just what may constitute a real and substantial link in a particular case, I need not explore. There were ample links here. The outer limits of the test may, however, well be coterminous with the requirements of international comity.

77. ...Since [the late 19th century] means of communications have proliferated at an accelerating pace and the common interests of states have grown proportionately. Under these circumstances, the notion of comity, which means no more nor less than "kindly and considerate behaviour towards others", has also evolved. How considerate is it of the interests of the United States in this case to permit criminals based in this country to prey on its citizens? How does it conform to its interests or to ours for us to permit such activities when law enforcement agencies in both countries have developed cooperative schemes to prevent and prosecute those engaged in such activities? To ask these questions is to answer them. ...I also agree with the sentiments expressed by Lord Salmon in *Director of Public Prosecutions v. Doot*, *supra*, that we should not be indifferent to the protection of the public in other countries. In a shrinking world, we are all our brother's keepers. In the criminal arena this is underlined by the international cooperative schemes that have been developed among national law enforcement bodies.

78.I see nothing in the requirements of international comity that would dictate that this country refrain from exercising its jurisdiction.

The protective function of the *Charter* in relation at the very least to the conduct of Canadian government actors abroad is directly analogous, from a first-principles and systemic-values perspective, to the philosophy of the SCC expressed almost 25 years ago with respect to the protective function of the criminal law in relation to harms caused to non-Canadians suffering Canadian-related harm outside Canada.

Khadr, 2008, SCC (unanimous) – CSIS interviews/interrogation as participation in US Guantánamo process when they handed over the results to US authorities: CHARTER APPLIES + BREACH OF CHARTER

- Preliminary: interpretation of *Khadr* inextricably tied to *Amnesty* case decided subsequently by FCA, but I will first comment briefly on *Khadr* (and on its understanding of *Hape*) before moving to the interpretations/applications by the FCA in *Amnesty* of the *Khadr* case
- *Hape*'s overruling of *Cook*'s "error" in interpreting s.32(1) of Charter to apply to conduct of Canadian government personnel abroad because Parliamentary "authority" is a prior question; because the law pertaining to police investigation is assimilated to being nothing but enforcement jurisdiction (versus prescriptive and/or adjudicative jurisdiction), and because PIL is found to allow for enforcement only by the territorial state (unless that state consents to another state's enforcement activities), then *ipso facto* the Charter cannot apply because (interpreted in light of this understanding of PIL jurisdictional principles) Parliament does not have the power to "enforce" its laws in another state

- In *Hape*, the SCC majority misunderstands the line between enforcement jurisdiction and prescriptive as well as related adjudicative jurisdiction.
- However, in *Khadr*, the *Hape* understanding of the territorial scope of application of the Charter in relation to some sort of International Human Rights Law (IHRL) exception leads to the basic finding in *Khadr* that the Charter both applies and has been breached; disclosure of documents is ordered.
- Note the role in *Khadr* of USSC judgments on illegalities in Guantánamo process in relation to IHRL findings.
- Relationship between violation of International Human Rights Law (IHRL) and (a) applicability of Charter and/versus (b) limitation on comity rationale for not applying otherwise-applicable Canadian law
- Charter application to evidence produced through rights violations: so far, at SCC level, this is the only context, but the *Hape* and *Khadr* IHRL reasoning not so limited > on to the FCA in *Amnesty*.

Amnesty International and BCCLA v. Chief of Defence Staff et al, FCA, 2008 (unanimous) – transfer of prisoners by Canadian military to Afghan authorities with risk of torture or other abuse after handover: CHARTER DOES NOT APPLY (THUS, NO BREACH OF CHARTER)

- Two questions: 1. Does Charter apply? 2. If not, does it nevertheless apply because of a claimed *Hape* IHRL exception? Unhelpfully, the FCA deals with the questions in reverse order.
- Interpretation of Charter applicability based on *Hape* > The FCA appears to reject *Hape* reasoning of Charter applicability as being able to arise despite initial non-applicability of the Charter; the FCA appears to view consent to application of foreign law (i.e. consent by Afghanistan to application of Charter of Rights to Canadian military conduct) as the only exception to Charter non-applicability abroad.
- Even then, the FCA gets Afghanistan “consent” badly wrong on the facts by assuming application of Canadian law to Canadian personnel does not cover the case at hand
- Also, the FCA simply misreads *Khadr* when FCA says *Hape* + *Khadr* does not result in application of Charter in the event of the IHRL exception being triggered.
- Implicitly, the FCA sees the existence of the USSC cases as dispositive to SCC reasoning in *Khadr* versus seeing the USSC case as simply the SCC’s convenient proxy for proof and establishment of IHRL violations.
- The FCA invokes the *Bankovic*/ECHR interpretation on effective control over the person almost as if some sort of direct precedent for Canada and (a) as if International Covenant on Civil and Political Rights (ICCPR) does not exist (e.g. 1981 *De Casariego v Uruguay* and *Lopez Burgos v Uruguay*, two longstanding UN Human Rights Committee cases; 2004 General Comment on ICCPR 2(1)) and (b) as if that case has not been widely criticized as tortured reasoning and veiled political deference by the ECtHR.
- It is ironic how the FCA continually asserts how Canada and Afghanistan agreed that international law was the common denominator in terms of being the law applicable to conduct by their officials (soldiers, police, etcetera) but fails to grasp why this should only reinforce the argument that Canadian courts applying IHRL (including overlapping International Humanitarian Law – IHL – or International Criminal Law – ICL) is not an affront to traditional comity in Canada-Afghanistan relations. At the very least, from even a traditional comity-shaped sensitivity (however misguided the traditional understanding may be), the FCA could have viewed these legal facts on the Canada-Afghanistan relationship in a way similar to how the SCC

referenced USSC decisions in *Khadr* as the factor that made it easier for SCC to apply the *Hape* IHRL exception.

- There is a complete lack of interpretive recourse by the FCA to Public International Law principles of attribution and state responsibility in relation to other states' acts in the law of state responsibility (2001 ILC Articles on State Responsibility > General Assembly of the UN) or to parallel legal developments on the law related to aiding and abetting in ICL.
- One close-to-the-surface subtext in the FCA judgment is a citizens (*Khadr*) versus foreigners (*Amnesty*) dichotomy; returning to the SCC Libman case and its ethos, this FCA discourse gets the legal and moral community all wrong.
- Is territoriality of the disclosure order in *Khadr* relevant, sub-textually or in relation to understanding the case's force for the future?

Back to *Hape*, 2007 (Lebel J. for a majority of 5) – RCMP investigation in Turks & Caicos and issue of lack of warrants according to Canadian Charter standards: NO APPLICATION OF CHARTER (THUS, NO BREACH OF CHARTER) + NO SEPARATE BREACH OF CHARTER IN TRIAL PROCESS

- Note again that the FCA in *Amnesty* was clearly wrong at the basic level as to what the SCC *said* in *Hape*, and then in *Khadr*.
- At same time, the FCA implicitly picks up on (a) the analytical incoherence of *Hape* on Charter applicability being triggered only if IHRL violations occur in *Hape*-like police investigation circumstances and (b) the SCC's (Lebel J.'s) misunderstanding of these kind of investigation cases as all and only about enforcement jurisdiction versus prescriptive jurisdiction (the latter dealing with the scope of application of Canadian law for purposes of consequences in Canadian legal system).
- There needs to be a return to the sophistication of *Cook* on the jurisdiction and power of a state to apply its own laws to generate legal effects in its own legal system subject to an analysis of whether this represents an undue intrusion in a foreign legal system. There needs as well to be a return to the ethos and big picture understandings of moral responsibility found in the LaForest J. judgment (for the Court) in *Libman*.
- Note in *Hape* LeBel J.'s own admonition to Binnie J. about letting law evolve as the Court learns and is faced with new situations. This collegial lecture should probably apply to *Hape* itself, although there is the ever-present danger that a new SCC configuration could use the analytical incoherence of *Hape* as a reason to back off of the IHRL reference point entirely.
- A final observation with respect to the line of jurisprudence on extraterritoriality and the Charter from *Terry*, *Harrer*, and *Cook* through to *Hape*, *Khadr* and *Amnesty*: the federal Department of Justice can be viewed as a repeat player in the same way we think of insurance companies and other powerful litigants as repeat players. The repeat player advantage is especially reinforced when intervenor status is denied by the FCA to the U of T Faculty of Law's IHRL Clinic based on it being characterized by the FCA motions judge as essentially a law firm with 'only' a "jurisprudential" interest in conformity of Canadian law with IHRL.
- The repeat player advantage is arguably also reinforced by the ongoing poverty of legal education in Canada and corresponding professional and judicial understanding of foundational principles, processes, sources, and institutions of public international law (not to mention the related structure and principles of private international law / conflict of laws).