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**The Omar Khadr Case: How the Supreme Court of Canada
Undermined the Convention on the Rights of the Child**

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ABSTRACT

Though a 15-year-old child when detained, Omar Khadr, now 23, is the only citizen of a western country who has not been repatriated from illegal detention by the United States at its Guantanamo Bay naval base. When the Supreme Court of Canada reversed a Federal Court order requiring the Prime Minister to request his repatriation, it violated the Convention on the Rights of the Child and *jus cogens* which prohibits torture. The court ignored the gravity of Omar's situation, failing to take account of the way international law has been incorporated in Canadian law and mis-stating Anglo-Canadian constitutional tradition with its claim that it lacked jurisdiction over the executive prerogative on matters touching on foreign policy. As a product of the British Empire, prerogative powers under Canada's constitution have always been legally limited by the will of the nation which is now expressed by the legislature and in international human rights instruments. The failure of Canada's highest court to uphold this principle has undermined both the Rights of the Child and the concept of the rule of law which is one of the most fundamental tenets of both parliamentary democracy and modern international relations. The result has been shocking judicial acquiescence to the illegal detention of a child by the party responsible for torturing him.

KEYWORDS

Constitution, Child, Dicey, Foreign Policy, Guantanamo, Human Rights, International Law, Prerogative, Torture

1. INTRODUCTION

Omar Khadr's situation demonstrates the extreme vulnerability of children's rights and of the fundamental freedoms that are essential if we are ever to establish a culture of peace that leaves behind the injustices and bad habits that became entrenched during the age of colonial aggression and imperial domination. Every now and then we are shocked to discover that some seemingly normal individual has sequestered an abducted child in a secret bunker. The inevitable media blitz feeds our horror. Reporters scramble to find out how the crime was discovered and how it remained hidden for so many years. Glimpses of the shackled perpetrator being led into court play before our eyes as we listen to the plans that have been made to rehabilitate the unfortunate victim. There is no question of putting such children on trial. Some cases come to light when the abducted child escapes. He or she may have grown to adulthood and waited years for the opportunity but, once free, heads straight for the police, confident that protection will be offered and the world will defend the right to common decency. For Omar Khadr that ray of hope has been extinguished. He already knows that he will not find protection. The United Nations and some of the most respected courts in the world have confirmed that he has been the victim of torture. Canada's House of Commons and Senate have both recommended his repatriation. Yet in January 2010, the Supreme Court of Canada reversed the order of two lower courts requiring Canada to ask the United States for his return from detention at Guantanamo (*Canada (Prime Minister) v. Khadr*, 2010 SCC). The effect of this judgment is to leave Omar under the control of his abusers while the violation of his fundamental human rights continues.

This is happening despite the fact that Omar is a citizen of Canada, a founding member of both the League of Nations and the United Nations, widely considered to be a leader in the field of human rights, as the Chief Justice of the Supreme Court herself has claimed (McLachlin, 2004). On top of this, the state that tortured him and that continues to hold him under conditions that violate his rights is the United States of America whose Constitution inspired the opening words of the Charter of the United Nations (Goodrich, Hambro, Simmons, 2) which, as stated in the Universal Declaration of Human Rights, is dedicated to "the inherent dignity and the equal and inalienable rights of all members of the human family". Why is this happening? Why is the Convention on the Rights of the Child (CRC) so difficult to uphold when it has been ratified by all states except Somalia and the United States making it the most successful and widely ratified human rights treaty in the world? (United Nations Treaty Collection, 2009 Ch.IV; Schabas, 1996). This article examines the Canadian institutional break down that has allowed Omar Khadr's rights as a child to be gobbled up by a black hole of indifference before the eyes of the world.

2. WHAT HAPPENED TO OMAR

When a child has been abducted by a twisted individual, no one waits for a court to establish evidence concerning the abuse. The child is removed immediately to safety. In Omar's case, however, he is being held captive by a state whose institutions are expected to provide public protection and that state has justified its actions by claiming that the confinement of those transported to its naval base at Guantanamo Bay was necessary to prevent enemy combatants from taking up arms against the United States (U.N. Economic and Social Council, 2006, para. 19). The failure of both Canada and the United States to uphold international norms has obscured many facts, preventing an orderly judicial examination of what happened and denying Omar any opportunity to tell his story.

2.1 FACTS ABOUT OMAR THAT HAVE GONE MISSING IN ACTION

Photos purporting to show Omar's bloody twisted body being dug out of the rubble after the battle in which he is alleged to have thrown a grenade have been published on the internet. He had been shot twice in the back, permanently blinded in one eye by shrapnel and may not have survived were it not for on-site American medical attention (<<http://en.wikipedia.org>> Omar Khadr).

Internet postings are not subjected to the same rigorous scrutiny as evidence submitted in court. However, undisputed evidence referred to in the factum presented by Omar's lawyers to the Supreme Court of Canada indicates that he was later severely tortured. After being hospitalized at Bagram, this seriously injured 15-year-old was pulled off his stretcher on to the floor; his head was covered with a bag while dogs barked in his face; cold water was thrown on him; he was forced to stand for hours with his hands tied above his head and to carry heavy buckets of water to aggravate his wounds; he was threatened with rape, forced to urinate on himself and had bright lights shone in his wounded eyes. One of Omar's interrogators at Bagram has confirmed that prisoners were tortured there. After being transferred to Guantanamo Omar was pressed against a wall until he passed out, he was shackled in painful positions for hours, he was exposed to extreme temperatures, threatened with rendition and sexual violence, forced to urinate on himself, then used as a human mop to clean up the mess and denied clean clothes for two days as well as being subjected to a sleep deprivation technique known as the "Frequent Flyer Program" that was recognised as torture and prohibited by the 1992 U.S. Army Field Manual (University of Toronto, Khadr Factum, para 15- 20). The horror of this treatment should not have slipped the attention of the Supreme Court of Canada because the factum took the unusual step of beginning with an extract from the 14 February 2003 *CSIS Interrogation of Omar Khadr* in which he expressed his fear of the Americans and asked repeatedly for protection, reporting that his admissions had been made under torture.

Despite the rigours of court procedure, controversial cases are often accompanied by advocacy in the media and, in 2007, a video found in the wreckage of the village where the battle took place was leaked to the press. It showed Omar laying land mines and playing with detonating cord (<<http://en.wikipedia.org>> Omar Khadr). The bluster surrounding U.S. justification for Guantanamo and its treatment of Omar has obscured the negative example that this state sets for young people, showing little commitment to stopping the use of weapons that injure innocent parties including children. Unlike 80% of the states in the world, the United States has yet to become a party to the 1997 Mine Ban Treaty, nor has it signed the Convention on Cluster Munitions and it continues to manufacture lethal weapons (<http://www.icbl.org>). UNICEF has expressed concern over the insidious danger such weaponry presents to children (<http://www.unicef.org/graca/mines.htm>). Yet the focus in the Khadr case has been on the culpability of a child caught in battle rather than on state responsibility and the need for disarmament and better communications skills. Moreover, in 2008, military reports accidentally released to the press indicate that U.S. operatives have been less than honest. Soldiers at the scene initially reported that the grenade that killed an American soldier was thrown by the Mujahadeen, not Omar, but the report was later changed to implicate the captured child (<<http://en.wikipedia.org>>).

Media accounts based on U.S. military documents concerning events leading up to the battle in which the contested grenade was thrown, raise other concerns. The incident began when American troops approached a mud brick village. They saw children playing outside and an elderly man asleep under a tree. Some men were sitting around a fire in the main house where

AK47s were visible. Everything was quiet until the old man awoke and started screaming in Pashto. The children acted as interpreters for the Americans and said the man was “just angry”. Things were calm enough for someone to take photographs of the children, then the Americans sent an Afghan militiaman to demand the surrender of the men with the weapons. When someone fired a gun, he retreated. The U.S. soldiers insisted on searching regardless of the men’s affiliation even after they had been informed they were Pashtuns. Things degenerated quickly and a battle broke out with no apparent consideration for the safety of civilians as would have happened if a similar incident had occurred in a western city. When the U.S. soldiers requested medical aid, helicopters strafed the village with cannon and rocket fire and reinforcements threw grenades at the houses (<<http://en.wikipedia.org>> Omar Khadr). In other words, this was not a planned aggression. It erupted because people on both sides mistrusted each other and both responded inappropriately.

We will probably never hear the villagers’ side of this story or find out whether any other children were killed or injured. Arguments concerning what happened have focused almost exclusively on how to interpret U.S. military reports and policy statements, ignoring the confusion that reigns concerning the actual relationship between the United States and the various warring factions in the Afghan region. Osama bin Laden and other members of Al Qaeda reportedly fled for the Pakistan-Afghanistan border after the attacks of September 11, 2001. Omar’s father, Ahmed Sa’id Khadr, is believed to have followed them and he was officially placed on the United States list of terrorists at that time (University of Ottawa, 2008, 7-8). However, former United States President George W. Bush, is also alleged to have been heavily involved with the bin Ladens for several years prior to 9/11(CBC News e. 2003)

The sharp contrast in the treatment accorded to the bin Ladens’ association with the Bush and Khadr families may be attributable to the differentiation of the “Other” used to justify western domination identified by Edward Said (Said, 1978, 1994). North Americans are so conditioned to see Muslims and Middle Eastern people as desert nomads engaged in terrorist activities that those with over-active imaginations fail to perceive points of commonality. Omar’s Egyptian-born father, Ahmed Said Khadr, was a computer engineer who had graduated from the University of Ottawa (University of Ottawa, 2008) so the family had access to ordinary middle-class life. Ahmed worked for charitable non-governmental organisations helping Afghan refugees and setting up agricultural projects, orphanages, a hospital and several medical clinics. He is said to have been skilled at brokering peace between war lords. After western intelligence agencies accused him of using these humanitarian aid activities to funnel funds to terrorists, he was arrested for complicity in bombing the Egyptian Embassy in Islamabad, but he was eventually released for lack of evidence. In 2003, not long after Omar’s capture, he was killed in or shortly after a battle in which one of Omar’s brothers was shot in the spine and paralysed from the waist down.(<<http://en.wikipedia.org>> Ahmed Khadr).

We may never know whether Omar’s father had actually been subverted into supporting terrorism or he was just a humanitarian who got caught in the cross-fire. Omar’s perception of the family conflicts with that of his brother Abdurahman who was released from Guantanamo and returned to Canada after being recruited by the U.S. as a double agent (CBC News a., 2009). Moreover, the reports of intelligence agencies have been tainted by their implication with evidence obtained under torture. In 2006, Justice O’Connor’s Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar investigated U.S. rendition of a Syrian born Canadian telecommunications engineer to Syria where he was tortured. O’Connor found that despite exhaustive efforts to find incriminatory information,

there was no indication that Arar was ever involved in any illegal or terrorist activity, concluding that the United States had sent Arar to Syria on the basis of false information provided by the Royal Canadian Mounted Police. As a result, an apology was issued and compensation paid (Arar, 2006, City News, 2007). An FBI agent later testified to a U.S. military commission that Omar had reported seeing Arar in Al-Qaeda safe houses and training camps, although this has been discounted as the product of torture. (CBC News c., 2009).

The convoluted circumstances surrounding Omar's detention contrast sharply with the treatment accorded by the United States to Patty Hearst, the wealthy heiress who, at 19, was an adult when she was kidnapped by the Symbionese Liberation Army. Bank security cameras recorded her active participation in an armed robbery. Even after her rescue she continued to defend the "urban guerilla" movement but, despite undisputable evidence of her criminal activity, her 35 year sentence was commuted to seven years and she was released after serving only 22 months. She was later given a presidential pardon in accord with public recognition that she had been a victim of "Stockholm syndrome", a psychological condition that induces hostages to sympathise with their captors (Wikipedia, "Patty Hearst", 2010). The evidence in Omar's case is much more ambiguous than that against Patty Hearst. He was only 11 years old when he was taken into a war zone. If he did throw a grenade, he was only 15 at the time and it took place in the heat of an impromptu battle in a remote area where he had been left by his father. He has been tortured repeatedly and he has already spent seven years in confinement with not so much as a trial. What is left of his family is not able to pay for top-flight legal defence. Nor does he have the benefit of the rule of law as defined by Canada, the United States and international human rights instruments that these states are parties to. Indeed, as of 2008, he had been permitted no visits and only two telephone calls from any family member (University of Ottawa, 2008, p.44).

2.2 THE FORGOTTEN LEGAL FRAMEWORK FOR CHILD PROTECTION

The Convention on the Rights of the Child which has been so flagrantly violated in Omar's case is part of a radical legal re-ordering that emerged during the twentieth century and is not yet complete. In 1832, the English jurist John Austin defined "laws" as "commands" and this model prevailed in European domestic and international relations during the age of colonial conquest and aggrandisement. The principles of human equality and consent as defined in international organisations like the United Nations and implemented through multilateral treaties like the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child are changing generally accepted concepts of legality. During the imperial age, treaties may have been the product of a monarch's prerogative but, with the rising importance of democratic norms, international procedure now allows states to ensure that international agreements represent the consensus their people. Texts presented for signature are agreed upon through comprehensive discussion processes. States may register reservations to provisions they do not support and, prior to ratification, they may present a treaty or convention for approval according to their varying domestic legislative processes.

A convention comes into force when the required number of ratifications has been received from other states. However, once a treaty has been signed, a state is obligated to refrain from acts that would defeat its object and purpose (Vienna Convention on the Law of Treaties, Art. 18). Some international law is considered *jus cogens* non-derogable. It is binding even on states that have not agreed to its terms. As the Supreme Court of Canada has acknowledged, the prohibition against torture is one such pre-emptory norm (Suresh, 2002 SCC [61-65, 72]). Since all members of the United Nations have completed ratification of the Convention on

the Rights of the Child except Somalia and the United States, it may also be approaching non-derogable status and, despite the reservations that have been registered by some states, it certainly represents universally accepted norms.

The Convention on the Rights of the Child replicates some of the provisions that can be found in other international treaties and conventions as well as in the domestic law of most states. As set out in O'Reilly J.'s trial judgment in Canada's Federal Court, it stipulates that "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment", "No child shall be deprived of his or her liberty unlawfully or arbitrarily", that the "arrest, detention or imprisonment of a child shall be in conformity with the law" and that every child in custody "shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision in any action".(CRC Art. 39; *Khadr*, 2009 FC, [21]). It also includes special provisions for children. Article 1 defines a child as a person under the age of 18. Article 39 specifies that "arrest, detention or imprisonment...shall be used only as a measure of last resort and for the shortest appropriate period of time". Article 37(c) requires children deprived of their liberty to be separated from adults and declares a right to maintain contact with family through correspondence and visits except in exceptional circumstances. Article 39 requires states to "take all appropriate measures to promote physical and psychological recovery and social reintegration" of a child victim of torture, cruel or degrading treatment or armed conflict. Article 19.1 also specifies that states have a duty to "take all appropriate legislative, administrative, social and educational measures" to protect children from maltreatment by parents, legal guardians or any other person.

There is broadly based popular support for international human rights in Canada and many pieces of legislation have been passed that implement the human rights conventions that Canada has agreed to uphold. The Canadian Charter of Rights and Freedoms, which is included in the Constitution Act, 1982, replicates several provisions found in both the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. The Geneva Conventions Act prohibits torture, and the Crimes Against Humanity and War Crimes Act implemented the Statute of Rome establishing the International Criminal Court to prosecute the perpetrators of genocide, war crimes and torture. As well as ratifying the Convention on the Rights of the Child on 13 December, 1991, Canada became the first state to ratify the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict on 7 July, 2000 and the National Defence Act was amended to comply with its terms. (University of Toronto c., [11]). Through this kind of process, international law has become part of Canadian law.

In its 2008 *Khadr* decision, the Supreme Court of Canada confirmed that Canada's commitment to international human rights norms is reflected in the laws that it enacts. Its earlier reasoning in *Suresh* found that "both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests" (Suresh, 2002 SCC [76]). The 2008 the Canadian Parliamentary Report to the Standing Committee On Foreign Affairs and International Development recommending Omar's repatriation was tabled in Parliament, along with the Conservative Party's dissent which focused on the serious crimes that he is alleged to have committed (House of Commons, 40th parl. 2nd sess) The Senate also adopted Senator RoméoDallaire's motion urging the repatriation of Omar Khadr (Canada, Senate, 2008). Both houses of parliament expressed particular concern with maintaining Canada's

leadership role in support of children's rights. In summary, there has been little to prepare us for the Supreme Court's 2010 Khadr decision which contradicts the object and purpose of both the Convention on the Rights of the Child and the Optional Protocol by prolonging Omar's detention and leaving him in the hands of the state that tortured him.

2.3 UNITED STATES' RESPONSIBILITY UNDER INTERNATIONAL LAW

Primary responsibility for Omar's mistreatment must fall on the United States. In 2006, the United Nations' Economic and Social Council issued a report on the "Situation of detainees at Guantanamo Bay" (U.N. E/CN.4/2006/120). Although the United States denied access to some members of the investigating panel and refused to allow private interviews of any of the detainees, the information the Council was able to compile was disturbing. The United States has not ratified the Convention on the Rights of the Child (CRC), but it is a party to the International Covenant on Civil and Political Rights (ICCPR) and it has violated many of its provisions without registering any official derogation from this or any other human rights treaty to which it is party. The investigation concluded that the "war on terror" does not constitute an armed conflict for the purposes of international humanitarian law and expressed particular concern over systematic violations of the Convention against Torture and of the right not to be subjected to cruel and degrading treatment under s. 7 of the ICCPR. It found that practices at Guantanamo had led, in some instances, to serious mental illness with 350 acts of self-harm in 2003 alone, individual and mass suicide attempts and widespread and prolonged hunger strikes.(U.N. E/CN.4/2006/120, para.71).²Noting that Omar's detention contravenes the CRC ((U.N. E/CN.4/2006/120, n.93), it pointed out that although the United States has not ratified the Convention, it is a signatory so it has an obligation to refrain from acts that would defeat its object and purpose (U.N. E/CN.4/2006/120, para. 66 citing the Vienna Convention on the Law of Treaties, art.18).

Many citizens of the United States are just as concerned as the United Nations over the Guantanamo regime. The slow struggle to defend both international human rights and domestic legal rights in United States federal courts has included the ruling in *Rasul v. Bush*, which found that President George W. Bush acted illegally when he issued orders considering Guantanamo detainees unlawful combatants with no standing to seek remedies in any court, no protection under the Geneva Conventions and no right to *habeas corpus*. In *re Guantanamo Detainee Cases* found that due process had been denied by the Combatant Status Review Tribunal that had classified Omar as an enemy combatant. In *Hamdan v. Rumsfeld*, the U.S. Supreme Court found that the Guantanamo regime violated the Geneva Conventions by denying detainees access to regular courts. However, before Omar's lawyers challenged Prime Minister Stephen Harper's decision not to request his repatriation, the U.S. Congress had passed the *Military Commissions Act* of 2006 removing the jurisdiction of U.S. federal courts to receive *habeas corpus* applications from Guantanamo detainees (*Khadr*, 2009 FC, [21]). Immediately after taking office in January 2009, U.S. President Obama signed an order closing the Guantanamo prison; however, in May the House of Representatives and Senate voted to prevent the transfer of the detainees to the United States and Omar remains the last westerner held at Guantanamo (CBC News, b., 2009). The United States has transferred about 435 detainees from Guantanamo including Omar's brother, and repatriated both citizens and permanent residents to Australia, Denmark, France, Germany, Belgium, Russia, Spain, Sweden and the United Kingdom. It accordingly seems that substantial responsibility for Omar's continued detention in contravention of both the CRC and the ICCPR falls on Canada.

2.4 OBSTACLES TO CANADIAN JUDICIAL PROTECTION

Although Omar was born in Toronto and is a Canadian citizen, the fact that he is being held by the United States presents several obstacles to the efforts that have been made to secure Canadian protection for his rights. To begin with, the Federal Court of Canada has jurisdiction only to grant relief against the Crown for the better administration of the laws of Canada (*Constitution Act, 1867*, s. 101; *Federal Court Act*, s.17). There must be an identifiable decision which can be challenged (*Khadr*, 2009 [36-38]) and, even though anyone incarcerated in Canada has access to legal aid, this is provided under provincial jurisdiction. Since Omar is outside the country, no funding is available. The appeals made on Omar's behalf in Canadian courts have been an entirely volunteer effort, initiated by Dennis Edney, a lawyer with sons Omar's age. Edney seems to have brought the case to Federal Court at his own expense and, since Omar could not participate, proceedings were initiated by Omar's grandmother acting as his best friend.

2.5 THE FACTS AND LAW AS SEEN BY THE FEDERAL COURT OF CANADA

Several decisions of the Federal Court of Canada concerning Omar demonstrate this institution's capacity to provide the legal infrastructure required to uphold international conventions including the Convention on the Rights of the Child. Following Omar's interrogation by agents from the Canadian Security and Intelligence Service (CSIS) and the Department of Foreign Affairs and International Trade (DFAIT), Justice von Finckenstein granted an injunction against further interrogations (*Khadr*, 2005 FC). An application was also made to review a decision of the Minister of Foreign Affairs not to seek further consular access to Omar (*Khadr*, 2004 FC). When the Federal Court rejected an application for disclosure of documents (*Khadr*, 2006 FC), the decision was reversed by the Federal Court of Appeal (*Khadr*, 2007 FCA) and the Minister's subsequent appeal was dismissed by the Supreme Court of Canada (*Khadr*, 2008 SCC). Canadian courts have accordingly proven capable of upholding both domestic and international law to prevent improper conduct by Canadian officials and obtain some disclosure.

Because he was being held abroad, Omar was not available to testify in any of these proceedings. O'Reilly J's trial judgement in *Khadr v. Canada (Prime Minister)*, 2009 F.C. which addressed the decision not to seek repatriation, began with a brief overview of the factual background establishing that Omar was born in Canada in 1986 and moved to Pakistan with his family in 1990. In 1995, his father, Ahmad Kahdr, was charged with complicity in bombing the Egyptian Embassy in Islamabad. The rest of the family went back to Canada but returned to Pakistan in 1996 when Ahmad was released. In 2001, they returned to Canada for a few months so Ahmad could recover from an injury caused by a land mine. They moved to Afghanistan in July 2001 and, following the events of September 11, 2001, Omar and his older brothers attended training camps associated with Al-Qaeda. In July 2002, Omar was present at a gun battle near Khost, Afghanistan where a United States soldier was killed by a grenade. Omar has been charged with throwing the grenade, but maintains his innocence. He was seriously injured by bullets and shrapnel, held in custody at Bagram Airbase for several weeks and then transferred to Guantanamo Bay on October 28, 2002. Beginning in 2005, Canadian consular officials checked on him regularly (*Khadr*, 2009, FC, [12 - 18]).

This skeletal focus on what was required to resolve the issues before the court did little to dislodge the suspicions of those who are susceptible to negative stereotypes about Islamic culture. The judgment did not even refer to Omar's partial blindness or describe the more horrible aspects of the torture he was subjected to. Sticking strictly to his limited jurisdiction

over Canadian government action, O'Reilly J. founded his reasoning on three significant facts that were agreed upon by both parties:

“First, on detention, Mr. Khadr was “given no special status as a minor” even though he was only 15 when he was arrested and 16 at the time he was transferred to Guantanamo Bay.

Second, Mr. Khadr had virtually no communication with anyone outside of Guantanamo Bay until November 2004, when he met with legal counsel for the first time.

Third, at Guantanamo Bay, Mr Khadr was subjected to the so-called “frequent flyer program”, which involved depriving him of rest and sleep and by moving him every three hours over a period of weeks. Canadian officials became aware of this treatment in the spring of 2004 when Mr. Khadr was 17, and proceeded to interrogate him.” (*Khadr*, 2009 FC, [8-11])

O'Reilly found that Canadian consular inquiries concerning Omar began in November, 2003 and were initially concerned with his welfare; however, he concluded that the interviews in 2003 by CSIS and DFAIT were conducted for intelligence purposes. By the spring of 2004, Canadian officials were knowingly implicated in the imposition of sleep deprivation techniques on Omar at a time when he was a 17-year-old minor, detained without legal representation, with no access to family and no Canadian consular assistance (*Khadr*, 2009 FC, [17]) After referring briefly to judgements in the United States concerning the illegality of the Guantanamo regime, he noted that Omar faced five charges under the U.S. Military Commissions Act: (1) Murder in Violation of the Laws of War; (2) Attempted Murder in Violation of the Law of War; (3) conspiracy; (4) Providing Material Support for Terrorism; and (5) Spying (*Khadr*, 2009 FC, [22]). He found that the issues in this case had not been previously decided and that Prime Minister Stephen Harper's declaration to a journalist that Omar's repatriation would not be requested was evidence of a decision that could be judicially reviewed. He also found that there was an on-going policy against requesting repatriation reflected in the dissent registered by Harper's government to the Parliamentary Committee's recommendation. (*Khadr*, 2009 FC, [36-37])

After reviewing several judgements concerning adult Guantanamo detainees, O'Reilly J. found that there was no clear duty to protect citizens under international law or the common law but, following the approach taken by the Constitutional Court of South Africa in *Kaunda v. President of South Africa*, he concluded that the government's decision was reviewable under the Charter although its determination concerning how to deal with the matter was entitled to “particular weight”(Khadr, 2009 FC, [49]). Within this context, he found that “When a person's life, liberty or security is at stake, s.7 of the Charter requires Canadian officials to respect the principles of fundamental justice” (*Khadr*, 2009 FC, [53]). In 2002, the Supreme Court of Canada had established in *Suresh v. Canada (Minister of Citizenship and Immigration)* that the principles of fundamental justice are informed by Canada's international obligations. Invoking the Supreme Court of Israel's finding that severe sleep deprivation for the purpose of breaking a suspect violates the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, O'Reilly concluded that Canada has an obligation to prevent torture, prosecute offenders and ensure that statements made as a result of torture are not used in any proceeding.

He then outlined Canada's duties under the Convention on the Rights of the Child, finding that Canada was required to protect Omar from "physical and mental violence, injury, abuse or maltreatment" and that it had implicitly condoned the use of sleep deprivation techniques by conducting interviews with knowledge that Omar had been subjected to them. (*Khadr*, 2009 FC, [63]). Although he found that the Optional Protocol on the Involvement of Children in Armed Conflict raised no specific legal obligation on Canada in respect to Omar, he found the principles set out in its preamble recognised the special needs of children "who are particularly vulnerable to recruitment or use in hostilities" and identified the need to strengthen international co-operation to implement the Protocol "as well as the physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict" (*Khadr*, 2009 FC, [66-68]). On this basis he determined that Canada's constitutional duty to uphold the principles of fundamental justice under s.7 of the Charter included a duty to protect Omar by ensuring that he is treated in accord with international human rights norms. He also found that a request for repatriation "as soon as practicable" was minimally intrusive on the Crown's prerogative over foreign affairs. (*Khadr*, 2009 FC, [89, 91]).

In short, O'Reilly J.'s reasoning, which was upheld by the Federal Court of Appeal, was a model demonstrating how a state can use domestic legal infrastructure to uphold its international human rights commitments. Omar's circumstances are unprecedented in Canada and it can only be hoped that they will never be replicated. If the Supreme Court of Canada had refused leave to appeal, all would have been well.

3. HOW CANADA'S SUPREME COURT SUBVERTED CHILDREN'S RIGHTS

Given the facts of Omar's situation, Canada's legislative support for human rights, and the Supreme Court's previous reasoning, its reversal of the order to request Omar's repatriation is both shocking and mysterious, particularly since the court failed to address children's rights and the issue of torture that figured so prominently in the Federal Court reasoning. The Court did confirm that the interrogations conducted by Canadian officials with knowledge that Omar had been subjected to sleep deprivation techniques signified Canada's active participation in a process that violated international human rights and deprived Omar of his right to liberty and security of the person guaranteed by s. 7 of the Charter. It even found that the order to request Omar's repatriation was an appropriate remedy. It is the reversal of this order on the grounds that it touched on the Crown prerogative over foreign affairs that is particularly troubling. What does it mean to grant government officials such broad discretion to suspend the laws of Canada with regard to a particular individual, especially when that person's rights were violated as a child? Its rationale for doing this was poorly explained, revealing some rather ominous cracks in what people have generally assumed to be an enviable legal regime.

3.1 THE PRIME MINISTER'S SUBMISSIONS TO THE SUPREME COURT OF CANADA

The appeal to the Supreme Court of Canada was prepared by Canada's Department of Justice on behalf of the Prime Minister, the Minister of Foreign Affairs, the Director of the Canadian Security Intelligence Service and the Commissioner of the Royal Canadian Mounted Police. In other words, arguments against the recommendation for repatriation tabled by both houses of parliament were prepared at the expense of Canadian citizens on behalf of government agencies that had already been implicated in serious violations of Canadian law in relation to Omar Khadr. This raises many questions. Do they have something to hide? Should the Department of Justice be formulating arguments on behalf of administrative departments against the express will of Parliament? Who represents Canada? And, given Omar's lack of resources, can justice be assured in the face of such a David and

Goliath imbalance in access to legal representation? Given the serious nature of both the prohibition against torture and the rights of children it also leads us to wonder whether the governmental veil should not be lifted in some circumstances to consider the personal responsibility of individuals purporting to act on Canada's behalf.

The partisan nature of the application for leave to appeal can be seen in the fact that it made no mention of the Convention on the Rights of the Child or of the prohibition against torture even though these were the foundation of the trial judgement. It referred only to an international obligation to fight terrorism, protesting against any governmental duty to protect citizens abroad and what it claimed was an emerging trend to issue specific orders impinging on foreign relations. It even went so far as to accuse the Court of using the Charter to reverse foreign policy (University of Toronto d., 2009, [38-39]) when the problem might more properly be seen in terms of an increased tendency of government agents to violate both Canadian and international law. Unfortunately, the Court crumpled under this allegation and granted leave.

Despite the extreme rarity of Omar's circumstances which served to limit the scope of the protection represented by a request for his repatriation, the Crown's factum focused on the spectre of an unmanageably expanded duty to protect Canadian citizens abroad. It paid very little attention to the Convention on the Rights of the Child except for making an incorrect and unsubstantiated suggestion that it had not been incorporated in Canadian law and claiming that Canada's obligations under this instrument were territorially limited (University of Toronto a., 2009, [53-55]). Most of its assertions were not relevant to Omar's particular situation. For example, the remedy of requesting repatriation did not require any extraterritorial action. Similarly, although the Crown pointed out at paragraph 99 that a citizen who leaves for another state must expect to be answerable to the justice system of that state, it failed to acknowledge that Omar was only eleven years old when he left Canadian territory and he was taken to Pakistan and Afghanistan. He did not in any sense choose to enter the jurisdiction of the United States. There were so many split ends in the Crown's tangled argument that it would have been impossible for the Court to address them all. The quality of the submissions certainly leaves us to wonder whether a state can be considered to be respecting its international obligations when its agencies exhibit such wilful blindness to its commitments.

Overall, the Crown's submissions were so biased and so lacking in understanding of the aspirational and mutually supportive character of international human rights law that it would have required at least a term at law school to correct some of its misperceptions. Its assertion of territorially defined sovereignty contradicts the colonial processes through which Canada became incorporated in the British empire and its ardent denial of any duty to protect deviates from the exchange of loyalty for protection that is central to the English concept of constitutional monarchy to which Canada is heir (*Halsbury's Laws of England* (4th), 1996 vol. 8(2) 26; *Calvin's Case*, 1608; *Coronation Oath Act, 1688*; Starkey, 2004). There have been a great number of changes in the political structure of both Canadian and international relations during the past century, yet s.9 of Canada's Constitution Act, 1867 still vests "Executive Government and Authority" in the Queen and the Queen is still subject to the coronation oath that she swore upon taking office confirming the monarch's traditional obligation to protect as seen specifically in the duty to uphold the laws of the land. Indeed, the Constitution Act, 1982 begins by stating that Canada is founded on the rule of law. In short, the Crown's submissions seem to have been based on a fundamental misunderstanding of both Canadian constitutional history and international law.

3.2 THE COURT'S REASONING

Fortunately Omar Khadr's situation is highly unusual. There is no Canadian precedent for such extraordinary mistreatment of a child by an allied state. Yet, if the Court had decided to uphold O'Reilly's order, all it needed to do was to reiterate the reasoning in some of its previous judgements. Binnie J.'s supplementary reasons in *R. v. Hape*, 2007 SCC [184] included a well articulated explanation of the wisdom of the common law case by case approach in areas that have yet to be fully defined such as that governing the relationship between Canadian and international law. This could have been used to counter the Crown's fears concerning an expanded duty to protect Canadians abroad. The main body of *Hape* also included a careful analysis of the effect of changes in international law on the interpretation of domestic legislation. The Court concluded that Canada follows the English tradition and, by the doctrine of adoption, "rules of international law are incorporated automatically, as they evolve, unless they conflict with legislation" (*R. v. Hape*, 2007 SCC [65]). *Suresh v. Canada (Minister of Citizenship and Immigration)* is full of statements confirming that torture outrages Canadian standards of decency as well as "Canada's constitutional commitment to liberty and fair process" (*Suresh*, 2002 SCC [58]). It also supports the incorporation of international law in Canadian law stating that:

When Canada adopted the *Charter* in 1982, it affirmed the opposition of the Canadian people to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s.12 (*Suresh*, 2002 SCC [51]).

Suresh touched on foreign policy in that it was concerned with deportation and the Court had no problem limiting executive discretion in that case stating:

The Minister is obliged to exercise the discretion conferred upon her by the Immigration Act in accordance with the Constitution...[and]...the principles of fundamental justice under s. 7 of the Charter (*Suresh*, 2002 SCC [77]).

In other words, the outcome of the *Khadr* case disturbed seemingly established legal principles. In keeping with its previous reasoning, the Court did confirm that the conduct of Canadian officials had violated s. 7 of the Charter, and that the request for repatriation was an appropriate and fair remedy. But this is of little consequence. The reversal of O'Reilly's order leaves Omar in the hands of his torturers and the Court's meek acceptance of the Crown's boldly asserted prerogative over foreign affairs leads us to the astonishing conclusion that it has abdicated from its traditional role as guardian of the rule of law.

In taking this tack, the Court failed to acknowledge the most serious concerns raised both by O'Reilly J. in his trial reasoning and by the factum presented by Omar's lawyers. The barbarity of Omar's treatment at Bagram and Guantanamo was not even mentioned. The word 'torture' only occurs once in the judgement, at paragraph 20, with reference to a U.S. case. Instead of using the appropriate word that invoked the appropriate Canadian and international law, the Court maintained the euphemisms of Omar's abusers, referring to the specific mistreatment in which Canada was implicated as 'sleep deprivation' or the 'frequent flyer program.' It also ignored children's rights, presenting no discussion what so ever on this topic in relation to the Crown's concerns despite the primordial role of the Convention on the Rights of the Child in O'Reilly J's reasoning and in the submissions made in this regard in both Omar's factum and those of some of the interveners, most notably that of the Canadian Coalition on the Rights of the Child (University of Toronto c., 2009). Even if Omar is guilty of having thrown the grenade, it can hardly be considered that, as a child, he was a leading Al-Qaeda operative responsible for plotting war crimes. He has already been incarcerated far

longer than Patty Hearst who used a machine gun to hold up a bank. So how can the Court's refusal to uphold O'Reilly's order be reconciled with Canada's obligation to "take all appropriate measures to promote physical and psychological recovery and social reintegration" of children caught in war?

The Court's justification for its extraordinary denial of its supervisory duties was extremely sketchy, barely reaching two pages in length. Ignoring the democratic processes required to establish modern legality and the substantial changes that took place during the twentieth century as Canadian independence from the British empire emerged, it cited the *Reference as to the effect of the Exercise of the Royal Prerogative of Mercy upon Deportation Proceedings*, a 1933 case that defined 'prerogative power' as, the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown" (Khadr, 2010 SCC, [34]). This is a direct quote from Dicey, whose 1885 review of British constitutional history asserted that constitutional conventions such as prerogative power "must be carried on in accordance with the will of the House of Commons, and ultimately with the will of the nation as expressed through that House" (Dicey, 1885 8th ed. 1914, Ch. XV). According to Dicey, "the supremacy of the law of the land means in the last resort the right of judges to control the executive government" (Ch. XV). Although treaties in Dicey's day could be made by the Crown or by Cabinet without the sanction of Parliament (Ch. XV), he noted the "danger lest the use of the prerogative should supersede the supremacy of law" (Ch. XII) and concluded that "treaty-making power" - ought not to be exercised in opposition to the will of Parliament" (Ch. XIV). For Dicey, the issue was not just whether a prerogative power existed, but whether it was exercised within the proper limits which, as he saw it, were set by the will of the nation as expressed by an elected legislature. Dicey was writing well before democratic norms found expression in international law such as the International Covenant on Civil and Political Rights. However, if the Court had considered Dicey's theory of the constitution in its entirety instead of relying on a snippet taken out of context it would not have granted the executive prerogative such extraordinary deference. It might even have been led to consider how to weigh the laws and conventions that Canada has ratified and the recommendation for repatriation tabled by both houses of parliament against the personal preferences of the Prime Minister and the minority government.

The Court correctly claimed that its role is to establish the legal framework within which executive decisions may be made (*Reference re Secession of Quebec*, 1998). It also acknowledged its ability to give specific directions to the executive branch in matters of foreign policy, citing *United States v. Burns*, [2001 SCC] in which it had rejected extradition for two Canadian youths charged with bludgeoning the family of one to death in the State of Washington. However, it distinguished *Burns* on the grounds that Omar is not in the control of the Canadian government, paying no heed to the fact that O'Reilly's order concerned only the actions of Canadian officials operating within Canadian territory. Despite the repatriation of so many other Guantanamo detainees at the request of so many other governments, even when many were not citizens and the rights of the child were not in issue, the Court then claimed that the effectiveness of requesting repatriation was "unclear".

The Court also misrepresented *Kaunda v. President of the Republic of South Africa* 2004 S.A. Const. Ct to claim that it could not uphold O'Reilly's order because courts should not interfere with the timing or language of diplomatic representations (Khadr, 2010 [44]. O'Reilly's order was not that restrictive. It only directed a request for repatriation "as soon as practicable." Moreover, *Kaunda* is not authority for the abdication of judicial supervision over foreign affairs. Chaskalson C.J. and all of the judges who wrote complementary reasons

made strong assertions upholding South Africa's obligation to act in accord with its constitution and with international law. For example, Sachs J. stated: "In my opinion, the government has a clear and unambiguous duty to do whatever is reasonably within its power to prevent South Africans abroad, however grave their alleged offences, from being subjected to torture, grossly unfair trials and capital punishment" (*Kaunda*, 2004 S.A. Const. Ct. [275]).

In short, the Court did not offer a well founded explanation for either its refusal to uphold O'Reilly's order or its abdication of its duty to uphold the will of parliament and Canada's international commitments. It is an alarming situation because it grants executive prerogative a level of deference that is unprecedented in Canadian history and that contradicts the very idea of the rule of law.

4. ACTION NEEDED & LESSONS TO BE LEARNED

Omar Khadr's story presents the obscene spectacle of child abuse and torture committed before the eyes of the world. The fact that the Convention on the Rights of the Child can be so easily ignored, especially in circumstances that demonstrate violation of the prohibition against torture, is a matter of serious concern for all members of the international community. This is especially so in this case, where the violations were perpetrated and effectively condoned by Canada and the United States, both of which claim to be leaders as far as democratic rights and the rule of law are concerned. Despite the fact that the United States is responsible for the worst atrocities, Canada's complicity is particularly troubling because Canada has ratified the Conventions which its Prime Minister and Supreme Court now choose to ignore.

The case has revealed serious institutional problems in Canada. The partisan stance adopted by the Prime Minister and the Department of Justice with regard to one particular individual who was a child at the time of the alleged offence is troubling to say the least. If the arguments submitted to support government officials who have violated both international law and the will of the Canadian people as represented by Parliament do not represent a lack of good faith, they certainly demonstrate ignorance concerning both international law and Anglo-Canadian constitutional history. The unwillingness of the Supreme Court of Canada to uphold the rule of law by exercising its traditional supervisory role is even more disconcerting, especially since the decision was unanimous and not one of the judges who have reasoned so impeccably in previous cases bothered to write dissenting reasons. It is obvious that a great deal of advocacy and educational work remains to be done. The *Khadr* case is a stark reminder that mere ratification is not sufficient to ensure respect for international norms, even when they are as widely accepted as the prohibition against torture and the Convention on the Rights of the Child.

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2 These included “the capture and transfer of detainees to an undisclosed overseas location, sensory deprivation, and other abusive treatment during transfer, detention in cages without proper sanitation, and exposure to extreme temperatures, minimal exercise and hygiene, systematic use of coercive interrogation techniques, long periods of solitary confinement, cultural and religious harassment,; denial or severely delayed communication with family; and the uncertainty generated by the indeterminate nature of confinement and denial of access to independent tribunals”