File No.: 33289

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

THE PRIME MINISTER OF CANADA,
THE MINISTER OF FOREIGN AFFAIRS, THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE, and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Appellants

- and –

OMAR AHMED KHADR

Respondent

-and-

AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH), HUMAN RIGHTS WATCH, UNIVERSITY OF TORONTO, FACULTY OF LAW – INTERNATIONAL HUMAN RIGHTS PROGRAM AND DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS,
CANADIAN COALITION FOR THE RIGHTS OF CHILDREN AND JUSTICE FOR CHILDREN AND YOUTH,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO),
CANADIAN BAR ASSOCIATION,
AVOCATS SANS FRONTIERES CANADA, BARREAU DU QUEBEC ET GROUPE D'ETUDE EN DROITS ET LIBERTES DE LA FACULTE DE DROIT DE L'UNIVERSITE LAVAL,
CANADIAN CIVIL LIBERTIES ASSOCIATION and NATIONAL COUNCIL FOR THE PROTECTION OF CANADIANS ABROAD

Interveners

RESPONDENT'S FACTUM

NATHAN J. WHITLING AND DENNIS EDNEY
Parlee McLaws LLP
#1500, 10180 – 101 Street
Edmonton AB T5J 4K1
Telephone: (780) 423-8658
Facsimile: (780) 423-2870
Email: nwhitling@parlee.com
dedney@shaw.ca
Counsel for the Respondent

LANG MICHENER LLP
Lawyers
#300, 50 O'Connor Street
Ottawa, ON K1P 6L2
PER: MARIE-FRANCE MAJOR
Telephone: (613) 232-7171
Fax: (613) 231-3191
Email: mmajor@langmichener.ca
Agent Counsel for the Respondent

DOREEN MUELLER
Department of Justice Canada
Prairie Region, #211 Bank of Montreal Bldg.
10199 – 101 Street, N.W.
Edmonton, AB T5J 3Y4
Telephone: (780) 495-8352
Facsimile: (780) 495-5835
Email:doreen.mueller@justice.gc.ca
Counsel for the Appellants

DEPARTMENT OF JUSTICE CANADA
Room #1161, Bank of Canada Bldg.
234 Wellington Street
Ottawa, ON K1A 0H8
PER: ROBERT J. FRATER
Telephone: (613) 957-4763
Fax: (613) 954-1920
Email: robert.frater@justice.gc.ca
Agent Counsel for the Appellants

SACHA R. PAUL
Thompson Dorfman Sweatman LLP
2200 - 201 Portage Avenue
Winnipeg, MB
Telephone: (204) 934-2571
FAX: (204) 934-0571
E-mail: srp@tdslaw.com
Counsel for the Intervener Amnesty International (Canadian Section, English Branch)

COMMUNITY LEGAL SERVICES -OTTAWA CARLETON
1 Nicholas Street, Suite #422
Ottawa, ON K1N 7B7
PER: MICHAEL BOSSIN
Telephone: (613) 241-7008
FAX: (613) 241-8680
Email: bossinm@lao.on.ca
Agent Counsel for the Intervener Amnesty International (Canadian Section, English Branch)

JOHN NORRIS AND BRYDIE BETHELL
100 - 116 Simcoe Street
Toronto, ON M5H 4E2
Telephone: (416) 596-2960
FAX: (416) 596-2598
Email: jnorris@dcdlaw.ca
Email: bbethell@dcdlaw.ca
Counsel for the Intervener Human Rights Watch, University of Toronto, Faculty of Law – International Human Rights Program and David Asper Centre for Constitutional Rights

LANG MICHENER LLP
300 - 50 O'Connor Street
Ottawa, ON K1P 6L2
PER: MARIE-FRANCE MAJOR
Telephone: (613) 232-7171
FAX: (613) 231-3191
E-mail: mmajor@langmichener.ca
Agent Counsel for the Intervener Human Rights Watch, University of Toronto, Faculty of Law – International Human Rights Program and David Asper Centre for Constitutional Rights

EMILY CHAN
Justice for Children and Youth
1203 - 415 Yonge Street
Toronto, ON M5B 2E7
Telephone: (416) 920-1633
FAX: (416) 920-5855
E-mail: chane@lao.on.ca
Counsel for the Intervener Canadian Coalition for the Rights of Children and Justice for Children and Youth

SOUTH OTTAWA COMMUNITY LEGAL SERVICES
406 - 1355 Bank Street
Ottawa, ON K1H 8K7
PER: CHANTAL TIE
Telephone: (613) 733-0140
FAX: (613) 733-0401
Agent Counsel for the Intervener Canadian Coalition for the Rights of Children and Justice for Children and Youth

JOSEPH J. ARVAY, Q.C.
Arvay Finlay
1350 - 355 Burrard Street
Vancouver, BC V6C 2G8
Telephone: (604) 689-4421
FAX: (604) 687-1941
E-mail: jarvay@arvayfinlay.com
Counsel for the Intervener British Columbia Civil Liberties Association

HAMEED FARROKHZAD LLP
43 Florence Street
Ottawa, ON K2P 0W6
PER: YAVAR HAMEED
Telephone: (613) 232-2688, Ext: 228
FAX: (613) 232-2680
E-mail: yhameed@bellnet.ca
Agent Counsel for the Intervener British Columbia Civil Liberties Association

BRIAN H. GREENSPAN
Greenspan Humphrey Lavine
15 Bedford Road
Toronto, ON M5R 2J7
Telephone: (416) 868-1755
FAX: (416) 868-1990
E-mail: bhg@15bedford.com
Counsel for the Intevener Criminal Lawyers' Association (Ontario)

GOWLING LAFLEUR HENDERSON LLP
2600 - 160 Elgin Street
Box 466 Station D
Ottawa, ON K1P 1C3
PER: BRIAN A. CRANE, Q.C.
Telephone: (613) 233-1781
FAX: (613) 563-9869
E-mail: brian.crane@gowlings.com
Agent Counsel for the Intervener Criminal Lawyers' Association(Ontario)

LORNE WALDMAN
Waldman & Associates
281 Eglinton Avenue East
Toronto, Ontario
M4P 1L3
Telephone: (416) 482-6501
FAX: (416) 489-9618
E-mail: lawald@web.apc.org
Counsel for the Intervener Canadian Bar Association

GOWLING LAFLEUR HENDERSON LLP
2600 - 160 Elgin Street
P.O. Box 466, Stn "D"
Ottawa, ON K1P 1C3
PER: HENRY S. BROWN, Q.C.
Telephone: (613) 233-1781
FAX: (613) 788-3433
E-mail: henry.brown@gowlings.com
Agent Counsel for the Intervener Canadian Bar Association

SIMON V. POTTER
McCarthy Tetrault, s.e.n.c.r.l., s.r.l.
2500 - 1000, rue De la Gauchetière Ouest
Montréal, Quebec
H3B 0A2
Telephone: (514) 397-4268
FAX: (514) 875-6246
E-mail: spotter@mccarthy.ca
Counsel for the Intervener Avocats sans frontières Canada, Barreau du Québec et Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval

MARLYS A. EDWARDH
Marlys Edwardh Barristers Professional Corporation
20 Dundas Street West, Suite 1100
Toronto, ON M5G 2G8
Telephone: (416) 597-9400
FAX: (416) 597-0070
E-mail: edwardh@marlysedwardh.com
Counsel for the Intervener Canadian Civil Liberties Association

DEAN PEROFF
Amsterdam & Peroff
35 Alvin Avenue
Toronto, ON M4T 2A7
Telephone: (416) 367-4100
FAX: (416) 367-0076
E-mail: peroff@amperlaw.com
Counsel for the Intervener National Council For the Protection of Canadians Abroad

GOWLING LAFLEUR HENDERSON LLP
2600 - 160 Elgin Street
Box 466 Station D
Ottawa, ON K1P 1C3
PER: BRIAN A. CRANE, Q.C.
Telephone: (613) 233-1781
FAX: (613) 563-9869
E-mail: brian.crane@gowlings.com
Agent Counsel for the Intervener Canadian Civil Liberties Association

LANG MICHENER LLP
300 - 50 O'Connor Street
Ottawa, ON K1P 6L2
PER: EUGENE MEEHAN, Q.C.
Telephone: (613) 232-7171
FAX: (613) 231-3191
E-mail: emeehan@langmichener.ca
Agent Counsel for the Intervener National Council For the Protection of Canadians Abroad

TABLE OF CONTENTS

CSIS: You look tired. Okay, so I brought you a burger. It's very hot though. What's happening?
OMAR: [indiscernible]
CSIS: Pardon me?
OMAR: ... something that's very important, but I'm afraid to say it.
CSIS: Okay, take your time and could you do me a favour today while we're talking? Just make sure you talk nice and loud, so I can keep that air conditioning on so we're cool.
OMAR: There's something that I'm scared to say.
DFAIT: You don't have to be scared of anything from us.
CSIS: What are you scared to say?
OMAR: Promise me you're going to protect me.
CSIS: Why don't you just tell us what it is you have to say?
OMAR: Promise me you are going to protect me from the Americans.
CSIS: From the Americans?
OMAR: Yes.
CSIS: Okay, what's going on with the Americans?
OMAR: Promise me that you are going to protect me if I tell you.
CSIS: Well we can't protect you if we don't know what it is that you have to say directly.
OMAR: Promise me you're going to protect me if I tell you.
CSIS: Well, the only thing I'll promise is that I'll listen to you, and I'll talk to the Americans for you here.
OMAR: And after you go?
CSIS: Pardon me?
OMAR: And after you go?
CSIS: And after I go, then I'll listen to what you know, then I'll come back and talk to you again. Make sure everything's alright. Tell me what's changed from yesterday.
OMAR: I'm scared to tell you.
CSIS: Well, I'll tell you, there's not much we can do, unless I know what you're talking about.
OMAR: Everything that I said to the Americans was not right, I just said that because they tortured me very badly in Bagram. So I had to say what I said.

CSIS Interrogation of Omar Khadr, February 14, 2003, Exhibit 'W' to the Affidavit of William Kuebler, J.R. 285.

Part I: STATEMENT OF FACTS

A. *Overview*

1. In this appeal, the Appellants the Prime Minister of Canada, the Minister of Foreign Affairs, the Commissioner of the Royal Canadian Mounted Police, and the Director of the Canadian Security Intelligence Service (hereinafter respectfully referred to as the "Crown") seek to overturn an Order requiring them to request that the United States return the Respondent, Mr. Omar Ahmed Khadr, to Canada as soon as practicable.

2. The Respondent respectfully submits that this appeal should be dismissed. The majority of the Court of Appeal did not err in their conclusion that the application judge committed no reversible error in finding that the Crown's complicity in profound violations of the Respondent's fundamental human rights constituted a violation of the *Charter*. Further, the majority did not err in finding that the application judge did not abuse the broad discretion conferred upon him by s. 24(1) of the *Charter* in granting the particular remedy that he did.

B. *The Respondent's Unlawful Conscription and Detention*

3. The Respondent is a Canadian citizen detained by U.S. forces at U.S. Naval Base, Guantánamo Bay, Cuba ("GTMO").[1] In approximately June of 2002, when he was 15, the Respondent's father, Ahmed Said Khadr, left him with a group of militants in a village near Khost, Afghanistan.[2] On July 27, 2002, the Respondent was taken prisoner following a military engagement between these militants and U.S. forces.[3] It is alleged that in this engagement, the Respondent threw a grenade which killed Sgt. First Class Christopher Speer.[4] The Respondent denies this allegation.

4. The Respondent was critically wounded during the engagement and was then taken to Bagram Air Force Base where he was held and interrogated.[5]

---

[1] Identification cards, Exhibit B to Affidavit of Lt. Cdr. William Kuebler, para. 3 (J.R. Vol. II, pp. 134, 150-51).
[2] Interview Notes and Report of Investigative Activity, Exhibits S and AA to Affidavit of Lt. Cdr. William Kuebler (J.R. Vol. II, p. 272, Vol. III, p. 290).
[3] Affidavit of Lt. Cdr. William Kuebler, para. 7 (J.R. Vol. II, p. 135).
[4] Referral of Charges, Exhibit KK to Affidavit of Lt. Cdr. William Kuebler, para. 45 (J.R. Vol. III pp. 345-51).
[5] Affidavit of Lt. Cdr. William Kuebler, at para. 8 (J.R. Vol. II, p. 135).

5. The Canadian government became aware of the Respondent's detention in Bagram at an early date, and made representations on his behalf to the U.S. government. In particular, the Canadian government immediately requested consular access and asked "United States intelligence contacts" that he not be transferred to GTMO.[6] The U.S. denied this request for consular access, and transferred the Respondent to GTMO on October 28, 2002.[7]

C. *The Legal Regime at GTMO and Resulting Litigation*

6. GTMO comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Article III of the lease agreement "recognizes the continuance of the ultimate sovereignty of the Republic of Cuba" but also states that "the United States shall exercise complete jurisdiction and control over and within said areas".[8]

7. The regime governing the detention of prisoners in GTMO was established by Military Order of the President of the United States dated November 13, 2001, which included the following:

> (2) the individual [detainee] shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.[9]

8. The Presidential Order was followed by a Memorandum from the President dated February 7, 2002, in which the President purported to determine that the *Geneva Conventions* do not apply to the conflict with Al Qaeda in Afghanistan, that Common Article 3 of the *Geneva Conventions* does not apply to either Al Qaeda or Taliban detainees, and that all Taliban and Al Qaeda detainees are unlawful combatants and do not qualify as prisoners of war under Article 4.[10]

9. In its June 28, 2004, decision in *Rasul v. Bush*, the Supreme Court of the United States held that the detainees in GTMO had to that point in time been unlawfully deprived of their statutory

---

[6] Exhibits F and G to Affidavit of Lt. Cdr. William Kuebler, para. 9 (J.R. Vol. II, pp. 135, 164-168).
[7] Affidavit of Lt. Cdr. William Kuebler, para. 10 (J.R. Vol. II, p. 135).
[8] Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418. **[Tab 63]**; Affidavit of Lt. Cdr. William Kuebler, para. 11 (J.R. Vol. II, p. 135).
[9] Affidavit of Lt. Cdr. William Kuebler, para. 5, Exhibit D (J.R. Vol. II, pp. 135, 157-161).
[10] Affidavit of Lt. Cdr. William Kuebler, para. 6, Exhibit E (J.R. Vol. II pp. 135, 162-163).

right to *habeas corpus*. The Presidential Order purporting to deny them of this right was therefore illegal.[11]

10. On July 2, 2004, the Respondent through his grandmother as next friend filed a petition for *habeas corpus* in the U.S. District Court for the District of Columbia.[12]

11. On July 7, 2004, Deputy Secretary of Defense Paul Wolfowitz issued an Order creating a military tribunal called the Combatant Status Review Tribunal ("CSRT") to review the status of each detainee in GTMO. The detainees before the CSRTs are not accorded any right to counsel. Formal rules of evidence do not apply, and there is a presumption in favour of the government's previous conclusion that a detainee is in fact an "enemy combatant". The detainee is not permitted access to the classified evidence relied upon to support detention.[13]

12. The Respondent's case came before a CSRT on September 7, 2004. The Respondent was not permitted to meet with legal counsel at any time prior to this hearing. The CSRT affirmed the previous determination that the Respondent was an "enemy combatant". The Respondent elected not to participate in this hearing. In reaching its decision, the CSRT relied exclusively upon classified evidence which the Respondent was not permitted to see or comment upon.[14]

13. On November 7, 2005, the Respondent was first charged with offences before a military commission convened at GTMO.[15] In its June 26, 2006, decision in *Hamdan v. Rumsfeld*, the Supreme Court of the United States held that this regime violated Common Article 3 of the *Geneva Conventions* as incorporated by the Uniform Code of Military Justice in that it violated the detainees' right to be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[16]

14. In response to *Hamdan*, Congress enacted the *Military Commissions Act* of 2006 ("MCA"), which purported to strip all courts of the United States of any jurisdiction to hear applications for

---

[11] *Rasul v. Bush*, 542 U.S. 466 **[Tab 48]**; Affidavit of Lt. Cdr. William Kuebler, para. 26 (J.R. Vol. II, p. 139).
[12] Affidavit of Lt. Cdr. William Kuebler, para. 27 (J.R. Vol. II, p. 140).
[13] Affidavit of Lt. Cdr. William Kuebler, para. 28 (J.R. Vol. II, p. 140).
[14] Affidavit of Lt. Cdr. William Kuebler, para. 29 (J.R. Vol. II, p. 140), Exhibit II (J.R. Vol. III, pp. 324-340).
[15] Affidavit of Lt. Cdr. William Kuebler, paras. 35-36 (J.R. Vol. II, p. 142), Exhibit JJ (J.R. Vol. III, pp. 341-344).
[16] *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) **[Tab 24]**; Affidavit of Lt. Cdr. William Kuebler, para. 38 (J.R. Vol. II, p. 142).

habeas corpus over detainees in GTMO.[17] On April 5, 2007, new charges were sworn against the Respondent under the MCA. These charges were then referred by the Convening Authority as non-capital on April 24, 2007.[18] In its June 12, 2008, decision in *Boumediene v. Bush*, the Supreme Court of the United States held that the *habeas* stripping provisions of the MCA are contrary to the Suspension Clause of the U.S. Constitution.[19]

D. *The Respondent's Torture at Bagram*

15. The undisputed evidence before the Court is that the Respondent was severely tortured by U.S. military personnel at Bagram Air Base during the months following his capture when he was 15 and 16 years of age and recovering from life-threatening wounds, including two bullet wounds through his back and chest. This treatment included shackling his hands and feet in unnecessary and painful ways, denying him pain medication during lengthy daytime interrogation sessions, forcing him to sit up when the wounds in his chest required him to remain laying down, pulling him off his stretcher onto the floor, covering his head with a bag while dogs barked in his face, throwing cold water on him, forcing him to stand for hours on end with his hands tied to a door frame above his head, forcing him to carry heavy buckets of water to aggravate the pain from his wounds, threatening to rape him, forcing him to urinate on himself, and shining extremely bright lights in his wounded eyes. These tactics subsided as Mr. Khadr began to give answers his interrogators sought.[20]

16. The Respondent's lead interrogator at Bagram "Sgt. C" was later convicted for beating another prisoner, Dilawar, to death. Several other soldiers were also charged in relation to the death of Dilawar, some of whom pleaded guilty or were convicted at trial.[21]

17. Shortly following the Respondents' filings in the present proceedings, the CBC aired a documentary entitled *United States of America v. Omar Khadr* in which Damien Corsetti, one of

---

[17] *Military Commissions Act of 2006*, Pub. L. No. 109-366, 120 Stat. 2600 (2006), Section 7 **[Tab 64]**; Affidavit of Lt. Cdr. William Kuebler, para. 8 (J.R. Vol. II, p. 135).
[18] Referral of Charges, Exhibit KK to Affidavit of Lt. Cdr. William Kuebler, para. 45 (J.R. Vol. III pp. 345-51).
[19] *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) **[Tab 10]**; Affidavit of Lt. Cdr. William Kuebler, para. 43 (J.R. Vol. II, p. 143).
[20] Affidavit of Omar Ahmed Khadr, at paras. 7, 9, 11, 12, 17, 18, 19, 22, 23, 24, 25 (J.R. Vol. I, at pp. 123-125).
[21] *Taxi to the Dark Side*, Exhibit J to Affidavit of Lt. Cdr. William Kuebler, para. 16 (J.R. Vol. II at p. 136, 188).

the Respondent's U.S. military interrogators at Bagram admitted that the treatment of prisoners at Bagram constituted torture.[22]

E. *The Respondent's Torture at GTMO*

18. The Respondent's torture continued after his transfer to GTMO in October of 2002. There the Respondent was subjected to "walling" (meaning that he was repeatedly pressed against a wall until he passed out), shackled in painful positions for hours at a time, isolated for many months at a time, exposed to extreme temperatures, threatened with rendition and sexual violence, repeatedly picked up and dropped on the floor while shackled, forced to urinate on himself, and used as a human mop to clean up the mess and then denied a change of clothing for two days.[23] Additionally, he was subjected to a sleep deprivation technique euphemistically referred to as the "Frequent Flyer Program" (the "FFP").

F. *The Use of Sleep Deprivation and the "Frequent Flyer Program"*

19. Prior to 9/11, the use of sleep deprivation as an interrogation technique was prohibited by the U.S. military. The U.S. Army's 1992 Field Manual 34-52, "Intelligence Interrogation", listed "Abnormal sleep deprivation" as an example of "mental torture", and stated that: "Such illegal acts are not authorized and will not be condoned by the US Army."[24]

20. However, in the months following 9/11, the U.S. government set out to redefine its interrogation policies. On January 15, 2003, following the rescission of earlier interrogation directives amidst great controversy, Secretary of Defense Donald Rumsfeld directed the establishment of a Working Group (the "WG") to review the use of aggressive interrogation techniques against detainees. Disregarding many serious concerns raised by senior military lawyers, DoD General Counsel William J. Haynes II subsequently directed that this review would be governed by the opinions reflected in a number of now discredited legal memoranda prepared by Mr. John Yoo, then of the Department of Justice's Office of Legal Counsel.[25] As has

---

[22] *United States of America v Omar Khadr*, Supplemental Affidavit of April Bedard, J.R. Vol VII, pp. 1252-1254.
[23] Affidavit of Omar Ahmed Khadr, paras. 36, 41,50, 55, 56 57, 59, 60 (J.R. Vol. I, pp. 126-129).
[24] Department of the Army, *Field Manual 34-52, Intelligence Interrogation*, (1992) at p. 1-8. **[Tab 81]**
[25] *Senate Armed Services Committee Inquiry into the Treatment of Detainees in US Custody*, "Executive Summary and Conclusions," December 11, 2008, pp. xxi-xxii **[Tab 87]**; *Memorandum for Alberto R. Gonzales, Counsel to the President*, Exhibit Q to the Affidavit of Lt. Cdr. William Kuebler (J.R. Vol. II at p. 231). The central feature of these opinions was that, in order to violate the federal torture statute: "The victim must experience intense pain or

since been stated: "These legal opinions, now disgraced, disavowed, and relegated to the scrap heap of history where they belong, laid the groundwork for the wholesale and systematic abuse of detainees..."[26]

21. In its report of April 4, 2003, the WG recommended "Sleep Deprivation" for approval, which it defined as "Keeping the detainee awake for an extended period of time. (Allowing an individual to rest briefly and then awakening him repeatedly.) Not to exceed four days in succession."[27] In doing so, the WG noted that "the Committee against Torture, established under Article 17 of the Convention Against Torture (CAT), has interpreted "sleep deprivation for prolonged periods" to be a violation of both Article 16 of the CAT as cruel, inhuman, or degrading treatment, as well as constituting torture under Article 1 of the CAT."[28]

22. Acting upon the advice of the WG, Secretary Rumsfeld issued a memorandum dated April 16, 2003, authorizing the use of 24 specific interrogation techniques, including "Sleep Adjustment", which he defined as follows:

> V. Sleep Adjustment: Adjusting the sleeping times of the detainee (e.g. reversing sleep cycles from night to day.) This technique is not sleep deprivation.[29]

23. On June 2, 2003, General James T. Hill, Commander of U.S. Southern Command, issued a memorandum providing clarification of the Secretary's memorandum of April 16, 2003. This memorandum defined "sleep deprivation" in the same terms as the WG, and thereby prohibited

---

suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result."

[26] Frakt, David J.R. (Maj.A.F.), "Closing Argument at Guantanamo: The Torture of Mohammed Jawad" (2008), 22 *Harvard Human Rights Journal* 1 at p. 11. **[Tab 83]**

[27] Affidavit of Lt. Cdr. William Kuebler, para. 19 (J.R. Vol. II, p. 137). Memorandum for the General Counsel of the Department of Defense, Detainee Interrogations, January 15, 2003. **[Tab 91]**

[28] Memorandum for the General Counsel of the Department of Defense, Detainee Interrogations, January 15, 2003 at p. 64, "2A", "7 of 11" and "11 of 11". **[Tab 91]**. The WG cited the *Concluding Observations of the Committee against Torture*, U.N. Doc. A/52/44, at paras. 253-260 **[Tab 78]**. The WG also noted the *Judgment on the Interrogation Methods Applied by the GSS*, Nos HC 5100/94, HC 4054/95, HC 5188/96, HC 7563/97, HC 7628/97, HC 1043/99 (Sup Ct of Israel, sitting as the High Court of Justice, Sep 6, 1999) **[Tab 25]**, and the fact that the European Court of Human Rights (ECHR) has held that sleep deprivation, in conjunction with four other problematic techniques (wall standing, hooding, subjection to noise, and deprivation of food and drink), constituted "inhuman and degrading treatment": *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (Ser. A) (1978) [Not Reproduced].

[29] Affidavit of Lt. Cdr. William Kuebler, para. 19 (J.R. Vol. II, p. 137). Senate Armed Services Committee Inquiry into the Treatment of Detainees in US Custody, "Executive Summary and Conclusions," December 11, 2008, at p. xxii. **[Tab 87]** Rumsfeld, Donald, *Memorandum for the Commander, U.S. Southern Command,* April 16, 2003. **[Tab 93]**.

the practice of keeping a detainee awake for "more than 16 hours or allowing a detainee to rest briefly and then repeatedly awakening him, not to exceed four days in succession."[30]

24. The origins of the FFP are not entirely clear. The Committee on Armed Services United States Senate, *Inquiry into the Treatment of Detainees in US Custody*, reports that as early as August, 2003, "continuous cell transfer" was discussed as an interrogation technique for use at GTMO. An August 3, 2003, GTMO email described interrogating a detainee for 15 hours, allowing him 5 hours of uninterrupted rest in his cell and then moving the detainee to a new cell every half hour until the 24 hour period expired whereby, according to the Operations Officer, the cycle would restart and "the fun begins again."[31]

25. In a Report by the Department of Justice entitled *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan and Iraq*, it is indicated that an FBI agent assigned to GTMO in June to August 2003 reported the existence of a program called "Operation Sandman" which involved sleep disruption and frequent cell relocations to keep detainees "mentally off balance, to isolate them either linguistically or culturally, and to induce them to cooperate."[32]

26. In a Report by the Department of Defense entitled *Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility* (commonly referred to as the "Schmidt-Furlow Report"), it is confirmed that the FFP was in use at GTMO "throughout 2003 and until March 2004". As the report states: "some detainees were subjected to cell moves every few hours to disrupt sleep patterns and lower the ability to resist interrogation." The report also states that: "Documentation on one detainee indicated that he was subjected to this practice as recently as March 2004."[33]

---

[30] *Army Regulation 15-6: Final Report, Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility*, (April 1, 2005) at p. 10. **[Tab 80]**

[31] Committee on Armed Services United States Senate, *Inquiry into the Treatment of Detainees in US Custody*, November 20, 2008, at pp. 147-148. **[Tab 88]**

[32] U.S. Department of Justice, *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan and Iraq* (Oversight and Review Division, Office of Inspector General, May 2008) at p. 184. **[Tab 96]**

[33] Dept. of Defense, Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility, Army Regulation 15-6: Final Report (1 April 2005; amended 9 June 2005; published 14 July 2005) at pp. 10-11. **[Tab 80]**

27. In any event, it has since been held that that the FFP was in use at GTMO by November of 2003, and that it "was intended to create a feeling of hopelessness and despair in the detainee and set the stage for successful interrogations". It has also been held that "the scheme was calculated to profoundly disrupt the detainee's mental senses".[34]

G. *Canada's Active Participation the GTMO "Enhanced Interrogation" Process*

28. As early as November of 2002, the U.S. was "very eager" to have Canadian officials interrogate the Respondent "for intelligence and law enforcement purposes". During this period, the U.S. prohibited consular visits from Canada in violation of the *Vienna Convention on Consular Relations*.[35] In the words of one Canadian official, "consular visits were a non-starter". Canada was advised that their interrogations would be "scrutinized very closely" to ensure that they were not disguised consular visits.[36]

29. In February of 2003, the U.S. government informed CSIS that the CSIS delegation had been approved to travel to GTMO, and outlined several conditions that would govern the interviews. One of these conditions was that the U.S. would videotape and sound record all interviews between CSIS and detainees. Another condition was that CSIS would have to provide "a copy of the final report on the visit, in addition to copies of all tapes, transcripts, records of conversations and other information gathered."[37]

30. When the decision was made to conduct the intelligence interrogations, CSIS was aware of the human rights concerns that had been raised in relation to the GTMO detention regime.[38] In particular, CSIS knew that at this time "it would be virtually impossible for a lawyer to get into

---

[34] *United States v. Jawad*, D-008 Ruling on Defense Motion to Dismiss – Torture of the Detainee (September 24th, 2008), at paras. 4, 6, 12.

[35] *Vienna Convention on Consular Relations*, U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512, Art. 36 **[Tab 66]**. Contrary to the Crown's statements in paragraph 65 of its Factum, the VCCR creates individual rights: *Khadr v. Canada (Minister of Foreign Affairs)*, 2004 FC 1145 at paras. 26-27 **[Tab 27]** *LaGrand (Germany v. United States of America)*, [2001] I.C.J. 3 (27 June 2001) at para. 77 **[Tab 29]**, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2004 I.C.J. (31 March 2004) at para. 40. **[Tab 13]**

[36] Secure Facsimile, Exhibit T to Affidavit of William Kuebler (J.R. Vol. I, at pp. 278-279, paras. 5-7).

[37] Security Intelligence Review Committee, *CSIS's Role in the Matter of Omar Khadr (SIRC Study 2008-05)*, (July 8, 2009) at pp. 11-12. **[Tab 95]**

[38] Cross Examination of William Hooper, Exhibit GG to Affidavit of Lt. Cdr. William Kuebler (J.R. Vol III, p. 313-314, pp. 23:12 – 26:26).

Guantanamo Bay".[39] Canadian officials were also aware that "As a combatant, [the Respondent] is being treated like any other detainee. He is being given no special status as a minor".[40] They were also aware that criminal prosecution was under consideration.[41]

31. Prior to CSIS's interviews of the Respondent at GTMO, there was widespread reporting of allegations of abuse and mistreatment of detainees in US custody in Afghanistan and GTMO. Serious concerns regarding the illegality of the GTMO regime were being raised by the United Nations,[42] the Courts,[43] international tribunals,[44] and the Parliamentary Assembly of Europe.[45] In its Report entitled *CSIS's Role in the Matter of Omar Khadr*, the Security Intelligence Review Committee ("SIRC") considered these warning signs and found: "CSIS failed to give full consideration to Khadr's possible mistreatment by US authorities before deciding to interact with them on this matter."[46]

32. The Canadian interrogations were conducted by officials from CSIS and the "Foreign Intelligence Division" of DFAIT in February and September of 2003, when the Respondent was 16, and in March of 2004, when he was 17. The interrogations of February 2003, were conducted in a room equipped with several hidden cameras. Much of the video of this date consists of the Respondent weeping and calling out for his mother.[47] The investigatory report of these interrogations prepared by the U.S. Air Force Office of Special Investigations states:

> The interrogators questioned KHADR concerning his change in demeanor. KHADR said he was "scared" to say something. He then asked his interrogators, "promise you'll protect me from the Americans". KHADR also stated he had been tortured by the Americans in Baghram. KHADR said everything he had provided the previous day was a lie. He stated all the information provided in his previous interviews was said only due to

---

[39] Cross Examination of William Hooper, Exhibit GG to Affidavit of Lt. Cdr. William Kuebler (J.R. Vol III, p. 315, p. 31:6-8).
[40] Secure Facsimile, Exhibit 'T' to Affidavit of William Kuebler (A.B. Vol. I, at p. 173, para. 4).
[41] Secure Facsimile, Exhibit 'T' to Affidavit of William Kuebler (A.B. Vol. I, at p. 174, paras. 8-9).
[42] U.N. Economic and Social Council, Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2003/8 (16 December 2002) at paras. 61-64. **[Tab 97]**
[43] *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] E.W.J. No. 4947, [2002] EWCA Civ. 1598 at paras. 22 and 107 **[Tab 2]**, *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003) (p. 21 of printout) **[Tab 19]**, rev'd and remanded in light of *Rumsfeld v. Padilla*, 542 U.S. 426: *Gherebi v. Bush*, 542 U.S. 952 **[Tab 20]**.
[44] Precautionary Measures in Guantanamo Bay, Cuba, Inter-American Commission on Human Rights, March 12, 2002.**[Tab 34]**
[45] Parliamentary Assembly of Europe's Resolution No. 1340 (2003) (Adopted June 26, 2003). **[Tab 92]**
[46] Security Intelligence Review Committee, *CSIS's Role in the Matter of Omar Khadr (SIRC Study 2008-05)*, (July 8, 2009) at pp. 14-17. **[Tab 95]**
[47] Videos of Interrogations of February, 2003, Affidavit of Lt. Cdr. William Kuebler, at para. 23, Exhibits V, W, X, Y, Z. (J.R. Vol. III, pp. 138, 284-288).

> "torture". His interrogators questioned him concerning who he may have spoken to the previous night in his cell. KHADR denied that he talked to anyone and denied that anyone coached him or told him what to say. He covered his eyes and began to cry heavily... KHADR removed his shirt to show the interviewers the wounds on his back and stomach. KHADR stated, "I lost my eyes", indicating that when he was shot, it affected his vision. KHADR put his head back in his hands and cried heavily.
> [...]
> At this point, KHADR's demeanor started to change. He stated he was afraid of torture by the United States. He denied killing anyone. The Canadian interrogator began to get more confrontational and stated that Canada cannot do anything for him. KHADR began to cry and was crying when the interrogators left.[48]

33. The video of February 14, 2003, shows the Respondent repeatedly stating that he had been tortured and pleading with the Canadian officials to "protect me from the Americans". And in the February 15, 2003, video, the Respondent said he was afraid that he might get "more torturing" as a result of answers given to the Canadian interrogators:

> **CSIS:** ...If you were my brother, I would tell you to say everything you can, because the more cooperation you give to us, the easiest life, the easier life is going to be for you in the future, you know. Right now Omar it doesn't get any worse, you know. It's never gonna get any worse for you now. But...
> **OMAR:** It may get worse...
> **CSIS:** In what sense?
> **OMAR:** I may get more torturing, an isolated room and no stuff...[49]

34. In addition to the reports generated by Canada, U.S. criminal investigators reviewed the videos of the Canadian interrogations and prepared their own investigatory reports from them, which reports and videos are now in the hands of the prosecutors in the military commission proceedings.[50] Under the "relaxed' rules of evidence under both the pre-*Hamdan* military commissions regime,[51] and the current *Military Commissions Act*,[52] these statements were and are potentially admissible as evidence notwithstanding the oppressive circumstances under which they were obtained.

35. Before the SIRC, CSIS asserted that they were mindful of the fact that the Respondent's answers could be used against him in U.S. proceedings, and that CSIS made "a conscious effort"

---

[48] Report of Investigative Activity, Exhibit AA to Affidavit of Lt. Cdr. William Kuebler (J.R. Vol. III, pp. 289-291).
[49] Feb 15, 2003, Video, Exhibit Y to Affidavit of William Kuebler (J.R. Vol. III, p. 287).
[50] Air Force Office of Special Investigations, Reports of Investigative Activity, Exhibits AA and BB to Affidavit of Lt. Cdr. William Kuebler (J.R. Vol. III, pp. 289-293).
[51] *Military Commission Order No. 1*, Art. 4(D)(1), Exhibit H to Affidavit of William Kuebler (J.R. Vol. II, p. 174).
[52] Affidavit of Lt. Cdr. William Kuebler, at para. 48, (A.B. Vol. at p. 73), citing *Military Commissions Act of 2006*, 28 U.S.C.A. §2241(e) (Supp. 2007), §948r(c). **[Tab 64]**

to stay away from topics that would be prejudicial to his interests in such proceedings.[53] In fact however, CSIS repeatedly questioned the Respondent about the central events at issue in his prosecution and extracted inculpatory statements from him, which statements were instantaneously shared with the U.S. and later summarized in U.S. investigative reports:

> KHADR was in Logar, Afghanistan when he was captured. He was staying with "bad people". They were "bad" because they were "killing Americans". KHADR denied training with mines to kill Americans. He was going to attack the Northern Alliance. KHADR's father dropped him off at the house because it was safe for him to travel with his father. His father told him he would be back for him. At first KHADR said all the people in the house were Afghanis. He then stated there were two Arabs in the group. It was the Arabs who told KHADR and the Afghanis to fight to the death. The Arabs shot the Americans, then the Americans shot back. KHADR did not want to fight, "I had no choice".[54]

36. The above admissions extracted by the Canadian interrogators and others, if admissible and believed, would be relevant to the charges that the Respondent currently faces, notably Conspiracy and Material Support for Terrorism, and are now reflected in written reports prepared by, and in the possession of, U.S. investigators.

37. When the Respondent told the CSIS interrogator that he had no choice but to be there because his father left him there when he was 14 to 15, the CSIS interrogator laughed at him:

> **OMAR**: What could I do? It... what other choice did I have?
> **CSIS:** Well, you could have been like your brother and ran away.
> **OMAR**: Can't run away.
> **CSIS:** Why?
> **OMAR**: I'm still too young.
> **CSIS:** No you're not too young, you're a man.
> **OMAR**: I was captured 15 years old.
> **CSIS:** So? (laughs)
> **OMAR**: And before that I was 14 years old. Think your son can live at 15 years old by himself?
> **CSIS:** Pardon me?
> **OMAR**: You think your son can live at 14 years old by himself?
> **CSIS:** I think you could live probably at probably 13 years old by yourself. You know, your dad dropped you off there for a reason.
> **OMAR**: What's the difference between my son and your son? Me and your son?
> **CSIS:** Well, I don't have a son.
> **OMAR**: Well, if you had a son.

---

[53] Security Intelligence Review Committee, *CSIS's Role in the Matter of Omar Khadr (SIRC Study 2008-05)*, (July 8, 2009) at p. 11.
[54] Report of Investigative Activity, Exhibit AA to Affidavit of Lt. Cdr. William Kuebler (J.R. Vol. III, p. 290).

CSIS: The difference?
OMAR: Yes.
CSIS: Well, I would think if my son was 15 years old, and would be dropped off with a bunch of guys, and they were pulling apart bombs to attack a group of, a group of Afghanis, I would hope my son wouldn't stay there. I hope he would have the... [redacted]
Well, did you or didn't you?
OMAR: I didn't.
CSIS: Well, you think it's fine what you did?
OMAR: I didn't do anything. What did I do? I was in a house and they brought me stuff and they told me do it.
CSIS: All I can say is what I told you yesterday, you know. You're in here for a reason, if you own your responsibility and cooperate, you can make your life better. If you don't, you won't...
OMAR: I'm not lying. If you were tortured, like I was tortured, you'd probably say more than what I said. You're not in my position and that's why you're saying this...
CSIS: You're saying that like a robot. It's like a rehearsed speech, you know. If I wanted a reverse speech or a recording, I'd get a tape recorder and I'd play it.[55]

38. In May and October 2003, CSIS provided the US State Department with reports summarizing its interviews with the Respondent. In both exchanges, CSIS attached caveats that the documents were being provided in confidence for internal use and information contained therein could not be disseminated without its consent. However, as the SIRC has stated: "the caveats attached to CSIS's written disclosures were effectively inconsequential since the information Khadr provided during his interviews was retained on videotapes that were US government property."[56]

39. The bulk of the intelligence information elicited from the Respondent was not ordered released by Justice Mosley, is deleted from the videos and reports, and consequently cannot be reviewed here. However, CSIS assesses its interrogations as "highly successful, as evidenced by the quality intelligence information" elicited from the Respondent.[57]

H. *Canada's Complicity in the Frequent Flyer Program*

40. In anticipation of the March 2004, Canadian interview, and in light of the fact that the earlier Canadian interrogations had been "highly successful", U.S. officials decided to place the Respondent on the FFP in March 2004. Every three hours, he was awoken, ordered to pack all

[55] Exhibit Y to Affidavit of Lt. Cdr. William Kuebler (J.R. Vol. II, p. 287).
[56] Security Intelligence Review Committee, *CSIS's Role in the Matter of Omar Khadr (SIRC Study 2008-05)*, (July 8, 2009) at p. 12.
[57] Security Intelligence Review Committee, *CSIS's Role in the Matter of Omar Khadr (SIRC Study 2008-05)*, (July 8, 2009) at p. 13.

his belongings, and moved to another cell block. In violation of the above 4-day restriction placed upon "sleep deprivation" by Gen. Hill,[58] this treatment was continuously applied for three weeks.[59] Aside from the DFAIT interview, no other interrogations were conducted during this period.

41. In March 2004, an official with DFAIT's Foreign Intelligence Division attended at GTMO for the anticipated interview. Prior to this interview, this official was advised by a U.S. official that the Respondent had been subjected to the FFP in order to "make him more amenable and willing to talk". At this time, the Respondent was 17 years of age. A report of this visit states:

> 6. In an effort to make him more amenable and willing to talk, [redacted] has placed Umar on the "frequent flyer program." for three weeks prior to Mr. Gould's visit, Umar has not been permitted more than three hours in any one location. At three hours intervals he is moved to another cell block, thus denying him uninterrupted sleep and a continued change of neighbours. He will soon be placed in isolation for up to three weeks and then he will be interviewed again...
> [...]
> 16 ...All those persons who have been in positions of authority over [the Respondent] have abused him and his trust, for their own purposes. In this group can be included his parents and grand-parents, his associates in Afghanistan and fellow detainees in Camp Delta and the U.S. military.[60]

42. Notwithstanding the above information, the Canadian official proceeded with the interview. The interview was monitored by closed-circuit television and through a two-way mirror.[61] This time, the Respondent refused to answer the questions put to him.[62]

43. Consistent with the advice provided to the DFAIT official, the Respondent was placed into isolation immediately after the March 2004 interview. The Respondent's security level was changed from "Level 1" to "Level 4 minus". Everything was taken away from him and he spent a month in isolation. During this time, the room he was kept in was very cold "like a refrigerator".[63]

---

[58] *Army Regulation 15-6: Final Report, Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility*, (April 1, 2005) at p. 10. [Tab *]
[59] Summary of Interview, Exhibit DD to Affidavit of Lt. Cdr. William Kuebler (J.R. Vol. III, p. 297 at para. 6).
[60] Summary of Interview, Exhibit DD to Affidavit of Lt. Cdr. William Kuebler (J.R. Vol. III, p. 297, 300 at paras. 6 and 16).
[61] Summary of Interview, Exhibit DD to Affidavit of Lt. Cdr. William Kuebler (J.R. Vol. III, p. 299, para. 11). The report of the latter interrogation includes a description of the Canadian official watching the Respondent flex his muscles in front of this mirror, unaware that he was being watched.
[62] Summary of Interview, Exhibit DD to Affidavit of Lt. Cdr. William Kuebler (J.R. p. 297-298 at para. 7-10).
[63] Affidavit of Omar Khadr at paras. 52-53 (J.R. Vol. II, p. 128).

44. Shortly after assuming command of JTF-GTMO in March 2004, Major General Jay Hood ordered the FFP discontinued.[64]

I. *Subsequent Consideration of the Frequent Flyer Program*

45. In February of 2006, the use of the FFP at GTMO was considered by the five special mandate holders of the United Nations in their joint report entitled *Situation of Detainees at Guantánamo Bay*. The five special mandate holders concluded that the infliction of this treatment constituted torture for the purposes of the UNCAT.[65]

46. On June 25, 2008, Mr. Justice Mosley of the Federal Court of Canada, acting pursuant to the mandate of this Court's Order in *Khadr 2008*, ordered the release of an internal DFAIT report respecting the March, 2004, interview. In doing so, Mosley J. held:

> [88] The practice described to the Canadian official in March 2004 was, in my view, a breach of international human rights law respecting the treatment of detainees under UNCAT and the 1949 Geneva Conventions. Canada became implicated in the violation when the DFAIT official was provided with the redacted information and chose to proceed with the interview.[66]

47. In rejecting the Crown's claim to national security immunity or privilege over this information, Mosley J. concluded that: "While [disclosure] may cause some harm to Canada-US relations, that effect will be minimized by the fact that the use of such interrogation techniques by the US military at Guantánamo is now a matter of public record and debate."[67] In this respect, Mosley J. referred to the Schmidt-Furlow Report. Mosley J.'s decision was not appealed.

48. The FFP was considered in the September 24, 2008, ruling of Col. Steven R. Henley, Military Judge, in the GTMO military commission prosecution styled as *U.S.A. v. Jawad.* Military Judge Henley found that the FFP "was intended to create a feeling of hopelessness and despair in the detainee and set the stage for successful interrogations", and that "the scheme was calculated to profoundly disrupt the detainee's mental senses". Military Judge Henley also found

---

[64] *United States v. Jawad*, D-008 Ruling (September 24th, 2008) at para. 5. Notwithstanding this order, the FFP was inflicted upon at least one other detainee, Mohamed Jawad, as late as May of 2004.
[65] United Nations Commission on Human Rights, *Situation of Detainees at Guantanamo Bay*, E/CN.4/2006/120, 27 February 2006, pp. 16-17, and p. 35, n. 59. **[Tab 98]**
[66] *Khadr v. Attorney General*, 2008 FC 807 at para. 88. **[Tab 26]** [Emphasis added]
[67] *Khadr v. Attorney General*, 2008 FC 807 at para. 89.

that the FFP "constitutes abusive conduct and cruel and inhuman treatment". Further, since the FFP had been imposed upon Mr. Jawad after Maj. Gen. Hood had ordered the process stopped, Military Judge Henley wrote: "Its continuation was not simple negligence but flagrant misbehavior. Those responsible should face appropriate disciplinary action, if warranted under the circumstances." However, Military Judge Henley declined to determine whether or not the infliction of the FFP upon Mr. Jawad rose to the level of torture, and declined to stay the prosecution before him as a remedy for this cruel and inhuman treatment.[68]

49. In the report of the Committee on Armed Services United States Senate, *Inquiry into the Treatment of Detainees in US Custody*, it was concluded that the FFP had not been authorized by the Army Field Manual, the White House Office of Legal Counsel ("OLC"), or the Secretary of Defense.[69] The Report also concluded as follows:

> The abuse of detainees in U.S. custody cannot simply be attributed to the actions of "a few bad apples" acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees. Those efforts damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemies, and compromised our moral authority.[70]

50. On September 17, 2009, in the *habeas corpus* proceeding *Al Rabiah v. United States*, U.S. District Court Judge Colleen Kollar-Kotelly refused to consider as probative a statement extracted from a GTMO detainee after he had been subjected to the FFP for one week. In doing so, she noted that the use of the FFP had not been authorized by the Army Field Manual, and that its imposition for one week exceeded the 4 day limitation imposed by Gen. Hill.[71]

J. *The Interim Injunction Issued by Justice von Finckenstein*

51. The Canadian interrogations were halted by the issuance of an interim injunction by Justice von Finckenstein of the Federal Court on August 8, 2005.[72] Since this motion was governed by

---

[68] *United States v. Jawad*, D-008 Ruling on Defense Motion to Dismiss – Torture of the Detainee (September 24th, 2008), at paras. 4, 6, 12. **[Tab 55]**

[69] Committee on Armed Services United States Senate, *Inquiry into the Treatment of Detainees in US Custody*, November 20, 2008, at pp. 147-148. **[Tab 88]**

[70] Inquiry into the Treatment of Detainees in US Custody, Committee on Armed Services United States Senate, "Executive Summary and Conclusions," December 11, 2008, at p. xii. **[Tab 87]**

[71] *Al Rabiah v. United States*, Civil Action No. 02-828, September 17, 2009 (D.C.Dist.Ct.) at pp. 26-27. **[Tab 4]**

[72] *Khadr v. Canada*, 2005 FC 1076. **[Tab 28]**

the tripartite test in *RJR MacDonald*,[73] Justice von Finckenstein did not determine the merits of the Respondent's *Charter* claim, but merely held that the claim raises a "serious issue".[74] He also repeatedly emphasized that the purpose of the interim injunction was not to remedy any past violations, but to prevent the commission of any potential future violations pending the trial.[75] The underlying action has not proceeded to trial and is at the early stages of document discovery.

K. *Khadr 2008*

52. In this Court's May 23, 2008, decision in *Canada (Justice) v. Khadr*, it was held that "By making the product of its interviews of Mr. Khadr available to U.S. authorities, Canada participated in a process that was contrary to Canada's international human rights obligations."[76] Consequently, the exceptional rule previously established in *Hape* applied,[77] and the *Charter* applied to the Canadians at GTMO. However, this Court expressly declined to determine whether the Crown's participation in the interrogations constituted a violation of the *Charter*, since this determination was unnecessary.[78] It was sufficient for the purposes of the disclosure application then before the Court to find that a *Charter* violation arose years later when the Crown refused the Respondent's demand for disclosure.[79]

L. *The Respondents' Policy and Reasons*

53. President Obama has ordered the closure of the GTMO detention facility by no later than January of 2010.[80] In particular, the U.S. State Department has been tasked with the responsibility of relocating prisoners to other countries.[81] During the Bush administration, Australia, Denmark, France, Germany, Belgium, Russia, Spain, Sweden, and the United

---

[73] *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. [Not reproduced]
[74] *Khadr v. Canada*, 2005 FC 1076 at para. 31. **[Tab 28]**
[75] *Khadr v. Canada*, 2005 FC 1076 at para. 18: "The question here is whether the Plaintiff's Charter rights will be violated by future interviews." Para. 20: "Surely the purpose of an interlocutory injunction is to prevent a violation of Charter rights while the underlying action is being tried." Para. 46: "granting an injunction is required to prevent a potential grave injustice". **[Tab 28]** [Emphasis added]
[76] *Canada (Justice) v. Khadr*, 2008 SCC 28 at para. 27. **[Tab 12]**
[77] *R. v. Hape*, 2007 SCC 26 at paras. 51, 52, and 101 **[Tab 40]**, *Canada (Justice) v. Khadr*, 2008 SCC 28 at paras. 17-18, 26. **[Tab 12]**
[78] *Canada (Justice) v. Khadr*, 2008 SCC 28 at para. 27. **[Tab 12]**
[79] *Canada (Justice) v. Khadr*, 2008 SCC 28 at para. 33. **[Tab 12]**
[80] Executive Order (The White House, Office of the Press Secretary, January 22, 2009), Sec. 3. **[Tab 82]**
[81] Executive Order (The White House, Office of the Press Secretary, January 22, 2009), Sec. 5. **[Tab 82]**

Kingdom all secured the repatriation of their nationals.[82] In his decision of June 25, 2008, Mosley J. noted that "it is equally clear that the US authorities were interested in having Canada consider whether Khadr could be prosecuted here and provided details about the evidence against him to Canadian officials for that purpose."[83]

54. Many specific demands have been made to the Appellants to request the Respondent's repatriation. These demands have been made by the Respondent's Canadian counsel,[84] the Respondent's U.S. counsel,[85] a collection of former Parliamentarians, law professors and NGO's,[86] Amnesty International,[87] and the Hon. Stéphane Dion,[88] among others. The Crown's Ministers have also been called upon to state their reasons for their policy not to demand the Respondent's repatriation before the Senate and the House of Commons on many occasions. Prior to the public disclosure of Canada's complicity in the FFP, these Ministers consistently emphasized that they had "received assurances that Mr. Khadr is being treated humanely".[89] Since the decisions of the Courts below, the use of this line has been discontinued.

55. On June 12, 2008, the Standing Committee on Foreign Affairs and International Development issued its "Report 7 – Omar Khadr". The Committee's recommendations included "that the Government of Canada demand Omar Khadr's release from US custody at Guantanamo Bay to the custody of Canadian law enforcement officials as soon as practical." The Report also included a "dissenting opinion" by the government which stated that "Mr. Khadr could become a

---

[82] *Repatriation of Omar Khadr to be Tried Under Canadian Law*, Exhibit NN to Affidavit of Lt. Cdr. William Kuebler, at para. 51 (J.R. Vol. III, pp. 403-421).
[83] *Khadr v. Attorney General,* 2008 FC 807 at para. 73. **[Tab 26]**
[84] Affidavit of Lt. Cdr. William Kuebler, Exhibit RR (J.R. Vol. III, pp. 462-464); *Letter from Nathan Whitling dated July 28, 2008* (J.R. Vol. III, at p. 481-485).
[85] Affidavit of Lt. Cdr. William Kuebler, Exhibit VV (J.R. Vol. III, pp. 474-475).
[86] Affidavit of Lt. Cdr. William Kuebler, Exhibit TT (J.R. Vol. III, pp. 466-471).
[87] Affidavit of Lt. Cdr. William Kuebler, Exhibit WW (J.R. Vol. III, pp. 476-477).
[88] Affidavit of Lt. Cdr. William Kuebler, Exhibit VV (J.R. Vol. III, pp. 474-475).
[89] Canada, *House of Commons Debates*, Vol. 142, No. 111, 2nd Sess., 39th Parliament, Tuesday, February 5, 2008, at pp. 2611-2612 **[Tab 72]**; Canada, *Debates of the Senate*, 2nd Sess., 39th Parliament, Vol. 144, No. 62, Tuesday, May 27, 2008, at pp. 1391-1394 **[Tab 70]**; Canada, *House of Commons Debates*, Vol. 142, No. 111, 2nd Sess., 39th Parliament, Thursday, May 29, 2008, at p. 6322, 6338-6340 **[Tab 73]**; Canada, *House of Commons Debates*, Vol. 142, No. 111, 2nd Sess., 39th Parliament, Monday, June 9, 2008, at p. 6735, and 6767 **[Tab 74]**; Canada, *House of Commons Debates*, Vol. 142, No. 111, 2nd Sess., 39th Parliament, Tuesday, June 10, 2008, at p. 6808 **[Tab 75]**; Canada, *House of Commons Debates*, Vol. 142, No. 111, 2nd Sess., 39th Parliament, Thursday, June 12, 2008, at p. 6890 **[Tab 76]**; Canada, *Debates of the Senate*, 2nd Sess., 39th Parliament, Vol. 144, No. 62, Tuesday, June 17, 2008, at pp. 1556-1558. **[Tab 71]**

litmus test on Canada's commitment to impeding global terrorism and the results of our actions today could result in consequences that are not in the long-term interest of the country."[90]

56. On July 10, 2008, the Respondent the Prime Minister of Canada was called upon by members of the media to respond to the information revealed in the documents ordered released by Mosley J., and asked what effect, if any, this information had on the Crown's policies respecting the Respondent. The Prime Minister confirmed that this information had not changed his existing policy, and that he would not be requesting the Respondent's return to Canada.[91]

Part II: ISSUES

57. The Respondent agrees with the Crown's statement of the issues raised in this appeal, except the Respondent relies upon ss. 6 and 12 of the *Charter* in addition to s. 7.

Part III: ARGUMENT

A. *Brief Overview of the Respondent's Response to the Crown's Arguments*

58. The Respondent submits that, with respect, the majority of the arguments presented in the Crown's Factum do not address the issues raised in this case, and as such are of little utility. In overview, the Respondent offers the following three points in response.

59. Firstly, the decisions of the Courts below are not premised either upon Canada's participation in the GTMO process or on an independent "duty to protect" all Canadians whose rights are being violated by foreign governments. Rather, the Courts below found that Canada's participation is one important factor which gives rise to a "duty to protect" in this particular case. The Crown's arguments either fail to grasp, or attempt to obscure, this interrelationship.

60. Secondly, the Crown's participation in the GTMO interrogation process was not restricted to "the actions of one DFAIT official on one occasion" as the Crown asserts.[92] The Crown's participation consisted of a course of co-operation and information sharing dating back at least as far as November, 2002, and continuing at least to the interview of March, 2004. The rights

---

[90] House of Commons, *Omar Khadr - Report of the Standing Committee on Foreign Affairs and International Development*, (Communication Canada – Publishing: Ottawa, 2008) at pp. 6-7, 15-17. **[Tab 84]**
[91] Affidavit of April Bedard at paras. 2-3 (J.R. Vol. II, pp. 131-132).
[92] Appellants' Factum at para. 118.

violations occurring during this period were not limited to the infliction of the FFP but also included denials of the Respondent's rights to *habeas corpus* and to a fair trial. Further, it must be recalled that the decision by U.S. officials to subject the Respondent to the FFP in March 2004 was made in anticipation of an upcoming Canadian interview, and with knowledge that the earlier Canadian interviews in February and September 2003 had been "highly successful". Therefore, Canada's complicity in the FFP is as much a product of the February and September 2003 interviews as the March 2004 interview.

61. Thirdly, contrary to the Crown's lengthy submissions respecting *Barcelona Traction* and related cases and writings, the "duty to protect" recognized in this case is not a broad duty to make diplomatic representations on behalf of Canadians detained in a foreign country. Rather, this duty is the product of the "special circumstances"[93] of this case, which include the torture and arbitrary detention of a child who had been unlawfully conscripted as a child soldier, and the Crown's complicity in those egregious violations. None of the domestic or international law authorities cited by the Crown address circumstances resembling those of this case.

B. *Res Judicata, Issue Estoppel, and the Earlier Proceedings*

62. The Crown argues at paragraphs 31 to 36 that its participation in the GTMO interrogation process should not be considered by this Court since the same *Charter* breach found by the Courts below has been assessed and remedied on two prior occasions. As the Court of Appeal noted, the Crown effectively abandoned this same argument at the Court of Appeal level. Consequently, the evidence relied upon by the Crown in support of this argument, now comprising more than half the volume of the Appeal Books before this Court, was not placed before the Court of Appeal.[94]

63. The Crown's arguments at paragraphs 31 to 36 are governed by the equitable doctrine of issue estoppel. As was emphasized by this Court in the leading case of *Danyluk v. Ainsworth*

---

[93] *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 at paras. 81-83: "I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances." **[Tab 22]**

[94] FCA Reasons J.R. at pp. 72-72, para. 38: "The Crown does not allege in its Notice of Appeal that *Khadr 2008* rendered the issues raised in this proceeding *res judicata*." This argument was also not raised in the Crown's Factum before the Court of Appeal. The record of the prior proceedings, contained in the Affidavit of Lillian Cook (J.R. Vol. IV, p. 589 to Vol VII p. 1251) was not included in the appeal books before the Court of Appeal. The Crown did attempt to resurrect this argument during oral argument.

Technologies Inc., the first precondition for this plea is "that the same question has been decided". This requirement will only be met where the same issue was "directly put in issue and directly determined" in the prior proceeding. "It will not suffice... if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which estoppel is said to arise must be "fundamental to the decision arrived at" in the earlier proceeding. Issue estoppel only extends to those issues "necessarily (even if not explicitly) determined in the earlier proceedings."[95]

64. As Justice O'Reilly correctly held,[96] this first precondition is clearly not met in this case. In the prior proceedings invoked by the Crown, both this Court and Justice von Finckenstein expressly declined to determine whether or not the Crown's participation in the GTMO interrogation process constituted a *Charter* breach. Since the remedy ordered by Justice von Finckenstein was merely an interim injunction, he emphasized that the merits of this issue were left to be determined at a future trial,[97] which trial has not proceeded. And in *Khadr 2008*, this Court expressly declined to decide whether or not this conduct constituted a violation of the *Charter* since the remedy then being sought was limited to disclosure:

> (ii) *Participation in the Process*
>
> [27] By making the product of its interviews of Mr. Khadr available to U.S. authorities, Canada participated in a process that was contrary to Canada's international human rights obligations. Merely conducting interviews with a Canadian citizen held abroad under a violative process may not constitute participation in that process. Indeed, it may often be essential that Canadian officials interview citizens being held by violative regimes to provide assistance to them. Nor is it necessary to conclude that handing over the fruits of the interviews in this case to U.S. officials constituted a breach of Mr. Khadr's s. 7 rights. It suffices to note that at the time Canada handed over the fruits of the interviews to U.S. officials, it was bound by the *Charter*, because at that point it became a participant in a process that violated Canada's international obligations.[98]

---

[95] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paras. 24-25. Citing *McIntosh v. Parent*, [1924] 4 D.L.R. 420 (Ont.C.A.) at p. 422 [Not reproduced] and *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at pp. 254, 267-68 [Not reproduced]. **[Tab 17]**

[96] FC Reasons, J.R. Vol. I pp. 22-24, paras. 29-32.

[97] *Khadr v. Canada*, 2005 FC 1076 at para. 21: "With respect to the Defendant's second contention concerning the alleged violation of the Plaintiff's rights and the corollary engagement of the Charter, this is the key issue to be decided in the upcoming trial... Once all these questions are answered, it will be possible to establish a context, make the necessary analysis and then determine if Omar Khadr's Charter rights were engaged or not." **[Tab 28]** [Emphasis added]

[98] *Canada (Justice) v. Khadr*, 2008 SCC 28 at para. 27. **[Tab 12]**

65. As Justice O'Reilly put it: "the Court [in *Khadr 2008*] did not find it necessary to decide whether Canadian officials had actually violated the *Charter* by interviewing Mr. Khadr and turning over the fruits of those interviews to U.S. authorities. The Court simply noted that the Canadian officials were bound by the *Charter* at that point because they were participants in a process that violated international law."[99] The Respondent submits that these conclusions are demonstrably correct. And as Lange states in *The Doctrine of Res Judicata in Canada*: "A decision which expressly defers a question is normally not a final decision on the question for the purpose of issue estoppel."[100]

66. The Crown also appears to argue that the relief granted in this case was not a "just and appropriate remedy" since the same breach has already been remedied twice. But aside from the fact that this breach has never been previously found, much less remedied, this argument fails to appreciate the nature and purpose of the previous orders relied upon. Like all interim injunctions, the one imposed by Justice von Finckenstein was not intended to remedy any past violation. As he stated: "Surely the purpose of an interlocutory injunction is to prevent a violation of Charter rights while the underlying action is being tried."[101] Similarly, this Court's disclosure order in *Khadr 2008* did not serve to remedy the harm occasioned by the *Charter* breach found in the present case. As was noted in *R. v. Bjelland*, "disclosure is a means to an end" not an end to itself.[102] Merely putting an individual in a position to prove that his rights have been violated hardly constitutes a remedy for the violation. Where an accused obtains a pre-trial disclosure order which results in the discovery of a *Charter* breach, it cannot be said that the breach has been remedied by the disclosure itself.

67. Additionally, the particular remedy sought in this case has never been sought in any previous case,[103] evidence which is "demonstrably capable of effecting the result"[104] was being unlawfully

---

[99] FC Reasons, J.R. Vol. I pp. 22-24, paras. 29-32.
[100] Lange, Donald J., *The Doctrine of Res Judicata in Canada*, 2nd ed. (Markham, Ont.: LexisNexis Butterworths, 2004) at p. 86. **[Tab 90]** Citing *Golden Valley Golf Course Ltd. v. British Columbia (Minister of Transportation and Highways)*, 2001 BCCA 392 at para. 35. **[Tab 21]**
[101] *Khadr v. Canada*, 2005 FC 1076 at para. 20. [Emphasis added] **[Tab 28]**
[102] *R. v. Bjelland*, 2009 SCC 38 at para. 20. **[Tab 37]** Quoting Rosenberg J.A. in *R. v. Horan*, 2008 ONCA 589 at para. 26. **[Tab 41]**
[103] Lange, Donald J., *The Doctrine of Res Judicata in Canada*, 2nd ed. (Markham, Ont.: LexisNexis Butterworths, 2004) at p. 394. **[Tab 90]** Citing *Groeneveld v. Calgary Power Ltd.* (1980), 109 D.L.R. (3d) 99 (Alta.Q.B.) at p. 103-04, paras. 16 and 36. **[Tab 23]**

suppressed by the Crown throughout the prior proceedings, and, as the Court of Appeal held, the particular decision at issue in this case has never been previously reviewed.[105]

68. In summary, the preconditions of issue estoppel are not met in the present case. Further, even if these preconditions were met, the Respondent submits that the unique circumstances of the present case would call for the exercise of the Court's discretion not to rigidly apply the rule.[106]

C. *Jurisdiction*

69. As the Crown concedes, the Courts may review decisions by the Executive pertaining to foreign relations where those decisions affect rights protected by the *Charter.*[107]

D. *Standard of Review*

70. Justice O'Reilly's judgment is based upon his finding that the Crown was "knowingly implicated"[108] in human rights abuses committed against the Respondent. These findings are, at best, findings of mixed fact and law, and as such are subject to the "palpable and overriding error" standard in *Housen v. Nikolaisen.*[109] As discussed in greater detail below, the remedy granted by Justice O'Reilly is a discretionary decision and as such is also subject to the "palpable and overriding error" standard.[110]

E. *Applicable Provisions of the Charter*

71. Throughout these proceedings, the Respondent has invoked ss. 6, 7, 12 and 24(1) of the *Charter.* The Courts below chose to determine the issues before them on the basis of s. 7.[111] Of course, the Respondent agrees that the Crown's participation in the GTMO interrogation process

---

[104] Crown's Factum at p. 12, para. 34, fn. 51. Citing *Grandview v. Doering*, [1976] 2 S.C.R. 621 at pp. 635-639, Lange, Donald J., *The Doctrine of Res Judicata in Canada*, 2nd ed. (Markham, Ont.: LexisNexis Butterworths, 2004) at p. 235. [Crown's Authorities]
[105] FCA Reasons J.R. at pp. 72-72, para. 38.
[106] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 33. **[Tab 17]**
[107] Crown's Factum at para. 39. *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at pp. 455 and 459 per Dickson J. and pp. 471-474 per Wilson J. [Crown's Authorities], *Copello v. Canada (Minister of Foreign Affairs)*, [2003] F.C.J. No. 1056 (C.A.) at para. 17 **[Tab 16]**. *Black v. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228 (Ont.C.A.) at paras. 46-53 **[Tab 9]**.
[108] Reasons for Judgment of O'Reilly J. (A.B. Vol. I, Tab B, p. 28, para. 17).
[109] *R. v. Ngo*, 2003 ABCA 121 at para. 15 **[Tab 44]**; *R. v. Arcand*, 2008 ONCA 595 at para. 59 **[Tab 36]**; *R. v. Chaisson*, 2006 SCC 11 at para. 7 **[Tab 38]**.
[110] *Mills v. The Queen*, [1986] 1 S.C.R. 863 at para. 279. **[Tab 43]**
[111] Reasons for Judgment of O'Reilly J. (A.B. Vol. I, Tab B, p. 28, para. 3).

constitutes a violation of s. 7. However, the Respondent submits that Canada's participation in the GTMO interrogation process constitutes a violation of s. 12.

72. This Court has often emphasized that where one of the specific provisions in ss. 8 to 14 of the *Charter* is applicable to the conduct at issue, a reviewing Court ought to apply that specific provision in favour of s. 7.[112] In *Burns* and *Suresh*, this Court held that since the circumstances in those cases dealt only with "potential consequences"[113] and not actual consequences, s. 7 rather than s. 12 was the applicable provision. Unlike those cases, the present case deals with the actual infliction of cruel and unusual treatment, and Canada's complicity in that treatment.

F. *The Crown's Complicity in the GTMO Interrogation Process*

73. The Crown's submissions respecting its participation in the GTMO interrogation process consist of a single sentence: "After-the-fact knowledge of abuse no more makes someone a party to that abuse than after-the-fact knowledge of a crime makes someone guilty of that crime."[114] Nadon J.A.'s analysis of this central issue is equally perfunctory: "Mere knowledge of Mr. Khadr [*sic*] mistreatment cannot be equated with participation in such mistreatment."[115] In related arguments, the Crown argues that s. 7 is not engaged since the denial of the Respondent's liberty and security of the person was imposed by the U.S. and not by Canada.[116]

(i) The Effect of Previous Decisions

74. As the majority of the Court of Appeal pointed out, the Crown's attempt to evade responsibility for its participation in the GTMO system "is untenable in the face of *Khadr 2008*".[117] In that case, this Court held that the degree of Canada's participation sufficed to bring Canada into violation of its international law obligations, notably its obligations to respect a detainee's right to *habeas corpus*, and a fair trial.[118]

---

[112] *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74 at paras. 160-161 **[Tab 42]**; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at para 178 **[Tab 53]** *R. v. Rodgers*, 2006 SCC 15 para. 23 **[Tab 46]**; *R. v. Noble*, (1984), 14 D.L.R. (4th) 216 (Ont.C.A.) at para. 43 **[Tab 45]**.

[113] *United States of America* v. *Burns*, 2001 SCC 7 at para. 60 **[Tab 54]**, *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 53. **[Tab 52]**

[114] Crown's Factum at para. 35.

[115] FCA Reasons, J.R. Vol. I, p. 106, para. 118.

[116] Crown's Factum at paras. 45-47.

[117] FCA Reasons, J.R. Vol. I, p. 77, para. 49.

[118] *Canada (Justice) v. Khadr*, 2008 SCC 28 at para. 25. **[Tab 12]**

75. Additionally, Justice Mosley has held that the infliction of the FFP constituted a violation of the UNCAT and *Geneva Conventions*, and that "Canada became implicated in the violation when the DFAIT official was provided with the redacted information and chose to proceed with the interview."[119]

76. As the above findings indicate, the United States was primarily responsible for these violations, but Canada aided and assisted in their commission, thereby rendering Canada complicit in violations of international law. These findings may not be collaterally attacked or re-litigated by the Crown in the present proceeding.

(ii) State Responsibility for Internationally Wrongful Acts under International Law

77. The decisions of the Courts below are also supported by the applicable principles of international law. The concerns arising from the U.S.'s frequent practice of inviting foreign interrogators to GTMO[120] have been the subject of studies by United Nations Special Rapporteur Professor Martin Scheinin, as well the House of Lords and House of Commons Joint Committee on Human Rights. Each study concludes that sending interrogators to question a suspect with knowledge (including constructive knowledge) that the detainee has been tortured or arbitrarily detained constitutes complicity in such treatment for the purposes of international law.

78. As both studies confirm, a State's complicity in an internationally wrongful act is governed by the principles reflected in Article 16 of the International Law Commission's *Articles on State Responsibility* which principles were recognized as embodying customary international law in the opinion of the International Court of Justice in *Bosnia and Herzegovina v. Serbia and Montenegro.*[121] Article 16 states:

Article 16

Aid or assistance in the commission of an internationally wrongful act

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

---

[119] *Khadr v. Attorney General*, 2008 FC 807 at para. 88. **[Tab 26]**

[120] Center for Constitutional Rights, *US Allows Security Forces from Brutal Human Rights Abusing Regimes into Guantanamo; Many Countries Complicit in Abuses at Guantánamo.* **[Tab 69]**

[121] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgment of 26 February 2007, § 420. **[Tab 6]**

> (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) The act would be internationally wrongful if committed by that State.[122]

79. In the study prepared by United Nations' Special Rapporteur, Martin Scheinin of February 4, 2009, for the Human Rights Committee, interrogations by foreign officials at GTMO, including the very Canadian interrogations at issue in the present case, were specifically considered, and the following conclusions were reached:

2. Participation in interrogations

> 54. The Special Rapporteur is concerned about the participation of foreign agents in the interrogation of persons held in situations that violate international human rights standards. The difference that some Governments make between intelligence and law enforcement personnel is of limited relevance, as the active participation through the sending of interrogators or questions, or even the mere presence of intelligence personnel at an interview with a person who is being held in places where his rights are violated, can be reasonably understood as implicitly condoning such practices. The continuous engagement and presence of foreign officials has in some instances constituted a form of encouragement or even support. In the view of the Special Rapporteur, the responsibility of the receiving State may be triggered also by even more passive and geographically distant forms of creating a demand for intelligence information obtained through internationally wrongful means. Therefore, the Special Rapporteur believes that the active or passive participation by States in the interrogation of persons held by another State constitutes an internationally wrongful act if the State knew or ought to have known that the person was facing a real risk of torture or other prohibited treatment, including arbitrary detention.[123]

80. In addition to Article 16 above, the Special Rapporteur cited Principle 21(1) of the United Nations' *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*:

> 1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.[124]

---

[122] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/10 (2001), Art. 16. **[Tab 62]**

[123] Martin Scheinin, "*Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*", U.N. doc. A/HRC/10/3 (4 February 2009) at pp. 19-20. [Emphasis added, Footnotes omitted] **[Tab 94]**

[124] United Nations, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by General Assembly resolution 43/173 of 9 December 1988, Art. 21(1). **[Tab 57]**

81. The above conclusions of the Special Rapporteur were quoted and agreed with in the July 21, 2009, Report of the House of Lords and House of Commons Joint Committee on Human Rights entitled *Allegations of UK Complicity in Torture.*[125] At the outset of its analysis, the Joint Committee emphasized the distinction between the tests applicable to State responsibility under Article 16, and individual criminal responsibility:

> 35. We therefore conclude that complicity has different meanings depending on whether the context is individual criminal responsibility or State responsibility:
>
> - for the purposes of individual criminal responsibility for complicity in torture, "complicity" requires proof of three elements: (1) knowledge that torture is taking place, (2) a direct contribution by way of assistance that (3) has a substantial effect on the perpetration of the crime;
>
> - for the purposes of State responsibility for complicity in torture, however, "complicity" means simply one State giving assistance to another State in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place.[126]

82. Applying the above test, the Joint Committee concluded as follows:

> 37. We are in no doubt that requests to foreign agencies to arrest and detain an individual, the provision of information enabling their arrest, the provision of questions for their interrogation, the sending of interrogators to question a suspect who is being tortured and of observers to sit in on interrogations, are all forms of assistance and facilitation capable of amounting to complicity in torture by the State concerned when those things are done in the knowledge that the person concerned is being, has been or will be tortured by the State which is detaining him, or where that ought to be obvious to the State providing the assistance.[127]

83. Analogously, in *Mohamed v. Secretary of State*, it was held that the degree of the U.K. government's co-operation with the U.S. in interrogating GTMO detainee Binyam Mohamed while he was being held *in communicado* in Pakistan "was far beyond that of a bystander or witness" and in fact "facilitated" the U.S.'s conduct.[128]

---

[125] House of Lords House of Commons Joint Committee on Human Rights, *Allegations of UK Complicity in Torture*, (London: The Stationery Office Ltd., August 4, 2009) at pp. 18-19. **[Tab 85]**
[126] House of Lords House of Commons Joint Committee on Human Rights, *Allegations of UK Complicity in Torture*, (London: The Stationery Office Ltd., August 4, 2009) at p. 16. **[Tab 85]**
[127] House of Lords House of Commons Joint Committee on Human Rights, *Allegations of UK Complicity in Torture*, (London: The Stationery Office Ltd., August 4, 2009) at p. 17. See also pp. 18, 37-38. **[Tab 85]**
[128] *Mohamed v. Secretary of State*, [2008] EWHC 2048 (Admin) at paras. 69-91. **[Tab 31]**

(iii) The Treatment in which the Crown Participated was "Cruel and Unusual Treatment"

84. As Justice Hugo Black noted in *Ashcraft v. Tennessee*: "It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired."[129] In the present case, the Crown has attempted to deny its complicity in the FFP, but has never attempted to defend this treatment as anything less than cruel and unusual treatment.

85. The conclusion of the Courts below that the infliction of the FFP constitutes cruel and unusual punishment is supported by the findings of the U.N. Committee Against Torture,[130] Mosley J.'s conclusion that this technique constitutes a violation of the UNCAT[131] and the *Geneva Conventions*,[132] the case of *Public Committee Against Torture in Israel v. Israel*,[133] the findings of the five special mandate holders of the United Nations in their joint report of February 15, 2006,[134] Military Judge Henley's conclusions in *Jawad*,[135] and Judge Kollar-Kotelly's decision in *Al Rabiah* to exclude a statement extracted from a detainee after being subjected to the FFP for one week.[136]

(iv) The Crown's Complicity in Arbitrary Detention and Related Violations

86. Although much emphasis has been placed upon the imposition of the FFP, the other unlawful features of the Respondent's detention at the time of the interrogations are equally relevant to the s. 12 issue. In *Charkaoui*, this Court stated:

> The s. 12 issue of cruel and unusual treatment is intertwined with s. 7 considerations, since the indefiniteness of detention, as well as the psychological stress it may cause, is related to the mechanisms available to the detainee to regain liberty... Denying the means

---

[129] *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) at fn. 6. **[Tab 7]**

[130] *Concluding Observations of the Committee against Torture*, U.N. Doc. A/52/44, at paras. 253-260. **[Tab 78]**

[131] *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36. **[Tab 58]**

[132] *Geneva Convention Relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, Can. T.S. 1965 No. 20, art. 3. **[Tab 60]**

[133] *Judgment on the Interrogation Methods Applied by the GSS*, Nos HC 5100/94, HC 4054/95, HC 5188/96, HC 7563/97, HC 7628/97, HC 1043/99 (Sup. Ct. of Israel, sitting as the High Court of Justice, Sep 6, 1999) at para. 31. **[Tab 25]**

[134] United Nations Commission on Human Rights, *Situation of Detainees at Guantanamo Bay*, E/CN.4/2006/120, 27 February 2006, pp. 16-17, and p. 35, n. 59. **[Tab 98]**

[135] *United States v. Jawad*, D-008 Ruling on Defense Motion to Dismiss – Torture of the Detainee (September 24th, 2008), at paras. 4, 6, 12. **[Tab 55]** Since the FFP had been imposed upon Mr. Jawad after Major General Hood's order that it be discontinued, Military Judge Henley also stated that: "Its continuation was not simple negligence but flagrant misbehavior. Those responsible should face appropriate disciplinary action, if warranted under the circumstances." **[Tab 55]**

[136] *Al Rabiah v. United States*, Civil Action No. 02-828, September 17, 2009 (D.C.Dist.Ct.) at pp. 26-27. **[Tab 4]**

> required by the principles of fundamental justice to challenge a detention may render the detention arbitrarily indefinite and support the argument that it is cruel or unusual.[137]

87. Conversely, in *Burns*, this Court rejected the applicability of s. 12, but emphasized that "s. 12 informs the interpretation of s. 7" and proceeded to assess the s. 7 issue in light of s. 12 principles.[138] Consequently, whether this case is to be approached on the basis of s. 7 or s. 12, the fact that the Crown's interrogations were conducted within a regime characterized by violations of the principles of fundamental justice is highly relevant.

88. Although the Crown argues at length that a duty to make diplomatic representations on behalf of citizens detained abroad is not a principle of fundamental justice, neither the Respondent nor the Courts below have relied upon the existence of such a duty. The "duty to protect" recognized by Justice O'Reilly is actually the product of Canada's complicity in violations of a great many specific legal principles which undeniably constitute principles of fundamental justice.

89. Firstly, as this Court held in *Khadr 2008*, the Canadian interviews constituted participation in, and tacit approval of, the Respondent's arbitrary detention, contrary to the CRC, ICCPR, and a host of other international human rights instruments.[139] The obligation to respect the right against arbitrary detention under the ICCPR is a peremptory norm of *jus cogens* that is so fundamental that it is non-derogable, even during a time of public emergency which threatens the life of the nation.[140] Even in matters of national security, the suspension of *habeas corpus* is impermissible.[141]

---

[137] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 96. **[Tab 15]** [Emphasis added]
[138] *United States v. Burns*, 2001 SCC 7 at para. 57. **[Tab 54]**
[139] See e.g. the following instruments [Not Reproduced]: *Universal Declaration of Human Rights*, U.N.G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948), Art. 8; *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, Art. 9; *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), Art. XVIII; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, (ETS No. 5), 213 U.N.T.S. 222, *entered into force* 3 September 1953, Art. 5; *African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, *entered into force* 21 October 1986, Arts. 6-7.
[140] Human Rights Committee, General Comment No. 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, para. 11 (2001). **[Tab 86]**
[141] Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of 30 January 1987, paras. 31-35 **[Tab 89]**; Human Rights Committee, General Comment No. 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para.16. **[Tab 86]**

90. Article 40(1) of the CRC imposes specific obligations on States Parties in relation to children who are "alleged as, accused of or recognized as having infringed the penal law". By interrogating the Respondent while he was being deprived of access to a lawyer, the Crown participated in violations of his right to legal assistance under Article 40(2)(b)(ii) CRC and 14(3)(d) *International Covenant on Civil and Political Rights* ("ICCPR"), his right not to be compelled to give testimony or confess guilt under Article 40(2)(b)(iv) CRC and 14(3)(g) ICCPR.[142] It will be noted that with respect to this latter right, the issue of "complicity" does not arise since the Crown's interrogations constituted a direct violation of this right.

91. Additionally, the principles identified by O'Reilly J. at paragraphs 56 to 70 of his reasons require States to ensure that no one, particularly children, shall be subjected to torture or other cruel, inhuman or degrading treatment; ensure that no evidence derived from torture or other cruel and unusual punishment be used as evidence in a legal proceeding; separate children deprived of liberty from adults; take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim; treat every child alleged to have infringed the penal law in a manner consistent with the promotion of the child's sense of dignity and worth; ensure the physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict.[143]

(v) Conclusions on the Crown's Complicity in the GTMO Interrogation Process

92. In summary, the Crown's present arguments respecting the degree of its participation in the GTMO interrogation process constitute an impermissible attempt to re-litigate the previous holdings of this Court and Justice Mosley. Although these arguments fail to acknowledge that the conduct of a secondary actor may give rise to legal responsibility for the conduct of a primary actor, this point was fully appreciated by the CSIS agent who interrogated the Respondent at GTMO on February 15, 2003:

> **OMAR**: If I didn't fight anybody why am I here?
> **CSIS:** If you didn't fight anybody?

---

[142] *Convention on the Rights of the Child*, Can. T.S. 1992, No. 3, Art. 40(1), 40(2)(b)(ii), 40(2)(b)(iv) **[Tab 59]** *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, Art. 14(3)(d) and (g). **[Tab 61]**

[143] Reasons for Judgment of O'Reilly J. at A.B. Vol. I, Tab B, at pp. 25-29, paras. 56-70, citing *Convention on the Rights of the Child*, Can. T.S. 1992, No. 3 at Arts. 1, 19.1, 37(*a*)(*b*)(*c*)(*d*), 39, 40.1 **[Tab 59]**, *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, Can. T.S. 2002, Vol. 5, Preamble, and Arts. 6, 7. **[Tab 65]**

> **OMAR**: Yeah I am mean I'm sitting, if you saw how I was sitting, just when an American came over and shot me three bullets.
> **CSIS:** And you were sitting?
> **OMAR**: Yes.
> **CSIS:** How did that American end up getting so dead then?
> **OMAR**: I don't know, there were three people and a fight around.
> **CSIS:** So it was okay because it was a fight?
> **OMAR**: It was not me, I don't even know who, maybe...
> **CSIS:** Well if three guys, if three guys are sitting in a car and they go rob a, rob a convenience store and one of them shoots somebody, everybody in the car is guilty of shooting that guy. That's the way the law works. You know. You were there, you participated in this action.[144]

93. Ironically, the above advice was inapposite to the situation of a 15-year-old child unlawfully conscripted into an armed conflict, but clearly explains why the speaker's own participation in the GTMO interrogation process rendered him complicit in the violations then being committed by the United States.

G. *"Special Circumstances" and the "Duty to Protect"*

94. The Respondent submits that the Crown's own complicity in the GTMO interrogation process - even considered alone - constituted a *Charter* violation justifying the remedy granted by the Courts below. As Justice O'Reilly held, the occurrence of this participation distinguishes the present case from *Gosselin.*[145] However, the Respondent further submits that the Courts below did not err in finding that this complicity, combined with the "special circumstances"[146] of the present case give rise to a "duty to protect" under s. 7 of the *Charter.* These circumstances include the torture and arbitrary detention of a Canadian child who was unlawfully conscripted as a child soldier. Additionally, or in the alternative, it is submitted these "special circumstances" are relevant to the issue of a "just and appropriate remedy' for the purposes of s. 24(1).

---

[144] Exhibit Y to Affidavit of William Kuebler (J.R. Vol. II, p. 287).
[145] FC Reasons at paras. 79-82 (J.R. Vol. I, at pp. 40-41): "As I see it, this case does not involve a similar request for positive action on the part of Canada. Mr. Khadr has very clearly been deprived of his liberty and Canadian agents are involved in that deprivation." [Emphasis added]
[146] *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 at paras. 81-83: "I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances." **[Tab 22]**

(i) "Serious Breaches" of Peremptory Norms of International Law

95. The Respondent has never invoked or relied upon the existence of a rule of international law which requires states to make diplomatic representations on behalf of its nationals. Rather, the Respondent has relied upon the existence of a specific rule of international law respecting "serious breaches" of "peremptory norms of international law" such as the prohibitions against torture and arbitrary detention. Since this rule does not specifically pertain to diplomatic relations, it does not appear in the ILC's *Draft Articles on Diplomatic Protection* relied upon by the Crown. Rather, it appears in the ILC's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Part Two, Chapter Three of which reads:

> CHAPTER III SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW
>
> *Article 40*
> *Application of this chapter*
>
> 1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
>
> 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.
>
> *Article 41*
> *Particular consequences of a serious breach of an obligation under this chapter*
>
> 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
>
> 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
>
> 3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.[147]

96. The rule articulated in the above Articles is reflected in the decision of the Advisory Opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of July 9, 2004.[148] Since the international prohibitions against

---

[147] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/10 (2001), Arts. 40-41. **[Tab 62]**

[148] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, p. 200, §159. **[Tab 30]**

torture is undoubtedly a principle of *jus cogens*,[149] the net effect of this remedial principle for the purposes of the present case was summarized by the Joint Committee of the House of Lords and House of Commons as follows:

> In international law, particular consequences also flow from "serious breaches" of obligations under peremptory norms of international law. A breach of such an obligation is "serious" if it involves "a gross or systematic failure by the responsible State to fulfil the obligation." States are under a positive obligation to co-operate to bring such serious breaches to an end, and are required not to recognise as lawful a situation created by such serious breaches, nor to render aid or assistance in maintaining that situation. So, for example, where a State systematically tortures terrorism suspects, other States are under a duty to co-operate to bring such a serious breach of the prohibition against torture to an end, and are required not to recognise the practice as lawful nor to give any aid or assistance to it continuing. We are concerned that these positive obligations in relation to torture, not to acquiesce in torture or to validate the results of it, are not fully appreciated by the Government, which often gives the impression that it is only under a negative obligation not to torture.[150]

97. In *Al Rawi*, Laws L.J. considered this issue and concluded that: "the status of *ius cogens erga omnes* empowers but does not oblige a State to intervene with another sovereign to insist on respect for the prohibition of torture" citing paragraph 151 of *Prosecutor v. Furundzija*.[151] However, in the subsequent case of *Mohamed v. Secretary of State*, Thomas J. questioned the correctness of this conclusion. In particular, Thomas J. noted that Laws L.J. had misinterpreted paragraph 151 of *Furundzija* by conflating the distinct concepts of obligations *era omnes* and norms of *jus cogens*, and also failed to consider both Article 41 of the ILC's *Draft Articles* and the *Palestinian Wall* case above.[152] Further, though not noted in *Mohamed*, Laws J.A.'s analysis failed to consider the added ramifications of "serious breaches" of peremptory norms of international law as defined in Article 40(2) as distinguished from isolated or sporadic breaches.

---

[149] *A(FC) v. Secretary of State for the Home Department*, [2005] U.K.H.L. 71 at para. 33 **[Tab 1]**, citing *Prosecutor v Furundzija*, [1998] I.C.T.Y. 3 (10 December 1998) at para. 147: "There exists today universal revulsion against torture: as a USA Court put it in *Filartiga v. Peña-Irala*, 'the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind'. This revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination." **[Tab 35]**

[150] House of Lords House of Commons Joint Committee on Human Rights, *Allegations of UK Complicity in Torture*, (London: The Stationery Office Ltd., August 4, 2009) at p. 14-15. [Emphasis added, footnotes omitted] **[Tab 85]**

[151] *Al Rawi v. Secretary of State*, [2006] EWCA Civ 1279, [2008] QB 289 at para. 102. **[Tab 5]**

[152] *Mohamed v. Secretary of State*, [2008] EWHC 2048 (Admin) at para. 178. **[Tab 31]**

98. In light of the above authorities, notably Article 40(1), the *Palestinian Wall* case and the Joint Committee Report, it is submitted that "serious breaches" of the prohibition against torture give rise to positive obligations on the part of States to bring such breaches to an end. Although this issue is open to some debate,[153] the occurrence of such serious breaches of peremptory norms at least raises "special circumstances" supporting the existence of a "duty to protect" under s. 7 and/or a "just and appropriate remedy" under s. 24(1).

(ii) *Positive Obligations Arising under the* Convention on the Rights of the Child *and its* Optional Protocol on the Involvement of Children in Armed Conflict

99. The Courts below did not err in their conclusion that the Crown's participation in the commission of torture and arbitrary detention is exacerbated by the fact that this treatment was inflicted upon the Respondent when he was a child.[154]

100. The importance of the *Convention on the Rights of the Child* has often been emphasized by this Court. In the concurring reasons of L'Heureux-Dubé, Gonthier and Bastarache JJ. *R. v. Sharpe*, the following was stated:

> The protection of children from harm is a universally accepted goal. While this Court has recognized that, generally, international norms are not binding without legislative implementation, they are relevant sources for interpreting rights domestically. . . .
>
> [A] balancing of competing interests [in constitutional interpretation] must be informed by Canada's international obligations. The fact that a value has the status of an international human right is indicative of the high degree of importance with which it must be considered. . . .
>
> Both legislators abroad and the international community have acknowledged the vulnerability of children and the resulting need to protect them. It is therefore not surprising that the *Convention on the Rights of the Child* has been ratified or acceded to

---

[153] Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) at pp. 249-252. "What is called for in the case of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in this respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy. Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40." **[Tab 79]**

[154] FCA Reasons at J.R. Vol. I, p. 79, para. 53.

> by 191 states as of January 19, 2001, making it the most universally accepted human rights instrument in history.[155]

101. Article 2(1) of the CRC provides that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction..." Similarly Article 6(1) of the *Optional Protocol on the Involvement of Children in Armed Conflict* provides that "Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction."[156] The United Nations' Bulletin of Human Rights 91/2, states that "The verb used to describe the obligation ("to ensure") is very strong and encompasses both passive and active (including pro-active) obligations."[157] Further, Article 39 of the CRC states:

> States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.[158]

102. At paragraph 66 of his decision, O'Reilly J. appeared to conclude that the words "should not" in Article 4(1) imply that Canada does not have obligations under the *Optional Protocol* with respect to the Respondent.[159] This however is not the case. Although it is true that Article 4(1) does not create mandatory obligations (since it only applies to non-state actors who are not parties to the Protocol), Articles 6(3) and 7 do create mandatory obligations since the Respondent is a "person within their jurisdiction recruited or used in hostilities contrary to the present Protocol" within the meaning of Art. 6(3) and a "victim of acts contrary thereto" within the meaning of Art. 7.

103. Articles 6(3) and 7 of the *Optional Protocol* also include obligations to "co-operate" in "rehabilitation and social reintegration" of victims of acts contrary to the *Optional Protocol*:

---

[155] *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paras. 175-177. **[Tab 47]** See also: *Baker v. Canada (Minister of Employment and Immigration)*, [1999] 2 S.C.R. 817 at paras. 69-71. **[Tab 8]**

[156] *Convention on the Rights of the Child*, Can. T.S. 1992, No. 3, Art. 6(1). **[Tab 59]**

[157] Alston, P., "The Legal Framework of the Convention on the Rights of the Child" (New York: United Nations, 1992), 91 Bulletin of Human Rights 2 at p. 9. **[Tab 67]**

[158] *Convention on the Rights of the Child*, Can. T.S. 1992, No. 3, Art. 2(1) 6(1), 39. **[Tab 59]**

[159] FC Reasons, J.R. Vol. I, p. 36, para. 66. This issue was not raised before Justice O'Reilly and is likely the product of certain erroneous arguments contained in an op-ed article printed in the Ottawa Citizen while his decision was under reserve: Howard Anglin, "Omar Khadr was not a child soldier" *Ottawa Citizen*, March 19, 2009. **[Tab 68]**

> 1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations.[160]

104. The Committee on the Rights of the Child has emphasized that the specific developmental, emotional and psychological differences between children and adults demand a separate juvenile justice system, including a different approach to detention and incarceration, a lesser standard of culpability, and different consequences and treatment upon a finding of culpability.[161] In *R. v. D.B.*, this Court affirmed that this "principle of diminished moral culpability" is a principle of fundamental justice enshrined in s. 7.[162]

105. From ages 15 to 18 the Respondent was detained as an adult, and was never segregated from the adult population at GTMO.[163] Further, for over seven years, he has faced prosecution before a military commission which has no mandate, and may have no jurisdiction to consider his age at the time of the alleged commission of the offence. At the time of the Canadian interviews, the Canadian government knew that "As a combatant, [the Respondent] is being treated like any other detainee. He is being given no special status as a minor".[164] Yet the Canadians chose to take advantage of his vulnerability for their own benefit.

106. Contrary to the conclusions of Nadon J.A. and the arguments of the Crown, Canada's jurisdiction in this context is "not delimited by the place where the violation occurred". Instead, a person is within or subject to the jurisdiction of the state even if he or she is outside the state's territory where: (a) the person is a national of that state; and (b) the state through its agents takes positive actions which directly violate the person's treaty-guaranteed rights.[165] Canada's

---

[160] *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, G.A. Res. 54/263, U.N. Doc. A/RES/54/263, Annex I (May 25, 2000), *entered into force* Feb. 12, 2002, Art. 7(1). **[Tab 65]**

[161] Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, 44th Sess., UN Doc. CRC/C/GC/10 (2007) at paras. 10, 13. **[Tab 77]**

[162] *R. v. D.B.*, 2008 SCC 25. **[Tab 39]**

[163] Affidavit of Lt. Cdr. William Kuebler, para. 57 (J.R. Vol. II, at p. 146).

[164] Secure Facsimile, Exhibit T to Affidavit of Lt. Cdr. William Kuebler (A.B. Vol. I, at p. 173, para. 4).

[165] *Celiberti de Casariego v. Uruguay*, No. 56/1979, para. 10.2 **[Tab 14]**; *Varela Nunez v. Uruguay*, No. 108/1981 **[Tab 56]**; *Samuel Lichtensztejn v. Uruguay*, No. 77/1980 **[Tab 49]**; *Pereira Montero v. Uruguay*, No. 106/1981 **[Tab 32]**. In all of these cases, the victim suffered the violation at the hands of Uruguayan state agents, but was not

obligations under the *International Covenant on Civil and Political Rights* and the CRC were triggered when it chose to interrogate the Respondent, a Canadian child, at GTMO, and to share the product of those interrogations with the United States.

(iii) *Ongoing Violations in the GTMO Detention Regime*

107. Throughout its Factum, the Crown argues that the unlawful features of the GTMO detention regime have been corrected by the U.S. Courts. Not even the current U.S. government agrees with this assertion.

108. Notwithstanding three successful appeals to the U.S. Supreme Court, the Respondent is still prohibited from seeking *habeas corpus*.[166] He is still charged with offences that did not exist at the time of their alleged commission. He is still before a military commission system designed to try adults, and with no mandate to consider his age at the time of the alleged offences. He still faces a trial where interrogators have adopted a deliberate policy of destroying interview notes in order to "minimize the legal issues that may arise" from the existence of such notes.[167] And he still faces trial for the murder of a U.S. soldier before a jury composed entirely of the deceased's fellow soldiers.

109. But perhaps the most obvious ongoing violation of the Respondent's rights is the fact that he has now spent more than 7 years in detention without trial, or the ability to apply for *habeas corpus* or bail. The current GTMO regime provides no remedy for this shocking and unacceptable delay since §948b(d)(1)(A) of the MCA specifically provides that the speedy trial provisions of the *Uniform Code of Military Justice* shall not apply to military commissions under the MCA.[168]

---

in the territory of Uruguay nor necessarily in the custody or control of Uruguayan agents. Cf. *Slahi v. Canada*, 2009 FCA 259 at para. 10. **[Tab 50]**

[166] The Crown argues that the Respondent's right of *habeas corpus* was established in *Rasul* and *Boumediene*. But the Respondent's *habeas* petition has been stayed by Judge John Bates pending the resolution of the Respondent's military commission prosecution. The prosecution, in turn, has been indefinitely delayed while the new administration ponders what it will do with the Respondent and the GTMO regime generally.

[167] Exhibit MM to Affidavit of Lt. Cdr. William Kuebler (J.R. Vol. III, pp. 368-369).

[168] *Military Commissions Act of 2006*, 28 U.S.C.A. §2241(e) (Supp. 2007), §948b(d)(1)(A). **[Tab 63]**

110. International law requires that all persons charged with criminal offences be brought before a judge or authorized adjudicator promptly and tried without unreasonable delay.[169] The HRC has held that excessive pretrial detention affects "the right to be presumed innocent and therefore reveals a violation of" international law.[170] Children have a particular right to be detained for the "shortest appropriate period of time", in light of their special vulnerability.

111. Despite considerations of international comity, there are times when it is appropriate for Canadian Courts to recognize gross deficiencies in foreign legal systems. For example, in *Philippines (Republic) v. Pacificador*, the Ontario Court of Appeal held that 1.5, 7 and 10 years of detention without trial or the right to make a bail application in the Philippines to be "shocking and unacceptable delay" such that an order for extradition would constitute a violation of s. 7 of the *Charter*.[171]

112. It is submitted that the ongoing unlawful conditions of the Respondent's detention, notably the shocking and unacceptable delay in the determination of his trial or *habeas corpus* petition, constitute "special circumstances" supporting the existence of a "duty to protect" and/or the conclusion of the Courts below that the Order granted constitutes a "just and appropriate remedy" for the purposes of s. 24(1) of the *Charter*.

H. *Remedy*

113. Where an appeal involves a remedy for a *Charter* breach, deference must be shown to the trial judge's choice of remedy. An appellate court should only intervene where the trial judge has committed an error of law or principle. In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, this Court held:

> Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may in some cases require the introduction of novel remedies. A superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, courts should be mindful of their roles as constitutional arbiters and the limits of their institutional capacities. Reviewing courts, for their part, must show considerable deference to trial judges' choice of remedy, and should refrain from using hindsight to

---

[169] *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, Arts. 9(3), 14(2)(3)(c). **[Tab 61]**
[170] *Cagas et al. v. The Phillipines*, Communication No. 788/1997 at para. 7.3. **[Tab 11]**
[171] *Philippines (Republic) v. Pacificador* (2002), 216 D.L.R. (4th) 47 (Ont.C.A.) at paras. 52-56. **[Tab 33]**

> perfect a remedy. A reviewing court should only interfere where the trial judge has committed an error of law or principle.[172]

114. In *Mills v. The Queen*, the scope of authority conferred by s. 24(1) was described in the following terms:

> What remedies are available when an application under s.24(1) of the *Charter* succeeds? Section 24(1) again is silent on the question. It merely provides that the appellant may obtain such remedy as the court considers "appropriate and just in the circumstances". It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.[173]

115. The Respondent submits that O'Reilly J. did not abuse the broad discretion conferred upon him by s. 24(1) in granting the remedy that he did. O'Reilly J. noted that this Court effectively required the Crown to seek diplomatic assurances from the U.S. in *Burns*, and that the request for the return of a Canadian citizen is at the lower end of the spectrum for Canadian intervention. Greater interventions were required of the Crown in the recent cases of *Smith*[174] and *Abdelrazik*.[175]

116. The Respondent submits that the special circumstances identified above, namely the torture and arbitrary detention of a child soldier, and the shocking and unacceptable delay in the provision of legal process, support Justice O'Reily's decision to grant the remedy he did.

117. Contrary to the Crown's submissions, the remedy granted in this case is very much connected with the *Charter* breaches committed by the Crown. This remedy requires the Crown to utilize its best efforts to bring an end to the past and ongoing violations of the Respondent's rights – violations in which the Crown has participated.

118. Also, the remedy granted does not extend beyond the traditional role of the Courts. Although it has often been said that decisions respecting foreign relations raise matters which are not justiciable, nothing in the decisions of the Courts below reflect an attempt to determine whether the Crown's past decisions and policies are "reasonable" or "unreasonable". Rather the

---

[172] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 87. [Emphasis added] **[Tab 18]**
[173] *Mills v. The Queen*, [1986] 1 S.C.R. 863 at para. 279. **[Tab 43]**
[174] *Smith v. Canada (Attorney General)*, 2009 FC 228 at para. 58. **[Tab 51]**
[175] *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580 at paras. 158-169. **[Tab 3]**

Courts have held that the Crown must attempt to remedy the past and ongoing violations of the Respondent's rights by making a request for his release and repatriation. None of the authorities cited by the Crown refute the availability or appropriateness of such a remedy under these circumstances.

Part IV: SUBMISSIONS RESPECTING COSTS

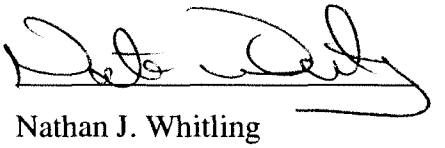
119. The Respondent respectfully requests costs of this appeal.

Part V: ORDER SOUGHT

120. The Respondent respectfully requests that this appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of October, 2009.

Dennis Edney
Counsel for the Respondent



Nathan J. Whitling
Counsel for the Respondent

Part VI: TABLE OF AUTHORITIES

TAB	Cases Cited	Paragraph No(s).
17.	*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.	63, 68
18.	*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62.	113
19.	*Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003).	31
20.	*Gherebi v. Bush*, 542 U.S. 952.	31
21.	*Golden Valley Golf Course Ltd. v. British Columbia (Minister of Transportation and Highways)*, 2001 BCCA 392.	65
22.	*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84.	61
23.	*Groeneveld v. Calgary Power Ltd.* (1980), 109 D.L.R. (3d) 99 (Alta.Q.B.).	67
24.	*Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).	13, 14
25.	*Judgment on the Interrogation Methods Applied by the GSS*, Nos HC 5100/94, HC 4054/95, HC 5188/96, HC 7563/97, HC 7628/97, HC 1043/99 (Sup. Ct. of Israel, sitting as the High Court of Justice, Sep 6, 1999).	21, 85
26.	*Khadr v. Attorney General*, 2008 FC 807.	46, 47, 53, 75
27.	*Khadr v. Canada (Minister of Foreign Affairs)*, 2004 FC 1145.	28
28.	*Khadr v. Canada*, 2005 FC 1076.	51, 64, 66
29.	*LaGrand (Germany v. United States of America)*, [2001] I.C.J. 3 (27 June 2001).	28
30.	*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004.	96
31.	*Mohamed v. Secretary of State*, [2008] EWHC 2048 (Admin).	83, 97
32.	*Pereira Montero v. Uruguay*, No. 106/1981.	106
33.	*Philippines (Republic) v. Pacificador* (2002), 216 D.L.R. (4th) 47 (Ont.C.A.).	111
34.	Precautionary Measures in Guantanamo Bay, Cuba, Inter-American Commission on Human Rights, March 12, 2002.	31
35.	*Prosecutor v Furundzija*, [1998] I.C.T.Y. 3 (10 December 1998).	97
36.	*R. v. Arcand*, 2008 ONCA 595.	70

TAB	Treaties and Other International Instruments Cited	Paragraph No(s).
58.	*Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36.	85
59.	*Convention on the Rights of the Child*, Can. T.S. 1992, No. 3.	90, 91, 101
60.	*Geneva Convention Relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, Can. T.S. 1965 No. 20.	85
61.	*International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171.	90, 110
62.	International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/10 (2001).	78, 95
63.	Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418.	6
64.	*Military Commissions Act of 2006*, Pub. L. No. 109-366, 120 Stat. 2600 (2006).	14
65.	*Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, Can. T.S. 2002, Vol. 5, Preamble.	91, 103
66.	*Vienna Convention on Consular Relations*, U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512.	28
	Authors and Additional Materials Cited	**Paragraph No(s).**
67.	Alston, P., "The Legal Framework of the Convention on the Rights of the Child" (New York: United Nations, 1992), 91 Bulletin of Human Rights 2.	101
68.	Anglin, Howard, "Omar Khadr was not a child soldier" *Ottawa Citizen*, March 19, 2009.	102
69.	Center for Constitutional Rights, *US Allows Security Forces from Brutal Human Rights Abusing Regimes into Guantanamo; Many Countries Complicit in Abuses at Guantánamo.*	77
70.	Canada, *Debates of the Senate*, 2nd Sess., 39th Parliament, Vol. 144, No. 62, Tuesday, May 27, 2008, at pp. 1391-1394.	54
71.	Canada, *Debates of the Senate*, 2nd Sess., 39th Parliament, Vol. 144, No. 62, Tuesday, June 17, 2008, at pp. 1556-1558.	54
72.	Canada, *House of Commons Debates*, Vol. 142, No. 111, 2nd Sess., 39th Parliament, Tuesday, February 5, 2008, at pp. 2611-2612.	54

TAB	Authors and Additional Materials Cited	Paragraph No(s).
73.	Canada, *House of Commons Debates*, Vol. 142, No. 111, 2nd Sess., 39th Parliament, Thursday, May 29, 2008, at p. 6322, 6338-6340.	54
74.	Canada, *House of Commons Debates*, Vol. 142, No. 111, 2nd Sess., 39th Parliament, Monday, June 9, 2008, at p. 6735, and 6767.	54
75.	Canada, *House of Commons Debates*, Vol. 142, No. 111, 2nd Sess., 39th Parliament, Tuesday, June 10, 2008, at p. 6808.	54
76.	Canada, *House of Commons Debates*, Vol. 142, No. 111, 2nd Sess., 39th Parliament, Thursday, June 12, 2008, at p. 6890.	54
77.	Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, 44th Sess., UN Doc. CRC/C/GC/10 (2007).	104
78.	*Concluding Observations of the Committee against Torture*, U.N. Doc. A/52/44.	21, 85
79.	Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002).	98
80.	Dept. of Defense, Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility, Army Regulation 15-6: Final Report (1 April 2005; amended 9 June 2005; published 14 July 2005).	26
81.	Department of the Army, *Field Manual 34-52, Intelligence Interrogation*, (1992).	19
82.	*Executive Order* (The White House, Office of the Press Secretary, January 22, 2009).	53
83.	Frakt, David J.R. (Maj.), "Closing Argument at Guantanamo: The Torture of Mohammed Jawad" (2008), 22 *Harvard Human Rights Journal* 1.	20
84.	House of Commons, *Omar Khadr – Report of the Standing Committee on Foreign Affairs and International Development*, (Communication Canada – Publishing: Ottawa, 2008).	55
85.	House of Lords, House of Commons, Joint Committee on Human Rights, *Allegations of UK Complicity in Torture*, (London: The Stationery Office Ltd., August 4, 2009).	81, 82, 96
86.	Human Rights Committee, General Comment No. 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, (2001).	89

TAB	Authors and Additional Materials Cited	Paragraph No(s).
87.	Inquiry into the Treatment of Detainees in US Custody, Committee on Armed Services United States Senate, "Executive Summary and Conclusions," December 11, 2008.	20, 22, 49
	Authors and Additional Materials Cited	**Paragraph No(s).**
88.	Inquiry into the Treatment of Detainees in US Custody, Committee on Armed Services United States Senate, November 20, 2008.	24, 49
89.	Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of 30 January 1987.	89
90.	Lange, Donald J., *The Doctrine of Res Judicata in Canada*, 2nd ed. (Markham, Ont.: LexisNexis Butterworths, 2004).	65, 67
91.	Memorandum for the General Counsel of the Department of Defense, Detainee Interrogations, January 15, 2003.	21
92.	Parliamentary Assembly of Europe's Resolution No. 1340 (2003) (Adopted June 26, 2003).	31
93.	Rumsfeld, Donald, *Memorandum for the Commander, U.S. Southern Command*, April 16, 2003.	
94.	Scheinin, Martin, "*Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*", U.N. doc. A/HRC/10/3 (4 February 2009).	79
95.	Security Intelligence Review Committee, *CSIS's Role in the Matter of Omar Khadr (SIRC Study 2008-05)*, (July 8, 2009).	29, 31, 35, 38, 39
96.	U.S. Department of Justice, *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan and Iraq* (Oversight and Review Division, Office of Inspector General, May 2008).	25
97.	U.N. Economic and Social Council, Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2003/8 (16 December 2002).	31
98.	United Nations Commission on Human Rights, *Situation of Detainees at Guantanamo Bay*, E/CN.4/2006/120, 27 February 2006.	45, 85

Part VII: STATUTES

None