Al Odah v. United States, D.C. Cir. 2005

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

NOTES ON THE GOVERNMENT'S OPENING BRIEF

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INTRODUCTION

These notes are a continuation of my amicus effort in the coordinated cases In re Guantanamo Detainee Cases. Personal matters are now pressing to the point where I'm not in a position to undertake another brief on my own, and the circuit rules require that amici coordinate. Counsel for petitioners may use these notes however they wish. My previous briefs in the detainee cases are available at: http://www.justicescholars.org/pegc/articles.html
These notes continue from those briefs and look at the government's opening brief in Al Odah v. United States (hereinafter "US Brief") where it discusses Geneva and Law of War issues at 49-64, available at:

http://www.justicescholars.org/pegc/archive/Al_Odah_vs_US/AlOdah.CTADC.DOJ.OpeningBrief.pdf

ENEMY COMBATANTS

"The detention of members or supporters of [enemy] forces is an established part of the laws of war. * * * The district court erred in suggesting that the exercise of this traditional power creates concerns of vagueness or overbreadth. * * * T]hese are quintessentially military judgements. * * * [T]he capture and detention of members or supporters of hostile forces is an important and traditional element of the President's warmaking powers." *Id*. at 49-51.

- A new paper by ICRC legal advisor Gabor Rona covers these issues well; see Gabor Rona, Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools, 5 Chi. J. Intl. L. 499 (2005). (There are also some articles in 5 Chi. J. Intl. L. by the likes of Yoo and Posner, see – http://cjil.uchicago.edu/win05.html).

- Geneva 1949, Hague 1907, and IMT 1945 codify the laws of war – the traditions are moot. Would they propose to adopt the ancient tradition of slaughtering all the men and selling everyone else into slavery? As Mr. Rona's article explains, anyone not protected as a POW by GPW art. 4 is protected as a civilian by GC art. 4.

- Customs do not trump statutes: "Generally, a statutory enactment controls all prior usages and laws, and establishes the rule which governs the subject-matter." U.S. v. Collier, 3 Blatchford, 332, cited in William Winthrop, Military Law and Precedents (1895)(US Army 2001), Ch. IV. The Unwritten Military Law, footnote 7 (the full chapter is worth reading), available at: http://www.justicescholars.org/pegc/_LAW_/Winthrop_Military_Law.pdf

- The adjudication of legal matters is a quintessentially judicial function, not a military one, and the President has no authority to violate the law or make judicial "determinations" of law.

- The war power of the President is simply the command of the armed forces: he has no inherent legislative or judicial authority, nor any authority to nullify the laws – both the Presidency and the nation itself are purely legal institutions and have no function or existence outside the law. The power to detain resides in the nation and its laws, not the person or office of the President – the fundamental purpose of the executive branch is to execute the law.

CSRTs

"If there were a defect in the current CSRT process, the proper remedy would be to vacate the CSRT rulings in question and permit that process to be conducted under corrected procedures." *US Brief* at 54.

- Ad hoc legal procedures are prohibited by GPW arts. 99 and 102, GC arts. 65-67, etc., and constitute grave breaches pursuant to GPW art. 130 and GC art.147.

- As discussed in my amicus briefs, HR art. 23(h), IMT arts. 6-8, and 18 USC § 2441 apply here: the CSRTs represent criminal violations of US law.

JUDICIAL ENFORCEMENT

"The Geneva Convention creates no judicially enforceable rights. * * * Judicial enforcement of treaties is not presumed. Rather, absent a clear contrary intent, a treaty "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." [Citing *The Head Money Cases*, 122 U.S. 580, 597 (1884), etc.]" *US Brief* at 55-56.

- The intent of Geneva is clear from CA1, the grave breach provisions requiring criminal sanctions in domestic law, the requirement to suppress lesser violations, etc.

- "No right without a remedy." It must be the case that all rights are ultimately enforceable in the courts as a matter of law, and anything which isn't is no right. Criminal statutes purport to represent *universal* rights:

> "Wrongs also are divisible into, first, private wrongs, which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and secondly, public wrongs, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors."
> Sir William Blackstone, *Commentaries on the Laws of England,* 1st ed., Oxford (1765-1769), Bk. I, Ch. 1, at 118; available at:
> http://www.yale.edu/lawweb/avalon/blackstone/blacksto.htm

- That enemy nationals must possess some rights is obvious from HR art. 23(h), which prohibits any action "[t]o declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party." 18 USC § 2441 (c)(2) makes it an offense punishable by life imprisonment or death to commit any violation of HR art. 23(h).

EISENTRAGER

"In *Eisentrager,* the Court held that German prisoners challenging the jurisdiction of the military tribunal that convicted them could not invoke the 1929 Geneva Convention because the rights afforded under it are not judicially enforceable by the captured party. 339 U.S. at 789." *Id.* at 56.

"As was the case with the 1929 [Geneva] Convention, the 1949 Convention itself does not provide judicially enforceable rights to individuals. * * * Hamdan's rationale for concluding that the Convention provides judicially enforceable rights is that that the treaty protects the rights of individuals. But if that were the case, it would have been equally true of the 1929 version of the treaty, which the Supreme Court held did not create judicially enforceable rights." *US Brief* at 59.

- The first quote is a bald lie: the Court held that the provisions of GPW 1929 at issue in *Eisentrager* (due process guarantees) were only applicable to acts committed after capture, following *Yamashita*. This was one of the major points addressed in my *Gitmo Amicus*. It's a critical issue, they're flat-out lying about it, and they should be pounded on it – *Eisentrager* and *Yamashita* are moot under Geneva 1949.

- The second quote is a non-sequitur, and it also ignores the very substantial differences between the 1929 and 1949 versions, including the grave breach provisions, the due process guarantees in regard to acts committed prior to capture, and the addition of the

fourth convention to protect civilians. See the historical discussion of GPW art. 85 in *ICRC Commentary III Geneva* (GPW) and note especially the reference to *Yamashita*:

http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/5cd83e96981e1ee0c12563cd00427ee4?OpenDocument

COMMON ARTICLE 1

"The first article of the treaty explains that the parties to the Convention "undertake to respect and to ensure respect for the present Convention in all circumstances." This was an important revision of the 1929 convention because it explained that it was the duty of all parties to the convention not only to adhere to the Convention, but also to ensure compliance by every other party to the convention.

"Instead, the terms and history of the revised Convention show that, as with the 1929 version, vindication of terms of the treaty is a matter of state-to-state relations, not domestic court resolution." *US Brief* at 57.

- Here they misrepresent the changes. GWS 1929 art. 25 and GPW 1929 art. 82 stated: "The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances. If, in time of war, a belligerent is not a party to the Convention, its provisions shall, nevertheless, be binding as between all the belligerents who are parties thereto." The first sentence was moved to CA1 with the added language "and to ensure respect for," and the second was moved to CA2. The entry for CA1 in *ICRC Commentary I Geneva* (GWS) shows the dishonesty of the government's spin clearly:

> "[p.25] The Conventions of 1864 and 1906 had no similar provision. The 1864 Convention (Article 8) merely said: "The implementing of the present Convention shall be ensured by the Commanders-in-Chief of the belligerent armies, following the instructions of their respective Governments, and in accordance with the general principles set forth in this Convention." The 1906 Convention (Article 25) reproduced this provision in approximately the same terms.
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> "The provision did not mean that the entire responsibility for the execution of the Conventions was left to the Commanders-in-Chief. The ratification by two States of a treaty in itself constitutes an obligation to respect its terms. It was in 1929 that the need for making the provision more explicit was first felt. Article 25 of the 1929 Convention said that "The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances". The idea was to give a more formal character to the mutual undertaking by insisting on its character as a general obligation. It was desired to avoid the possibility of a belligerent State finding some pretext for evading its obligation to apply the whole or part of the Convention.
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> "The provision adopted in 1949 has the effect of strengthening that of 1929. This is due both to the prominent position which it is given at the beginning of the Convention and to its actual wording. By undertaking at the very outset to respect the clauses of the Convention, the Contracting Parties draw attention to the special character of that instrument. It is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party

observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations 'vis-à-vis' itself and at the same time 'vis-à-vis' the others. The motive of the Convention is such a lofty one, so universally recognized as an imperative call of civilization, that one feels the need for its assertion, as much because of the respect one has for it oneself as because of the respect for it which one expects from one's opponent, and perhaps even more for the former reason than for the latter.

"The Contracting Parties do not undertake merely to respect the Convention, but also to 'ensure respect for' it. The wording may seem redundant. When a State contracts an engagement, the engagement extends eo ipso to all those over whom it has authority, as well as to the [p.26] representatives of its authority; and it is under an obligation to issue the necessary orders. The use of the words "and to ensure respect" was, however, deliberate: they were intended to emphasize and strengthen the responsibility of the Contracting Parties. It would not, for example, be enough for a State to give orders or directives to a few civilian or military authorities, leaving it to them to arrange as they pleased for the details of their execution. It is for the State to supervise their execution. Furthermore, if it is to keep its solemn engagements, the State must of necessity prepare in advance, that is to say in peacetime, the legal, material or other means of loyal enforcement of the Convention as and when the occasion arises. It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention."

ICRC Commentary I Geneva (GWS), entry for art. 1, available at:
http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/3dab115d29dffdcac12563cd0041fa3d?OpenDocument

- Note that "state-to-state relations" is secondary to domestic enforcement here. The government's spin ignores all this and essentially argues for the understanding stated by the 1864 or 1906 versions of Geneva.
- Why should diplomatic efforts by other nations be required in order for the United States government to obey or enforce its own laws? CA1 requires respect for Geneva in *all* circumstances, and 18 USC § 2441 makes it a federal offense to commit a grave breach of Geneva under any circumstance.

GPW ARTICLE 5

"The district court relied on Article 5 of [GPW], which provides that certain detainees are entitled to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." * * * That provision only applies, however, if "doubt arise[s] as to whether persons, having committed a belligerent act and having fallen into the hands of an enemy," meet the convention's definition of prisoners of war. Petitioners have never explained why their status would be doubtful under Article 5, which

contemplates that a detainee who challenges his status must provide some basis for doubt." *US Brief* at 63.

"The district court also relied on Army regulations that, in it's view, require that detainees be treated as if their status is "in doubt" under Article 5. Even if the court's interpretation of the regulations were correct, those regulations would not serve to override the determination of the Commander-in-Chief that Taliban detainees are not entitled to "prisoner of war" status under the Geneva Convention." *Id.* at 64.

- Here the government is pretending GPW art. 5 means exactly the opposite of what it says. This was another major topic in my *Gitmo Amicus*: captured belligerents are assumed to be POWs until such time as a competent tribunal determines otherwise, in which case they're civilians protected by GC. GPW art 5 says "any doubt," not that the detainee must raise it himself – the government's fraudulent "determination" that no detainee is entitled to protection under Geneva is precisely such a doubt.

- The pre-Bush administration US military regulations are merely an honest reflection of the conventions – 18 USC § 2441 and the conventions themselves are the controlling law. The Bush administration has been lying about this for over three years now, and the lies are obvious from the plain text of GPW art. 5.

WHITE HOUSE POLICY

On February 7, 2002 the White House issued a "fact sheet" concerning the treatment of detainees in the "global war on terror" which was based on a memo of the same date from Bush to Cheney, Rumsfeld, and Ashcroft, etc. The memo was publicly released in the aftermath of the Abu Graib, and was drafted by David Addington, counsel to Cheney. It states a "policy" which DoD and the White House have repeatedly used to deny that the administration has authorized the abuse of prisoners:

> "As a matter of policy, the United States Armed Forces shall continue to treat all detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."
> George W. Bush, *Humane Treatment of al Qaeda and Taliban Detainees*, White House policy memorandum (2/7/2002).

That statement is a smokescreen –

- The stated policy requires an exact understanding as to "appropriate and consistent with military necessity," and likewise, "the principles of Geneva."

- No "military necessity" can exist outside of combat operations.

- Unarmed civilians, wounded, and prisoners are not subject to attack.

- Hence, the stated policy amounts to saying that we will respect Geneva unless we violate Geneva. I raised this point with Rear Admiral John D. Hutson (USN ret.), Dean of the Franklin Pierce Law Center, during a conference call Q & A held by *Human Rights First*, and he strongly agreed. An audio file is available at:

http://www.humanrightsfirst.org/us_law/etn/lawsuit/index.asp#

- The conditions of detention at Guantanamo Bay, the "military commissions," and the "CSRTs" are all facially inconsistent with Geneva and constitute grave breaches of the conventions. All of it is clearly the result of deliberate administration policy, and none of it entails any legitimate military necessity: it is a policy of deliberate abuse which constitutes a conspiracy to commit war crimes pursuant to 18 USC § 2441. Yet the administration hides behind the 2/7/2002 memo and the fallacious claim that interrogations are of unprecedented importance in the GWOT because it's the only way to prevent future acts of terrorism. Given those claims, it's difficult to believe the abuse is merely the result of ignorance, poor training, and / or individual misconduct when the US military is clearly the most professional in history. Phillip Carter has some pertinent observations about all of this on his blog, *Intel Dump*. See the entry "Just Following Orders?" (May 13, 2005) at:

http://inteldump.powerblogs.com/archives/archive_2005_05_08-2005_05_14.shtml#1116042298

- Also relevant is US Army FM 6-0, Mission Command: Command and Control of Army Forces (2003), available at:

http://www.globalsecurity.org/military/library/policy/army/fm/6-0/index.html

Lake Chelan
May 16, 2005
[revised 2006.08.02]

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