S.C.C. File No.: 32147

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

BETWEEN:

THE MINISTER OF JUSTICE AND ATTORNEY GENERAL 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

RESPONDENT'S FACTUM
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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Part I: Statement of Facts

A. Statement of Position

1. The Respondent, Omar Ahmed Khadr, submits that this appeal must be dismissed. Under the circumstances of this case, the Crown's refusal to disclose the relevant documents in its possession constitutes a violation of s. 7 of the *Charter*. Although the charges the Respondent faces are not being prosecuted by the Crown, the Crown has assisted the prosecution in gathering evidence, and has been complicit in violations of the Respondent's basic human rights as recognized by both the *Charter* and international law.

2. The alternative remedies identified by the Crown, such as the right of the general public to access documents pursuant to the *Access to Information Act*, are inadequate substitutes for an accused's *Charter*-based right to disclosure of relevant information for the purpose of raising full answer and defence in an imminent criminal trial.

3. The Crown's ostensible concerns respecting national security and international relations are irrelevant to this appeal. These concerns are presently being addressed in concurrent proceedings ongoing before the Federal Court pursuant to ss. 38 – 38.16 of the *Canada Evidence Act*.

B. Statement of Facts - Introduction

4. Notwithstanding the length of the Statement of Facts herein, the basic facts in this appeal are not in dispute. The Respondent faces serious criminal charges. The Crown is in possession of documentary material relevant to these charges. The Crown interrogated the Respondent while he was detained in Guantánamo Bay in 2003 and 2004, and shared the product of those interrogations with the Americans. The Respondent has demanded disclosure of all relevant information, and that demand has been refused.

5. In their decisions below, both the applications judge and the Court of Appeal relied upon certain evidentiary material filed in separate but related proceedings involving the same parties. On December 5, 2007, the Respondent filed a motion to adduce this material as further evidence before this Court. In response, McLachlin C.J.C. ordered:

> IT IS HEREBY ORDERED that the new evidence proposed by the Respondent may be included in the case on appeal in a separate volume entitled the "Respondent's Fresh Evidence Record", and the admissibility of the Respondent's Fresh Evidence Record shall be determined by the Court hearing the appeal.[1]

6. Of the material included in the Respondent's Fresh Evidence Record ("RFER"), the Crown does not object to the admissibility of the Affidavit of William Kuebler to the extent that it provides an update of events which have recently transpired, but objects to the remainder of this material. Factual points based upon disputed material are herein indicated by **bold** footnotes.

C. The Respondent Omar Ahmed Khadr

7. The Respondent is a Canadian citizen who has been detained by U.S. forces at U.S. Naval Base, Guantánamo Bay, Cuba, for approximately 5 and-a-half years since he was 15 years of age. Contrary to the first sentence of the Crown's factum, the Respondent had not been absent from Canada for six years at the time of his capture. In fact, he had stayed with his grandparents in Canada for several months the previous year.[2]

8. The Respondent was taken prisoner on July 27, 2002, at the conclusion of a military battle in a village near Khost, Afghanistan. The United States alleges that near the end of this battle, the Respondent threw a grenade which killed U.S. Army Sergeant First Class Christopher Speer. Following his capture, the Respondent received life-saving medical attention for wounds received during the battle.

9. It is further alleged that, prior to his capture, the Respondent conspired with high officials of Al Qaeda, including Usama bin Laden, Ayman al Zawahiri, Sheikh Sayed al Masri, and Muhammad Atef to commit acts of murder and terrorism against U.S. and coalition forces. All allegations against the Respondent are denied and remain unproven.

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[1] *Minister of Justice et al. v. Omar Ahmed Khadr*, Court File No. 32147, Order of McLachlin C.J. dated December 19, 2007. **[Tab 57]**

[2] Exhibit 'C' to Cross-Examination of William Johnston, A.B. Vol. II, p. 309.

D. Omar's "Legal Limbo" from July 27, 2002, to June 28, 2004

10. For approximately the first two years of his detention, the Respondent was held virtually *in communicado*,[3] was not charged, and was denied access to legal counsel and the courts. The legal regime governing the Respondent's detention during this period is detailed in the Affidavit of Richard Wilson, a law professor at American University. During this period, the position taken by the Government of the United States was that the Respondent could be held indefinitely without trial or other legal process.[4]

11. The purported legal authority which governed the detention of prisoners in Guantánamo Bay during this period was the Military Order issued by the President of the United States in the wake of the 9/11 attacks dated November 13, 2001 (the "Presidential Order").[5] The Presidential Order directs that those individuals subject to the Order be "detained at an appropriate location designated by the Secretary of Defense outside or within the United States",[6] and declares that detainees "shall not be privileged" to access the courts of the United States, courts of foreign nations (like Canada), or any international tribunals.[7]

12. The Presidential Order also makes specific provision for the trial of individuals to which it applies. In particular, the Presidential Order purports to confer exclusive jurisdiction upon military commissions[8] for the trial of "any and all offenses triable by military commission",[9] and purports to "find" pursuant to 10 U.S.C. §836 that applying normal rules of criminal procedure to such trials "is not practicable".[10]

13. As both the title and text of the Presidential Order confirm, its application is strictly limited to persons who are not citizens of the United States.[11] Consequently, U.S. citizens may not be detained in Guantánamo Bay pursuant to this authority.[12]

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[3] The Respondent was able to send postcards to his family such as those attached as Exhibit 'E' to the Affidavit of Richard Wilson dated January 20, 2006, A.R. Vol. II, pp. 153-157.
[4] Affidavit of Richard Wilson dated January 20, 2006, para. 12. A.R. Vol. I, p. 55.
[5] Exhibit 'F' to the Affidavit of Richard Wilson, A.B. Vol. II, pp. 158-162.
[6] Exhibit 'F' to the Affidavit of Richard Wilson, A.B. Vol. II, p. 159, s. 3(a).
[7] Exhibit 'F' to the Affidavit of Richard Wilson, A.B. Vol. II, p. 161-162, s. 7(b)(2).
[8] For a discussion of the nature and history of U.S. military commissions see: *Hamdan v. Rumsfeld*, 548 U.S. __, Opinion of the Court at pp. 25-30. **[Tab 32]**
[9] Exhibit 'F' to the Affidavit of Richard Wilson, A.B. Vol. II, p. 160-161, ss. 4 and 7(b)(1).
[10] Exhibit 'F' to the Affidavit of Richard Wilson, A.B. Vol. II, p. 158-159, s. 1(f).
[11] Exhibit 'F' to the Affidavit of Richard Wilson, A.B. Vol. II, p. 158, title, and p. 159 s. 2(a).

14. The Presidential Order was followed by the issuance of a Memorandum from the President dated February 7, 2002. In this Memorandum, the President determined that the provisions of the *Geneva Conventions* do not apply to the conflict with Al Qaeda in Afghanistan, that common Article 3 of the *Geneva Conventions* do 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.[13]

E. The U.S. Naval Base at Guantánamo Bay

15. The U.S. Naval Base at Guantánamo Bay, commonly referred to as "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 provides:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement, the United States shall exercise complete jurisdiction and control over and within said areas...[14]

16. In 1934, the United States and Cuba entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in effect "[s]o long as the United States of America shall not abandon the... naval station of Guantánamo."[15]

F. Military Commission Order No. 1

17. On March 21, 2002, pursuant to the Presidential Order, the Secretary of Defense issued Military Commission Order No. 1 ("MCO") establishing procedures for the conduct of military commissions in GTMO.[16]

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[12] In *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) **[Tab 73]**, a U.S. citizen charged with participating in the activities of the Taliban and Al Qaeda while in Afghanistan was brought to the continental United States and tried before the U.S. District Court for the Eastern District of Virginia.

[13] Memorandum of George W. Bush to the Vice President et al., Re: Humane Treatment of Taliban and al Qaeda Detainees, February 7, 2002, at para. 2. **[Tab 49]**

[14] Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418. **[Tab 45]**

[15] Treaty Defining Relations with Cuba, May 29, 1934, U. S.-Cuba, Art. III, 48 Stat. 1683, T. S. No. 866. **[Tab 69]**

[16] Affidavit of Richard Wilson, A.B. Vol. I, p. 55, paras. 10-11, Exhibit 'G' to Affidavit of Richard Wilson, A.B. Vol. II, pp. 163-178.

18. Perhaps the most striking feature of military commission regime established by the MCO was its lack of independence from the executive branch of government. This subject was later examined by Kennedy J. of the Supreme Court of the United States in *Hamdan v. Rumsfeld*, writing for the majority on this point. This analysis is here referred to but not reproduced.[17]

19. Another "striking feature" of the rules established by the MCO was that they permitted the admission of *any* evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." Under this test, not only was testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements needed to be sworn.[18]

20. Yet another "glaring condition" imposed by the MCO was that the accused and his civilian counsel could be excluded from, and precluded from ever learning what evidence was presented during, any part of the trial that either the Appointing Authority or the presiding officer decides to "close" on any number of extremely broad grounds. Appointed military defense counsel had to be privy to these closed trial sessions, they could, at the presiding officer's discretion, be forbidden to reveal to his or her client what took place therein.[19]

21. The offenses triable by the military commissions established by the MCO were subsequently defined by the terms of Military Commission Instruction No. 2 dated April 30, 2003.[20]

G. Omar's Detention Attracts International Condemnation

22. Following their implementation, the system imposed by the Presidential Order and the MCO attracted international condemnation.

23. In the November 6, 2002, decision of the England and Wales Court of Appeal in *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, GTMO was described as a "legal

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[17] *Hamdan v. Rumsfeld*, 548 U.S. __, Opinion of Kennedy J., concurring in part, at pp. 11-16. **[Tab 32]**
[18] Exhibit 'G' to Affidavit of Richard Wilson, A.B. Vol. II, pp. 163-178, §§6(D)(1), (2)(b), (3). This description is taken from the Opinion of the Court in *Hamdan v. Rumsfeld*, 548 U.S. __ at p. 51. **[Tab 32]**
[19] Exhibit 'G' to Affidavit of Richard Wilson, A.B. Vol. II, pp. 170-171, §6(B)(3). This description is taken from *Hamdan v. Rumsfeld*, 548 U.S. __, Opinion of the Court, at p. 51. **[Tab 32]**
[20] Department of Defense, Military Commission Instruction No. 2, April 30, 2003, at §3A. **[Tab 23]**

black hole". While denying the appeal, the Court expressed its "deep concern that, in apparent contravention of the fundamental principles of law [the prisoners] may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of [their] detention before any court or tribunal."[21]

24. On December 16, 2002, the United Nations' Working Group on Arbitrary Detention released a "Legal Opinion Regarding the Deprivation of Liberty of Persons Detained in Guantánamo Bay", which concluded that the regime in GTMO was contrary to both the *Geneva Convention* and of the *International Covenant on Civil and Political Rights*.[22]

25. On March 13, 2002, the Inter-American Commission on Human Rights of the Organization of American States issued the following request, which was ignored:

> ...[T]he information available suggests that the [GTMO] detainees remain entirely at the unfettered discretion of the United States government. Absent clarification of the legal status of the detainees, the Commission considers that the rights and protections to which they may be entitled under international or domestic law cannot be said to be the subject of effective legal protection by the State.
>
> ...[T]he Commission hereby requests that the United States take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.[23]

26. Also during this period, serious concerns respecting the legality of the GTMO regime were expressed by the Courts of the United States. In the December 18, 2003, decision of the U.S. Court of Appeals for the Ninth Circuit in *Gherebi v. Bush*, the following was stated:

> Gherebi has not been subjected to a military trial. Nor has the government employed the other time-tested alternatives for dealing with the circumstances of war: it has neither treated Gherebi as a prisoner of war (and has in fact declared that he is not entitled to the rights of the *Geneva Conventions*,... nor has it sought to prosecute him under special procedures designed to safeguard national security... Instead, the government is following an unprecedented alternative. Under the government's theory, it is free to imprison Gherebi indefinitely along with hundreds of other citizens of foreign countries,

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[21] *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 1]**

[22] 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). **[Tab 70]**

[23] Precautionary Measures in Guantanamo Bay, Cuba, Inter-American Commission on Human Rights, March 13, 2002. **[Tab 58]**

friendly nations among them, and to do with Gherebi and these detainees as it will, when it pleases, without any compliance with any rule of law of any kind, without permitting him to consult counsel, and without acknowledging any judicial forum in which its actions may be challenged. Indeed, at oral argument, the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees. To our knowledge, prior to the current detention of prisoners at Guantanamo, the U.S. government has never before asserted such a grave and startling proposition. Accordingly, we view Guantanamo as unique not only because the United States' territorial relationship with the Base is without parallel today, but also because it is the first time that the government has announced such an extraordinary set of principles - a position so extreme that it raises the gravest concerns under both American and international law.[24]

27. Some of the international community's condemnation of the GTMO system focused specifically on the Respondent's plight. For example, the Parliamentary Assembly of Europe's Resolution No. 1340 (2003) (Adopted June 26, 2003) included the following:

> 1. The Parliamentary Assembly:
>
> > i. notes that some time after the cessation of international armed conflict in Afghanistan, more than 600 combatants and non-combatants, including citizens from member states of the Council of Europe, may still be held in United States' military custody – some in the Afghan conflict area, others having been transported to the American facility in Guantánamo Bay (Cuba) and elsewhere, and that more individuals have been arrested in other jurisdictions and taken to these facilities;
> >
> > ii. notes that a number of children are being held in Guantánamo Bay, including a "handful" of children between 13 and 15 years of age transferred from the Bagram Air Base in 2003, and a 16-year old Canadian national transferred at the end of 2002;
> >
> > iii. believes that children should only be detained as a last resort and that they require special protection; that the continuing detention of these young people is a most flagrant breach of the United Nations Convention on the Rights of the Child.
>
> 2. The Assembly is deeply concerned at the conditions of detention of these persons, which it considers unacceptable as such, and it also believes that as their status is undefined, their detention is consequently unlawful.

[24] *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003) (p. 21 of printout) **[Tab 28]**, rev'd and remanded in light of *Rumsfeld v. Padilla*, 542 U.S. 426: *Gherebi v. Bush*, 542 U.S. 952 **[Tab 29]**.

3. The United States refuses to treat captured persons as prisoners of war; instead it designates them as "unlawful combatants" – a definition that is not contemplated by international law.

4. The United States also refuses to authorise the status of individual prisoners to be determined by a competent tribunal as provided for in Geneva Convention (IIIī) relative to the Treatment of Prisoners of War, which renders their continued detention arbitrary.

5. The United States has failed to exercise its responsibility with regard to international law to inform those prisoners of their right to contact their own consular representatives or to allow detainees the right to legal counsel.[25]

H. CSIS "Operational Interviews" in GTMO

28. Rather than acting to protect the basic human rights of its young citizen, the Crown chose to take advantage of the Respondent's vulnerability to advance its own interests. On several occasions, including February and September, 2003, CSIS agents attended at GTMO and interrogated the Respondent for "intelligence and law enforcement purposes". The Respondent was then 16 years of age.

29. Crown documents indicate that U.S. officials were "very eager for Canadian security and law enforcement officials to visit Khadr. They are assuming that we are pursuing cases of our own to which Khadr would be relevant, and the [CIA] would like to share intelligence information with us on these matters as well".[26] Documents also confirm that "the purpose of the visit was the collection and sharing of information for intelligence and law enforcement purposes. Consular visits were a non-starter, and applications that appeared to be consular visits by other means would be scrutinized very closely".[27]

30. The CSIS agents questioned the Respondent with respect to incriminatory matters which are the subject of the prosecution, including his and his family's involvement with Al Qaida.[28] When the Respondent stated that he had been tortured and that certain previous statements

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[25] Parliamentary Assembly of Europe's Resolution No. 1340 (2003) (Adopted June 26, 2003). **[Tab 57]**
[26] Exhibit 'A' to Cross-Examination of William Johnston, A.B. Vol. II, p. 305 para. 5.
[27] Exhibit 'A' to Cross-Examination of William Johnston, A.B. Vol. II, p. 306 para. 7.
[28] Exhibit 'C' to Cross-Examination of William Johnston, A.B. Vol. II, p. 309. **See also: Exhibit D-2 to Cross-Examination of William Hooper RFER Vol II at p. 327.**

were untrue, the CSIS agents confronted the Respondent with the existence of a certain videotape said to constitute "irrefutable proof" of his participation in criminal activity.[29]

31. The CSIS agents took a primary role in the interrogations and were not under instructions of U.S. authorities. There is no evidence that the Respondent was advised of his right to counsel, or that he was advised that his statements could be used against him in a future prosecution. There is no evidence that assurances were sought from or provided by U.S. authorities, that the interviews would not be taped, or that the evidence would not be used against him.[30]

32. Some potentially exculpatory information was also elicited from the Respondent and is now reflected in Crown documents. At one point, the Respondent is stated to have denied the truth of certain earlier statements on the basis that those statements were the product of torture. When asked to describe the torture he endured the Respondent said: "listening to other people scream".[31]

33. The product of CSIS's interviews was shared with the Americans.[32]

34. Additionally, the Cross-Examination of William Hooper in the RFER confirms that:

(1) reports of the interviews were also shared with the RCMP;[33]

(2) there are no geographical restrictions as to the area in which CSIS may collect information or intelligence;[34]

(3) when a CSIS employee is conducting an interview outside Canada, that person is exercising legal authority conferred by the Parliament of Canada;[35]

(4) the purpose of the interviews was to elicit information which might inform CSIS's investigation into Sunni Islamic terrorism;[36]

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[29] Exhibit 'C' to Cross-Examination of William Johnston, A.B. Vol. II, p. 309.
[30] *Khadr v. Canada*, [2006] F.C.J. No. 640, 2006 FC 509 at para. 19; *Khadr v. Canada*, [2005] F.C.J. No. 1315, 2005 FC 1076 para. 23(e).
[31] Exhibit 'C' to Cross-Examination of William Johnston, A.B. Vol. II, p. 309.
[32] *Khadr v. Canada*, [2006] F.C.J. No. 640, 2006 FC 509 at para. 19; *Khadr v. Canada*, [2005] F.C.J. No. 1315, 2005 FC 1076 para. 23(d); **Cross Examination of William Hooper, 14:17 – 15:3.** This point was stipulated by Crown counsel at the hearing before the Court of Appeal and is again admitted at paragraphs 1 and 62 of the Crown's Factum.
[33] **Cross Examination of William Hooper, RFER Vol. I, pp. 77-79.**
[34] **Affidavit of William Hooper, para. 3. RFER Vol. I, p. 21.**
[35] **Cross Examination of William Hooper, RFER Vol. I, pp. 81-82.**

(5) summaries of the intelligence reports derived from the interviews were provided to the United States government;[37]

(6) CSIS did not seek assurances that the interviews not be monitored;[38]

(7) CSIS did not seek any assurances regarding what could be done with the information derived from the interviews;[39]

(8) CSIS took the directing or primary role in the conduct of the interviews;[40]

(9) Mr. Hooper was "reasonably sure" that, at the time of the interviews, CSIS was aware of the concerns then being raised as to the absence of fundamental human rights at Guantanamo Bay;[41]

(10) at the time of the interviews "it would be virtually impossible for a lawyer to get into Guantanamo Bay";[42]

(11) At the interviews in September, 2003, the Respondent stated that he had no knowledge of Islamic extremism or Al Qaeda and the interviewers "repeatedly challenged him on those denials" and tried to get him to admit that he did have such knowledge;[43]

(12) In the February interviews, CSIS elicited a great deal of information on individuals known to be associated with Al Qaida or believed to be Al Qaida members.[44]

I. Requests Pursuant to the *Access to Information Act*

35. On January 14, 2004, counsel for the Respondent made requests for disclosure of documents in the possession of the Department of Foreign Affairs and International Trade pursuant to the *Access to Information Act*.[45] Following lengthy and unreasonable delays by DFAIT, which necessitated two successful complaints to the Information Commissioner of Canada,[46] three installations of heavily redacted documents were finally received by the Respondent's

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[36] **Cross Examination of William Hooper, RFER Vol. I, pp. 83.**
[37] **Cross Examination of William Hooper, RFER Vol. I, pp. 86-87.**
[38] **Cross Examination of William Hooper, RFER Vol. I, pp. 88-89.**
[39] **Cross Examination of William Hooper, RFER Vol. I, pp. 88-89.**
[40] **Cross Examination of William Hooper, RFER Vol. I, pp. 94-95.**
[41] **Cross Examination of William Hooper, RFER Vol. I, pp. 95-96.**
[42] **Cross Examination of William Hooper, RFER Vol. I, pp. 102-103.**
[43] **Cross Examination of William Hooper, RFER Vol. I, pp. 104-107.**
[44] **Cross Examination of William Hooper, RFER Vol. I, pp. 109-110.**
[45] Letter from Nathan Whitling to DFAIT, January 14, 2004, Exhibit 'A' to Affidavit of April Bedard, A.B. Vol. I, pp. 239-240.
[46] Letter from the Hon. John M. Reid, P.C. to Nathan Whitling, Exhibit 'O' to Affidavit of April Bedard, A.B. Vol. II, pp. 262-263; Letter from the Hon. John M. Reid, P.C. to Nathan Whitling, Exhibit 'X' to Affidavit of April Bedard, A.B. Vol. II, pp. 281-282.

counsel some 15 months later on April 11, 2005, April 22, 2005, and May 6, 2005.[47] the Respondent did not seek further appeal or review of these redactions.

J. Federal Court of Canada Proceedings T-536-04 and T-686-04

36. On March 15, 2004, and March 31, 2004, respectively, the Respondent commenced Federal Court proceedings T-536-04 by Statement of Claim and T-686-04 by Notice of Application. In the former proceeding, the Respondent seeks *Charter* damages for the CSIS interrogations, and interlocutory and permanent injunctions enjoining any further interrogations. In the latter proceeding, the Respondent seeks an order compelling the provision of consular services. These proceedings were commenced at a time when the Respondent was not facing any charges.

37. The Hon. Mr. Justice K. von Finckenstein was appointed case manager of the two proceedings and subsequently allowed in part and dismissed in part Crown motions to summarily dismiss them.[48] In each proceeding, the Crown's documentary production was deficient. In T-536-04, DFAIT had failed to include a large number of documents which were later obtained from its Access to Information officer.[49] In T-686-04, the Crown failed to produce documents relevant to the Ministerial decision there under review.[50]

38. On August 8, 2005, von Finckenstein J. granted an interim injunction prohibiting the Crown from conducting any further interviews of the Respondent. In doing so, he made certain findings which were later relied upon in the decisions now under review by this Court.[51]

39. The documents produced by the Crown in T-536-04 and T-686-04 were heavily redacted on the basis of national security, international relations and/or national defence, necessitating proceedings pursuant to s. 38 - 38.16 of the *Canada Evidence Act*.

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[47] Affidavit of April Bedard, February 6, 2006, A.B. Vol. I, p. 61, para. 3.
[48] *Khadr v. Canada (Minister of Foreign Affairs)*, [2004] F.C.J. No. 1391, 2004 FC 1145; *Khadr v. Canada (Attorney General)*, [2004] F.C.J. No. 1700, 2004 FC 1394.
[49] *Khadr v. Canada*, T-536-04, Order of von Finckenstein J. dated June 20th, 2005. **[Tab 40]**
[50] *Khadr v. Canada (Minister of Foreign Affairs)*, [2005] F.C.J. No. 160, 2005 FC 135. **[Tab 43]**
[51] *Khadr v. Canada*, [2005] F.C.J. No. 1315, 2005 FC 1076 at para. 23.

K. *Rasul v. Bush*

40. On June 28, 2004, the Supreme Court of the United States issued its landmark decision in *Rasul v. Bush*. In this case, the Respondent through his grandmother as next friend had filed submissions as an *amicus curiae*, in which he asserted his rights under international law.[52]

41. In *Rasul*, a majority of the Court held that the federal *habeas* statute, 28 U.S.C. §2241, which authorizes district courts, "within their respective jurisdictions," to entertain *habeas* applications by persons claiming to be held "in custody in violation of the . . . laws . . . of the United States,"[53] extended to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty".[54] Hence, to that point, the Presidential Order had unlawfully deprived the Respondent and the other GTMO detainees of their right to commence proceedings in the nature of *habeas corpus*.

42. It is arguable that the Court's holding in *Rasul* was limited to statutory *habeas corpus* and did not determine the extraterritorial reach of the Suspension Clause of the U.S. Constitution.[55] However, Justice Stevens for the majority did drop the following footnote 15:

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. §2241(c)(3). Cf. *United States* v. *Verdugo-Urquidez,* 494 U. S. 259, 277– 278 (1990) (KENNEDY, J., concurring), and cases cited.[56]

L. The CSRT's

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[52] Affidavit of Richard Wilson para. 13, A.B. Vol. I at p. 55; Brief of *Amicus Curiae* Omar Ahmed Khadr by his Next Friend Fatima Al-Samnah in Support of Petitioners, Answers to Undertakings Arising from Cross-Examination on Affidavit of Richard J. Wilson, March 27, 2006, A.B. Vol. II, pp. 368-386.

[53] §§2241(a), (c)(3).

[54] *Rasul v. Bush*, 542 U.S. 466 at pp. 480-484. **[Tab 65]**

[55] United States Constitution, Art. I, § 9, cl. 2: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." **[Tab 71]**

[56] *Rasul v. Bush*, 542 U.S. 466, p. 483, fn. 15 **[Tab 65]** [emphasis added]. In *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, U.S. District Judge Joyce Hens Green describes Footnote 15 as "perhaps the strongest basis for recognizing that the detainees have fundamental rights to due process": Answers to Undertakings Arising from Cross-Examination on Affidavit of Richard J. Wilson, March 27, 2006, A.B. Vol. II, pp. 347-348.

43. On July 7, 2004, nine days after the issuance of the *Rasul* decision, 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. Under its terms, detainees were for the first time accorded the right to hear some of the factual bases for their detention. Detainees are also accorded the right to testify and to present additional evidence that the tribunal finds to be relevant and "reasonably available".[57] The detainees are not accorded any right to counsel, although each is assigned a military officer who serves as a "Personal Representative". 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". Although the tribunal is free to consider classified evidence supporting a contention that an individual is an "enemy combatant," that individual is not entitled to have access to or know the details of that classified evidence.[58]

44. The Respondent's case came before a CSRT on or about September 7, 2004. Prior to this hearing, the Respondent had not been accorded any hearing or legal process of any kind. Nor was the Respondent permitted to meet with legal counsel at any time prior to, or in preparation for, this hearing. The CSRT affirmed the previous determination that the Respondent was an "enemy combatant". The Respondent elected not to participate in this hearing.[59] In reaching its decision, the CSRT relied exclusively upon classified evidence which the Respondent was not permitted to see or comment upon.[60]

M. Omar's Petition for *Habeas Corpus*

[57] All requests by detainees to call witnesses not detained in GTMO have been denied: M. Denbeaux and J. Denbeaux, "No-Hearing Hearings, CRST: The Modern *Habeas Corpus*?", Seton Hall Law, Public Law and Legal Research Paper Series, at p. 2. **[Tab 24]** Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951245.
[58] Order Establishing Combatant Status Review Tribunal, July 7, 2004, Exhibit 'I' to Affidavit of Richard Wilson, A.B. Vol. II. pp. 196-199. Summary taken from *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), Answers to Undertakings Arising from Cross-Examination on Affidavit of Richard J. Wilson, March 27, 2006, A.B. Vol. II, pp. 333-334.
[59] Affidavit of Richard Wilson, para. 17, A.B. Vol. I, pp. 56-57.
[60] Unclassified Summary of Basis for Tribunal Decision, September 7, 2004, A.B. Vol. II, pp. 210-212.

45. On July 2, 2004, just 4 days after the release of *Rasul*, 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.[61]

46. On October 26, 2004, an emergency motion seeking access to the Respondent's medical records and an independent medical evaluation was denied by District Court Judge John Bates.[62]

47. On July 12, 2005, Judge Bates denied a petition seeking to enjoin further interrogation and torture or other cruel, inhuman, or degrading treatment of the Respondent while in control of U.S. authorities.[63] In the context of this motion, the Respondent raised specific allegations of torture by U.S. authorities.[64]

48. On January 31, 2005, Judge Joyce Hens Green heard a Government motion to strike the Respondent's *habeas corpus* petition and those of a number of other detainees. In her decision, Judge Green held that the CSRT procedures violate the due process clause of the Fifth Amendment due to their failure to provide the detainees with access to the evidence relied upon, their failure the permit the assistance of counsel, their reliance upon evidence possibly obtained through torture, and an overly broad definition of "enemy combatant".[65] A conflicting decision had been rendered several days earlier by Judge Richard J. Leon in *Khalid v. Bush*.[66]

49. Appeals from the decisions of Judge Green and Judge Leon were jointly heard before the U.S. Court of Appeals for the D.C. Circuit on September 8, 2005. While the Court's decision on this appeal was pending, the *Detainee Treatment Act* of 2005 (the "DTA")[67] was signed into law.

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[61] Affidavit of Richard Wilson, para. 14, A.B. Vol. I, pp. 55-56, Petition for Habeas Corpus, July 2, 2004, Exhibit 'B' to Affidavit of Richard Wilson, A.B. Vol. II, pp. 134-149.
[62] *O.K. v Bush*, 344 F. Supp. 2d 44 (D.D.C. 2004). **[Tab 53]**
[63] *O.K. v. Bush*, 377 F. Supp. 2d 102 (D.D.C. 2005). **[Tab 54]**
[64] *O.K. v. Bush*, 377 F. Supp. 2d 102 (D.D.C. 2005) at pp. 106-108 (pp. 5-6 of printout) **[Tab 54]. See also Exhibit 'F' to Affidavit of Muneer Ahmad, RFER, at RFER Vol. I, pp. 156-163.**
[65] *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), Answers to Undertakings Arising from Cross-Examination on Affidavit of Richard J. Wilson, March 27, 2006, A.B. Vol. II, pp. 353-363.
[66] *Khalid v. Bush*, 355 F. Supp. 2d 311 (2005) (D.D.C. 2005). **[Tab 44]**
[67] Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739. **[Tab 25]**

N. The *Detainee Treatment Act* of 2005

50. The DTA was signed into law on December 30, 2005. Subsection (e) of §1005 of the DTA purports to strip the courts of the United States from hearing any application for *habeas corpus* filed by or on behalf of an alien detained by the Department of Defense at GTMO. Paragraph (2) of subsection (e) vests in the Court of Appeals for the District of Columbia Circuit the "exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly designated as an enemy combatant." Paragraph (2) also delimits the scope of that review.[68]

O. The Pre-*Hamdan* Charges Against Omar

51. On November 7, 2005, the U.S. Department of Defence announced that appointing authority John D. Altenburg Jr. had approved charges for five persons detained in Guantánamo Bay, one of whom was the Respondent. This announcement was accompanied by the release of a "Charge Sheet" detailing the specific charges as "Conspiracy", "Murder by an Unprivileged Belligerent", "Attempted Murder by an Unprivileged Belligerent" and "Aiding the Enemy".[69] Also on November 7, 2005, the Supreme Court of the United States agreed to hear an appeal in the case of *Hamdan v. Rumsfeld.*

P. Omar Demands Disclosure from Canada for the Pre-*Hamdan* Charges

52. On November 21, 2005, the Respondent's counsel sent a letter to the Appellants demanding disclosure of all documents relevant to the charges in the possession of the Crown pursuant to s. 7 of the *Charter.*[70] These proceedings were commenced in Federal Court by Notice of Application dated January 3, 2006.[71] The Respondent's request was expressly refused on January 31, 2006.[72]

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[68] Affidavit of William Kuebler, RFER Vol. I at pp. 121-122 paras. 3-4. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739, §1005(e). **[Tab 25]**
[69] Exhibit M to Affidavit of Richard Wilson, A.B. Vol. II, p. 219ff.
[70] Letter from Nathan Whitling to Appellants, November 21, 2005, Exhibit 'Q' to Affidavit of Richard Wilson, A.B. Vol. II, pp. 236-237.
[71] Notice of Application, January 3, 2006, A.B. Vol. I, at pp. 39-46.
[72] Exhibit 'A' to Cross-Examination of Richard Wilson, A.R. Vol. II, pp. 314-315.

Q. Omar's Application is Dismissed by the Application Judge

53. The Respondent's application was dismissed by the Hon. Mr. Justice K. von Finckenstein on April 25, 2006. At paragraph 12 of his reasons, von Finckenstein J. quoted this Court's decision in *R. v. Cook*[73] for the "well-established" test applicable to the case before him. In applying this test, he concluded that granting the Order sought "would not be desirable or useful as it might lead to interference with foreign legal proceedings which Justice Iacobucci warned against in *Cook*, above."[74] This decision was appealed by Notice of Appeal dated April 26, 2006.[75]

R. *Hamdan v. Rumsfeld*

54. On June 29, 2006, the Supreme Court of the United States issued its landmark decision in *Hamdan v. Rumsfeld*. As a preliminary matter, the Court held that the DTA did not apply to *habeas corpus* proceedings which had been commenced prior to the DTA's enactment and hence did not strip the Court of its jurisdiction to hear the case.[76]

55. The Court in *Hamdan* also struck down the military commission regime created by the MCO. More specifically, the Court held that this regime was contrary to Article 3 of the Third Geneva Convention (often referred to as "Common Article 3" since it is common to all the Geneva Conventions), which requires prisoners in Guantanamo Bay to be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." This provision, in turn, was held to have been made applicable to military commissions conducted at Guantanamo Bay by the Uniform Code of Military Justice, 10 U.S.C. §801 *et seq.* (2000 ed. and Supp. III) (the "UCMJ"), notably §821. As a result, the Court held that the military commissions were "illegal."[77]

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[73] *R. v. Cook*, [1998] 2 S.C.R. 597.
[74] Reasons for Order and Order of the Federal Court (von Finckenstein J.), A.B. vol. I, pp. 5-6, paras. 12 and 18.
[75] Notice of Appeal to the Federal Court of Appeal, April 26, 2006, A.B. Vol. I pp. 47-49.
[76] Affidavit of William Kuebler, RFER Vol. I at p. 122 paras. 5-6. *Hamdan v. Rumsfeld*, 548 U.S. __ at pp. 7-20. **[Tab 32]**
[77] Affidavit of William Kuebler, RFER Vol. I at p. 122 paras. 5-6. *Hamdan v. Rumsfeld*, 548 U.S. __ at pp. 7-20. **[Tab 32]**

56. Kennedy J., with whom Stevens, Breyer, Ginsburg, and Souter JJ. concurred on this point,[78] held that the military commission's lack of judicial independence violated Common Article 3's standard of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" as incorporated by the UCMJ.[79]

57. A plurality of Stevens, Breyer, Ginsburg, and Souter JJ. would have also held that the offense of "conspiracy" was not a war crime and hence was not triable by military commission,[80] and that the MCO's authorization to remove the accused from his trial, and to withhold evidence to be used against him also violated Common Article 3.[81]

S. *Military Commissions Act* of 2006

58. In response to *Hamdan*, Congress enacted the *Military Commissions Act* of 2006 ("MCA").[82] Like the DTA, the MCA purports to strip all courts of the United States of any jurisdiction to hear applications for *habeas corpus* over detainees in GTMO, but unlike the DTA the prohibition is expressly extended to any and all applications filed prior to its enactment.[83]

59. Section 3 of the MCA also re-defined the nature of the charges which may be laid before the military commissions in Guantánamo Bay. The specific offences are set out in Title 10, §950v of the U.S. Code (as amended by the MCA). Title 10, §950p states that these offences "have traditionally been triable by military commissions" and that the MCA "does not establish new crimes that did not exist before its enactment".

60. On April 5, 2007, new charges were sworn against the Respondent pursuant to the MCA, which charges are described as "Murder in Violation of the Law of War", "Attempted Murder in Violation of the Law of War", "Conspiracy", "Providing Material Support for Terrorism", and "Spying". These charges were then referred by the Convening Authority as non-capital on April 24, 2007.[84]

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[78] *Hamdan v. Rumsfeld*, 548 U.S. __, Opinion of Stevens J. at p. 71. **[Tab 32]**
[79] *Hamdan v. Rumsfeld*, 548 U.S. __, Kennedy J., concurring in part at pp. 1-16. **[Tab 32]**
[80] *Hamdan v. Rumsfeld*, 548 U.S. __ at pp. 38-49. **[Tab 32]**
[81] *Hamdan v. Rumsfeld*, 548 U.S. __ at pp. 71-72. **[Tab 32]**
[82] Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600. **[Tab 50]**
[83] Affidavit of William Kuebler, RFER Vol. I at p. 122 para. 8. *Military Commissions Act of 2006*, Pub. L. No. 109-366, 120 Stat. 2600 (2006), Section 7. **[Tab 50]**
[84] Affidavit of William Kuebler, RFER Vol. II at pp. 333ff. para. 12, Exhibit 'A'.

61. On May 30, 2007, the Court of Appeals for the D.C. Circuit summarily denied a motion to stay the Respondent's prosecution, holding that the MCA had deprived it of jurisdiction.[85]

T. The Decision of the Federal Court of Appeal

62. On May 10, 2007, the Federal Court of Appeal allowed the Appellants' appeal. In doing so, the Court cited and relied upon this Court's decision in *Cook*,[86] and proceeded to conclude:

> ¶ 34 In these circumstances, the participation of Canadian officials in gathering evidence against the appellant at the pre-charge level raises, in my view, a justiciable Charter issue (*Kwok* at paragraph 106; *Purdy* at paragraph 22 (B.C.C.A.)). They took an active role in interviewing the appellant and in transmitting summaries of the information collected to U.S. authorities. In doing so, they assisted U.S. authorities in conducting the investigation against the appellant and in preparing a case against him. Canada's participation may have made it more likely that criminal charges would be laid against the appellant thereby increasing the likelihood that he would be deprived of his right to life, liberty and security of the person. I believe that in these circumstances the Charter applies. There is a sufficient causal connection between the Canadian government's participation in the foreign investigation and the potential deprivation of life, liberty and security of the person which the appellant now faces. I am satisfied that the applications judge erred in concluding that a sufficient causal connection did not exist.[87]

U. *R. v. Hape*

63. On June 7, 2007, this Court released its decision in *R. v. Hape*.[88] In this case, this Court overruled the *Cook* case relied upon by both Courts below and established a new framework applicable to investigations conducted by Canadian officials abroad.

V. The Ongoing Prosecution

64. The Respondent's first appearance on the post-*Hamdan* charges was June 4, 2007. That same day, Col. Peter Brownback III, Military Judge, dismissed the prosecution on the basis that the Respondent had not been found to be an "unlawful enemy combatant" ("UEC") for the

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[85] *Omar Khadr v. Robert M. Gates*, No. 07-1156 (D.C.Cir.), Order of May 30, 2007. **[Tab 55]**
[86] Judgment of the Federal Court of Appeal, para. 28.
[87] Judgment of the Federal Court of Appeal, para. 34. On June 19, 2007, the Court of Appeal granted a Crown motion for reconsideration, resulting in an adjustment of the language of its original Order: Order of the Federal Court of Appeal, June 19, 2007, A.B. Vol. I, pp. 37-38.
[88] *R. v. Hape*, 2007 SCC 26 at paras. 83-92.

purposes of 10 U.S.C. §948a.[89] On September 24, 2007, the Court of Military Commission Review allowed the government's appeal from Col. Brownback's decision and held that the UEC issue could be heard and determined by the military commission in the context of a preliminary motion.[90]

65. The Respondent has now been arraigned before the military commission, and a trial schedule has now been set by Order of Col. Brownback. Pursuant to this Order, certain "Law Motions" were heard February 4-8, 2008. "Evidentiary Motions" will be filed by February 28, 2008, and heard beginning April 1, 2008. The latter category of motions "include motions which require a substantial number of witnesses and production of evidence to litigate." The trial proper will commence by the assembly and *voir dire* of commission members (essentially a jury of senior military officers) on May 5, 2008.[91]

66. The prosecution may seek to introduce evidence of statements the Respondent allegedly made to U.S. government interrogators and other officials, and the admissibility of such statements may be an important issue to be determined at trial. The provision of the MCA of particular importance to the admissibility of any such statements is MCA § 948r(c):

> (c) STATEMENTS OBTAINED BEFORE ENACTMENT OF DETAINEE TREATMENT ACT OF 2005.—A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—
>
> (1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
>
> (2) the interests of justice would best be served by admission of the statement into evidence.[92]

W. *Boumediene v. Bush*

67. On February 20, 2007, a divided panel of the D.C. Circuit Court of Appeals finally rendered its decision on the appeals from Judge Green's and Judge Leon's decisions heard on

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[89] Affidavit of William Kuebler, RFER at p. 124, para. 13. *United States of America v. Omar Ahmed Khadr*, Order on Jurisdiction, June 4, 2007. **[Tab 74]** Reconsideration denied: *United States of America v. Omar Ahmed Khadr*, Disposition of Prosecution Motion for Reconsideration, June 29, 2007. **[Tab 75]**

[90] Affidavit of William Kuebler, RFER Vol. I at p. 124, para. 14. *United States of America v. Omar Ahmed Khadr*, CMCR 07-001, September 24, 2007. **[Tab 76]**

[91] *United States of America v. Omar Ahmed Khadr*, Schedule for Trial, 28 November 2007. **[Tab 77]**

[92] Affidavit of William Kuebler, RFER Vol. I at pp. 124-125, para. 16.

September 8, 2005. This decision had been delayed as a result of the DTA, *Hamdan*, and the MCA. In *Boumediene v. Bush*, the majority relied upon the MCA to dismiss the leading *habeas* petitions before it, including the Respondent's. The majority held the MCA's jurisdiction-stripping provisions are valid since GTMO detainees have no constitutional right to *habeas corpus*. This conclusion was based upon the view that common law *habeas* did not extend to non-citizens captured abroad and held outside the United States.[93]

68. The detainees other than the Respondent in *Boumediene* sought review of the Circuit Court decision at the Supreme Court of the United States. On April 2, 2007, the Court denied the petitioners' petition for *certiorari*.[94] However, on June 29, 2007, in a highly unusual action, the Supreme Court reconsidered its denial and agreed to hear the case in its 2007-2008 term.[95] *Boumediene* was argued before the Supreme Court on December 5, 2007. In this case, the Court may or may not finally determine whether the detainees in Guantánamo Bay may claim the benefit of rights contained in the Constitution of the United States.[96]

X. Ongoing Section 38 Proceedings

69. Pursuant to the Order of McLachlin C.J.C. dated January 23, 2008, a motion by the Crown to stay the s. 38 proceedings directed by the Court of Appeal below was dismissed upon certain conditions.[97] Those s. 38 proceedings are now pending before the Federal Court and are being case managed by Lutfy C.J. An expedited timeframe for this proceeding is being implemented, but no documents will be released absent a further Order of this Court.

Part II: Issues

70. The Respondent respectfully submits the following statement of issues:

> Did the Courts below err in declining to dismiss these proceedings due to the existence of adequate alternative remedies?

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[93] Affidavit of William Kuebler, RFER Vol. I at p. 123, para. 9. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).
[94] *Boumediene v. Bush*, 549 U.S. __ (2007). **[Tab 9]**
[95] *Boumediene v. Bush*, Certiorari Granted, Order List: 551 U.S., Friday June 29, 2007. **[Tab 10]**
[96] Affidavit of William Kuebler, RFER Vol. I at p. 123, para. 10.
[97] *Minister of Justice et al. v. Omar Ahmed Khadr*, Court File No. 32147, Order of McLachlin C.J. dated January 23, 2008. **[Tab 52]**

Did the Crown's refusal to produce documents relevant to the charges raised against the Respondent constitute a violation of the Respondent's rights under s. 7 of the *Charter*?

Did the Crown's interrogations of the Respondent under the conditions then prevailing in Guantánamo Bay constitute a violation of s. 7 of the *Charter*?

If the answer to either or both of questions 1 or 2 is yes, is an order for full and complete disclosure a just and appropriate remedy under s. 24(1) of the *Charter*?

Part III: Statement of Argument

A. This Proceeding is Not a Common Law *Mandamus* Application

71. In *Mills*, it was noted that since the *Charter* does not create any new forms of procedure, applications for *Charter* relief must "be fitted into the existing scheme of Canadian legal procedure."[98] However, LaForest J. also emphasized that "it is the *Charter* that governs, and if the ordinary procedures fail to meet the requirements of the *Charter* fully, then a means must be found to give it life."[99]

72. Since the demand letter of November 21, 2005, it has been understood by all concerned that the Respondent's claim is grounded in s. 7 of the *Charter*. However, no form of procedure is specifically applicable to this unique claim. Pursuant to *Mills*, this proceeding was "fitted" within the procedure established by s. 18.1(3)(a) of the *Federal Courts Act*, and seeks an order "in the nature of *mandamus*". Notwithstanding this form of procedure, the substantive issues raised in this proceeding are governed by the *Charter* and not by the common law of *mandamus*.

B. Neither the *Access to Information Act*, Nor Production Rights in Civil Proceedings Constitute an Adequate Alternative Remedy to *Charter* Relief

73. At paragraphs 36 to 38 and elsewhere, the Crown argues that the Respondent's plea for *Charter* relief ought to be dismissed since he could have pursued alternative remedies pursuant to the *Access to Information Act* and/or pursuant to his civil discovery rights in T-536-04 and T-686-04. In approaching these arguments, the purpose of the Respondent's

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[98] *R. v. Mills*, [1986] 1 S.C.R. 863 at para. 263, per McIntyre J. **[Tab 62]**
[99] *R. v. Mills*, [1986] 1 S.C.R. 863 at para. 295. **[Tab 62]**

original demand, and these resulting proceedings, as accurately summarized by the Court of Appeal bears emphasis:

> The appellant admits that many of the documents at issue in these proceedings have been produced in Federal Court proceedings T-536-04 and T-686-04 and/or pursuant to requests under the AIA. He accepts the legal limits to disclosure. He wishes however to challenge, in the most effective manner possible, the respondents' reliance on public interest immunity claims and statutory exemptions under the AIA to provide heavily redacted copies of the documents sought or to withhold documents entirely. He wants to ensure that his challenge is determined under section of the *Canada Evidence Act* and not under section 50 of the AIA. He also wants to ensure that his right to make full answer and defence will be taken into consideration in the balancing of interests (*Gold v. R.*, [1986] 2 F.C. 129 at paragraphs 15-17 (C.A.); *Ribic v. Canada (Attorney General)* (2003), 185 C.C.C. (3d) 129 at paragraphs 13-32 (F.C.A.)). He was not facing charges at the time the earlier proceedings were initiated. Consequently, when applying section 38.06 of the *Canada Evidence Act* in the context of T-536-04 and T-686-04, it is doubtful, in his opinion, that the designated judge may consider and weigh the appellant's right to raise full answer and defence in the balancing of interests required by subsection 38.06(2).[100]

74. Although the Crown cites no authority in support of these arguments, the leading case on point is *Harelkin v. University of Regina*.[101] In *Judicial Review of Administrative Action in Canada*, the authors summarize the effect of *Harelkin* and subsequent authorities as follows:

> Thus, in each context, the reviewing court applies the same basic test: is the alternative remedy adequate in all the circumstances to address the applicant's grievance? And as indicated, "adequacy" is determined by reference to considerations such as ensuring justice according to the law for the individual applicant, the economic use of judicial resources, the integrity of the administrative scheme, and the comparative costs and delays associated with the statutory remedy and judicial review proceeding, respectively.[102]

75. It has been held that rights under the *ATIA* or the *Privacy Act* do not constitute an adequate alternative remedy to *Charter*-based disclosure in the criminal context.[103] The bureaucratic delays and toothless enforcement mechanisms applicable to *ATIA* requests are evident from

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[100] Judgment of the Federal Court of Appeal, para. 21.
[101] *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at p. 588 **[Tab 33]**. Followed: *Anderson v. Canada (Armed Forces)*, [1996] F.C.J. No. 1370 (C.A.) at para. 4. **[Tab 5]**
[102] D. Brown & J. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: DJMB Publishing Inc., looseleaf, updated July 2005) at p. 3-7. **[Tab 12]**
[103] *H. v. The Queen.*, [1986] 2 F.C. 71 (T.D.) at para. 17 **[Tab 30]**; *Purdy v. Canada (Attorney General)* (2003), 226 D.L.R. (4th) 761 (B.C.S.C.) at paras. 24-27, **[Tab 59]** aff'd: 230 D.L.R. (4th) 361 (B.C.C.A.).

the requests made in this case,[104] and are clearly not suitable for ensuring timely and fulsome disclosure for an impending criminal trial.

76. An accused's right to raise full answer and defence to criminal proceedings is irrelevant to the *ATIA*, and may not be weighed or considered by the Court sitting in review.[105]

77. Should the Court of Appeal's Order be upheld, the Respondent's ability to challenge the Crown's claims of national security privilege would then be governed by s. 38 – 38.16 of the *Canada Evidence Act*,[106] rather than s. 50 of the *ATIA*.[107] Unlike the latter provision, s. 38.06(1) *CEA* allows the Court to substitute its own opinion as to whether or not disclosure would in fact be injurious to international relations or national defence or national security.[108]

78. More importantly, unlike s. 50 of the *ATIA*, s. 38.06(2) *CEA* allows the Court to balance the Crown's confidentiality interests against the individual's and the public's interests in disclosure -- notably an accused's interest in raising full answer and defence to a criminal prosecution.[109] As this Court stated in *Charkaoui*, s. 38.06(2)'s approach "illustrates Parliament's concern... for striking a sensitive balance between the need for protection of confidential information and the rights of the individual."[110] No such balancing is permitted under the *ATIA*.

79. Similarly, Federal Court proceedings T-536-04 and T-686-04 were commenced prior to the laying of any charges against the Respondent and seek civil forms of relief. Consequently, the Respondent's right to raise full answer and defence to the charges is not there at issue and likely could not be weighed in the s. 38 proceeding which will arise from those proceedings.

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[104] Affidavit of April Bedard, A.B. Vol. I, pp. 239-240. Exhibits to Affidavit of April Bedard, A.B. Vol. II at pp. 239-290.
[105] *Blank v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 1844, 2001 FCA 374 at paras. 9-12. **[Tab 8]**
[106] *Canada Evidence Act*, R.S. 1985, c. C-5, s. 38.06. **[Tab 13]**
[107] *Access to Information Act*, R.S., 1985, c. A-1, s. 50. **[Tab 2]**
[108] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Ruling on National Security Confidentiality, at paras. 52-55. **[Tab 19]**
[109] *Canada v. Khawaja*, 2007 FC 490 at paras. 83, 84, 93, **[Tab 14]** aff'd: 2007 FCA 342. **[Tab 15]**
[110] *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9 at para. 76. **[Tab 17]**

80. Neither of the Courts below accepted the Crown's proposition that *ATIA* or civil discovery rules provided an adequate alternative remedy to *Charter* relief. It is submitted that neither Court erred in declining to dismiss these proceedings on this basis.

81. At paragraph 84, the Crown goes so far as to suggest that the appropriate route for Omar to seek access to relevant materials is by action commenced by Statement of Claim. However, it has been recognized that the costs and delays entailed by a civil action render such proceedings inappropriate for *Charter* relief in the criminal context.[111]

C. Crown Conduct and Section 32 of the *Charter*

82. The Crown argues that this case does not engage state conduct for the purposes of s. 32 of the *Charter*. In response, the Respondent refers to conduct both within and without the geographic boundaries of Canada: (1) the Crown's conduct in withholding the relevant documents in its possession, and (2) the interviews of the Respondent conducted by Crown officials under the conditions prevailing in GTMO. Either or both of these circumstances establish state conduct for the purposes of s. 32 of the *Charter*.

83. As the Court of Appeal correctly held,[112] the potential *Charter* violation committed by the Crown in this case occurred when it withheld the relevant information in its possession, and thereby deprived the Respondent of his ability to raise full answer and defence to the foreign prosecution. Hence, although extraterritorial events give rise to the Crown's duty to disclose, this duty was violated by Crown officials here in Canada and falls squarely within the reach of s. 32(1).

84. The Court of Appeal's analysis in this respect is consistent with Sopinka J.'s holding in *Stinchcombe* that it is the withholding of relevant information from the accused which grounds a s. 7 violation in the domestic criminal context. As he stated: "The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of

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[111] *R. v. McCallen* (1999), 131 C.C.C. (3d) 518 (Ont.C.A.) at para. 95 **[Tab 60]**, *R. v. Mater* (1988), 47 C.R.R. 351 (Ont.Dist.Ct.) at para. 10. **[Tab 61]**

[112] F.C.A. Judgment at para. 37.

the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege."[113]

D. A "Sufficient Causal Connection"

85. In arguing that no "sufficient causal connection" exists between the Crown's conduct and the Respondent's potential deprivation of liberty, the Crown relies heavily upon the decision of this Court in *Suresh*, and argues that in order to raise a s. 7 claim, the Respondent "must establish" that (a) Canada's participation is a necessary precondition for the deprivation of liberty; and (b) that the deprivation is a foreseeable consequence of Canada's participation.[114] The Respondent notes the following points in response to this argument.

86. Firstly, the language of *Suresh* does not create a minimum threshold which must be met in every case in order for a s. 7 violation to occur. Rather, this Court stated that "At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation" a s. 7 violation may be found." Clearly, this Court did not establish dual requirements which must always be met, but rather allowed for flexibility in future cases.

87. Secondly, this Court's decisions in *Burns* and *Suresh* were not based upon the actual infliction of capital punishment or torture. Rather, this Court emphasized that it was the potential occurrence of such events that attracted the protection of s. 7.[115] The individuals in those cases were not required to prove that capital punishment or torture would in fact occur in consequence of the Crown conduct at issue.

88. In any event, it is clear that the Crown's refusal to produce relevant documents to the Respondent is "a necessary precondition for the deprivation" at issue in this case and it is clear that "the deprivation is an entirely foreseeable consequence of Canada's participation". The s. 7 right at issue in this case is the Respondent's right to raise full answer and defence to the charges he faces. Through its own conduct here in Canada, the Crown has itself deprived the Respondent of his ability to raise full answer and defence, and the unfairness of the

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[113] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at para. 22.
[114] Crown Factum, para. 68.
[115] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 at para. 53.

foreign prosecution is an entirely foreseeable consequence of the Crown's withholding of documents.

89. As both *Stinchcombe* and the Court of Appeal[116] recognize, withholding relevant documents from an accused person increases the risk or danger of that person being wrongfully convicted and imprisoned. As Sopinka J. noted, the Crown's duty of disclosure exists because of "the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence", which right is "one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted".[117]

90. Hence, where an accused person's ability to access relevant documents is impeded or denied by the Crown, wrongful convictions are foreseeable, and have in fact occurred. Should the Respondent be unable to utilize documents in the Crown's possession for the purpose of raising full answer and defence, his foreign trial will thereby be rendered unfair, and the danger of a wrongful conviction will be increased. These circumstances would be the direct result of the Crown's refusal to disclose relevant documents in its possession.

91. It is submitted that the Crown seeks to place unreasonable and indeed, impossible evidentiary burdens upon the Respondent in these proceedings. In the Crown's view, disclosure may only be obtained in the presence of proof that the withholding of disclosure or the Crown's interrogations is in fact the cause of the Respondent's deprivations of liberty, and will in fact cause his wrongful conviction. No such requirements are present in the domestic criminal context, and no basis exists to impose such requirements in respect of foreign prosecutions.

E. By Assisting the United States in GTMO the Crown Violated Omar's Rights Under Section 7 of the *Charter*

92. In addition, and in the alternative, the state conduct at issue in this case is supplied by the interviews conducted by Crown officials of the Respondent in GTMO while he was a minor, and while he was being subjected to the conditions of the GTMO legal regime.

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[116] F.C.A. Judgment at para. 37.
[117] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at 336. [Crown's Authorities Vol. I, Tab 22]

93. At the time of the interviews, many ongoing violations of the Respondent's basic human rights were clearly apparent. These violations are so vast in their breadth and importance that they may only be briefly examined here. Although these violations were not directly imposed by the Crown, the Crown exploited, condoned, encouraged, and benefited from their commission by the United States. In addition to the actual sharing of information, the very presence, participation, and express or tacit approval of the Canadian government increased the danger of the Respondent's prolonged detention in GTMO.

F. The Extra-territorial Application of the *Charter* – *R. v. Hape*

94. As this Court noted in *Kwok*, rights of disclosure pursuant to s. 7 of the *Charter* may arise from the involvement of Canadian authorities in the gathering of evidence for use in a foreign prosecution. However, disclosure was denied in *Kwok* since "Canadian authorities had not provided any assistance to the Americans in gathering evidence and, in any event, the latter were not relying on anything but their own evidence."[118] This authority was relied upon and applied by the British Columbia Court of Appeal in *Purdy*.[119]

95. The assistance provided to the American authorities by the Crown was provided at a location outside Canada in a region where the U.S. enjoyed "complete jurisdiction and control",[120] or "plenary and exclusive jurisdiction".[121] At the time of both the interrogations, and the decisions of the Courts below, such extra-territorial operations were governed by the approach established in *Cook*.[122]

96. In *Hape*, this Court departed from *Cook*, holding that generally, Canadian officials acting abroad need only comply with local law. However, an exception was established in the following passages:

> 52... Comity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders. That deference ends where clear violations of international law and fundamental human rights begin.

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[118] *United States of America v. Kwok*, [2001] 1 S.C.R. 532 at para. 106.
[119] *Purdy v. Canada (Attorney General)* (2003), 230 D.L.R. (4th) 361 (B.C.C.A.) at para. 21.
[120] Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418. **[Tab 45]**
[121] *Rasul v. Bush*, 542 U.S. 466 at pp. 471. **[Tab 65]**
[122] *R. v. Cook*, [1998] 2 S.C.R. 597 at para. 25.

[...]

90 ...The only reasonable approach is to apply the law of the state in which the activities occur, subject to the *Charter*'s fair trial safeguards and to the limits on comity that may prevent Canadian officers from participating in activities that, though authorized by the laws of another state, would cause Canada to be in violation of its international obligations in respect of human rights.

[...]

101 Moreover, there is an argument that comity cannot be invoked to allow Canadian authorities to participate in activities that violate Canada's international obligations. As a general rule, Canadian officers can participate in investigations abroad, but must do so under the laws of the foreign state. The permissive rule that allows Canadian officers to participate even when there is no obligation to do so derives from the principle of comity; the rule that foreign law governs derives from the principles of sovereign equality and non-intervention. But the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights. In such circumstances, the permissive rule might no longer apply and Canadian officers might be prohibited from participating. I would leave open the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s. 24(1) of the *Charter* because of the impact of those activities on *Charter* rights in Canada.[123]

97. By way of further guidance, Lebel J. in *Hape* provided the following illustrative example of a situation where the human rights exception would be applicable:

> 51 The principle of comity does not offer a rationale for condoning another state's breach of international law. Indeed, the need to uphold international law may trump the principle of comity (see for example the English Court of Appeal's decision in *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] E.W.J. No. 4947 (QL), [2002] EWCA Civ. 1598, in respect of a British national captured by U.S. forces in Afghanistan who was transferred to Guantanamo Bay and detained for several months without access to a lawyer or a court).[124]

98. As *Hape*, *Abbasi*, and the Australian case of *Hicks v. Ruddock* all conclude, international comity, or the "Act of State" doctrine, does not offer a rationale for condoning breaches of

[123] *R. v. Hape*, 2007 SCC 26 at paras. 52, 90 and 101.
[124] *R. v. Hape*, 2007 SCC 26 at paras. 51,.

international human rights law in GTMO.[125] Issues of this nature can and should be determined by the Courts.

G. The Crown's Participation in the GTMO Regime Brought Canada into Violation with its International Human Rights Obligations

99. As Mr. Justice O'Connor stated in his *Report of the Events Relating to Maher Arar*:

> [T]here are significant risks whenever Canadian investigators interact with a country with a questionable human rights record, particularly when a Canadian is being detained in that country. Although decisions to interact must be made on a case-by-case basis, they should be made in a way that is politically accountable, and interactions should be strictly controlled to guard against Canadian complicity in human rights abuses or a perception that Canada condones such abuses.[126]

100. The Crown advances no principled basis for a departure from the result of the British Columbia Court of Appeal's decision in *Purdy*. Although in that case, the involvement of Canadian authorities may have been different than that in the present case, there was no suggestion that the conduct of Canadian authorities in *Purdy* rendered them complicit in violations of the Canadian citizen's human rights under international law. Hence, the result in *Purdy* applies *a fortiori* to the case at bar.

101. The human rights violations committed against the Respondent in GTMO, before, during and after the CSIS interrogations are so vast in their breadth, scope and significance that they may only be briefly examined here. Suffice to say that these violations of international law were and are blatant, undeniable, and widely recognized. By exploiting the vulnerability caused by this mistreatment, the Crown brought itself squarely within the human rights exception established in *Hape*.

H. The *Convention on the Rights of the Child* and the *Child Soldier Protocol*

102. As noted above, the Respondent was first captured in July, 2002, when he was 15 years old. The first series of CSIS interrogations occurred in February, 2003, when the Respondent was 16 years old. The second series occurred in September, 2003, several days after his 17th

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[125] *R. v. Hape*, 2007 SCC 26 at paras. 51, 52, 90 and 101; *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] E.W.J. No. 4947 (QL), [2002] EWCA Civ. 1598, at para. 57 **[Tab 1]**, *Hicks v Ruddock*, [2007] FCA 299 at paras. 14-34. **[Tab 34]**

[126] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar*, Analysis and Recommendations, at p. 35. **[Tab 20]**

birthday. The Respondent's status as a minor overarches and intensifies the many human rights violations examined below.[127]

103. In *R. v. Sharpe*, L'Heureux-Dubé, Gonthier and Bastarache JJ. noted as follows:

> 177 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 by 191 states as of January 19, 2001, making it the most universally accepted human rights instrument in history.
>
> 178 Indeed, international law is rife with instruments that emphasize the protection of children. Article 25(2) of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc A/810, at p. 71 (1948), recognizes that "childhood [is] entitled to special care and assistance". The United Nations *Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV) (1959), in its preamble, states that the child "needs special safeguards and care". In 1992, the United Nations Commission on Human Rights adopted the *Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography*, 55th Mtg., 1992/74. Additional instruments such as the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, art. 10(3), and the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 24, also emphasize the protection of children.[128]

104. The United States and Somalia are the only two nations not to have ratified the CRC. However, on February 16, 1995, the United States signed the CRC, thereby affirming its obligation "to refrain from acts which would defeat the object and purpose of [the] treaty".[129] Additionally, on January 23, 2003, the United States ratified the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.*[130] Also, the CRC has been recognized and applied by the courts of the United States as customary international law.[131]

105. Clearly, at the time of the CSIS interviews, blatant and ongoing violations of the CRC were readily apparent. For example, Article 37 of the CRC provides:

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[127] Melissa A. Jamison, Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children, 9 UC Davis J. Juv. L. & Pol'y 127 (Winter, 2005) **[Tab 39]**; Human Rights Watch, *The Omar Khadr Case, A Teenager Imprisoned in Guantanamo*, (June 2007) **[Tab 36]**.

[128] *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 at paras. 177-178. **[Tab 64]**

[129] Vienna Convention on the Law of Treaties, U.N.T.S., vol. 1155, p. 331, *entered into force* 27, Art. 18. **[Tab 81]**

[130] *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* U.N.G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49), U.N. Doc. A/54/49 (2000), *entered into force* February 12, 2002. **[Tab 56]**

[131] *Beharry v. Reno*, 183 F. Supp.2d 584, 600 (E.D.N.Y. 2002) **[Tab 6]**, rev'd on other grounds: *Beharry v. Ashcroft*, 329 F.3d 51 (2003) **[Tab 7]**; *Sadeghi v. I.N.S.*, 40 F.3d 1139, 1147 (CA10 1994) (page 7 of printout) **[Tab 68]**.

States Parties shall ensure that:

[...]

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

[...]

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.[132]

I. Arbitrary Detention

106. Perhaps the most glaring example of the violations perpetrated against the Respondent both at the time of the CSIS interrogations and subsequently was his prolonged detention without legal process. The illegality of this treatment cannot be seriously disputed and, at least as a matter of U.S. domestic law, was expressly acknowledged by the Supreme Court of the United States in *Rasul*. As McLachlin C.J.C. stated in *United States of America v. Ferras*:

> It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process. The idea is as old as the *Magna Carta* (1215), Clause 39 of which provided: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals, or by the law of the land."[133]

107. Today, a detainee's right to legal process is enshrined in a host of international human rights instruments,[134] and has long been recognized to exist as a matter of customary

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[132] *Convention on the Rights of the Child*, Can. T.S. 1992, No. 3, Art. 37 **[Tab 21]**. See also: *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty : resolution / adopted by the General Assembly.*, 14 December 1990. A/RES/45/113 **[Tab 78]**; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, 29 November 1985, A/RES/40/33. **[Tab 79]**

[133] *United States of America v. Ferras; United States of America v. Latty*, [2006] 2 S.C.R. 77, 2006 SCC 33 at para. 19 **[Tab 72]**. In 1799, Lord Kenyon said: "It is to be found at the head of our criminal law, that every man ought to have an opportunity of being heard before he is condemned : and I should tremble at the consequences of giving way to this principle." *The King v. Gaskin*, (1799) 101 E.R. 1349, 8 T.R. 209 (Ch.), at p. 1350 E.R. **[Tab 63]**

[134] *Universal Declaration of Human Rights*, U.N.G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948), Art. 8 **[Tab 80]**; *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, Art. 9 **[Tab 38]**; *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 **[Tab 4]**; *European Convention for the Protection of Human Rights and*

international law.[135] This right has also been recognized in many decisions of international tribunals.[136] For example, in *The Haitian Centre for Human Rights et al. v. United States*, the Inter-American Commission held that article XVIII of the American Declaration of the Rights and Duties of Man was violated when the U.S. interdicted Haitian refugees and held them in GTMO without access to the U.S. courts.[137]

108. Significantly, the duty to respect the right against arbitrary detention applies whenever a state exercises authority and control over a person, regardless of where the detention occurs. As the U.N. Human Rights Committee held in *Burgos v. Uruguay,* it would be "unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."[138]

109. The obligation to respect the right against arbitrary detention under the ICCPR is one that is so fundamental that it is non-derogable, even during a time of public emergency which threatens the life of the nation.[139] Even in matters of national security, the suspension of *habeas corpus* is impermissible.[140]

Fundamental Freedoms, (ETS No. 5), 213 U.N.T.S. 222, *entered into force* 3 September 1953, Art. 5 **[Tab 26]**; *African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, *entered into force* 21 October 1986, Arts. 6-7. **[Tab 3]**

[135] *Restatement (Third) of Foreign Relations Law of the United States*, § 702(e), n. 6.(1987). **[Tab 66]**

[136] *Currie v. Jamaica*, Communication No. 377/1989, U.N. Doc. CCPR/C/50/D/377/1989 (1994) **[Tab 22]**; *Luyeye v. Zaire*, 38th Sess. U.N. Doc. A/38/40, p. 187, annex XIX, REPORT OF THE HUMAN RIGHTS COMMITTEE, GAOR, 43rd Sess., Supp. No. 40, U.N. Doc. A/43/40, Annex VII.C at paras. 7.2 - 8. **[Tab 48]**

[137] *The Haitian Centre for Human Rights et al. v. United States*, Case 10.657, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. (1996) at para. 180 **[Tab 31]**. See also: *Vuolanne v. Finland*, No. 265/1987, Views of the Human Rights Committee, CCPR/C/35/D/265/1987 at ¶ 9.6, 2 May 1989. **[Tab 82]**

[138] *López Burgos v. Uruguay,* No.52/1979, Views of the Human Rights Committee, CCPR/C/13/D/52/1979 at ¶12.3, 29 July 1981 **[Tab 47]**. See also: *Casariego v. Uruguay*, No.56/1979, Views of the HRC, CCPR/C/13/D/56/1979 at ¶¶10.1-10.3, 29 July 1981 **[Tab 16]**; *Coard v. United States*, Case 10.951, Inter-Am. C.H.R. Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. at 1283 (1999) at §§ 37, 39, 41 and 43. **[Tab 18]**

[139] *See* Human Rights Committee, General Comment No. 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶11 (2001). **[Tab 35]**

[140] Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of 30 January 1987, paras. 31-35 **[Tab 37]**; 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.

J. The *Geneva Conventions* and the Law of War

110. The Geneva Conventions are regarded as pillars of international humanitarian law and binding as a matter of customary international law,[141] as well as treaty law. In Canada, they carry statutory force by virtue of the *Geneva Conventions Act.*[142]

111. On February 7, 2002, the President purported to "determine" that the Geneva Conventions, notably Common Article 3 thereof, did not apply to the detainees at GTMO.[143] In consequence of this determination, the Respondent was not accorded any "legal process" prior September 7, 2004, when his case was brought before a CSRT. Most notably, the Respondent was denied a status determination as required by Article 5, and was denied the procedural protections required by CA3.

112. As noted above, by his Memorandum of February 7, 2002, the President purported to impose a blanket determination that all the detainees in GTMO (including the Respondent) are "unlawful combatants", and as such are not entitled to POW status. No individualized determination of this issue had occurred at the time of the CSIS interviews or since. Article 5 provides:

> Art 5. The present Convention shall apply to the persons referred to in Article 4 [Prisoners of War] from the time they fall into the power of the enemy and until their final release and repatriation.
>
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[144]

113. More than 4 years after the President's denial as to the applicability of CA3, the Supreme Court of the United States rejected this view, holding that the military commission established by the MCO was subject to CA3 as incorporated by the UCMJ and was therefore "illegal".[145] CA3 provides:

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[141] *Legality of the Threat of Use of Nuclear Weapons,* (Advisory Opinion), 1996 I.C.J. 226, 257 (Jun 24). **[Tab 46]**
[142] *Geneva Conventions Act*, R.S., 1985, c. G-3, s. 2. **[Tab 27]**
[143] Memorandum of George W. Bush to the Vice President et al., Re: Humane Treatment of Taliban and al Qaeda Detainees, February 7, 2002, at para. 2. **[Tab 49]**
[144]
[145] *Hamdan v. Rumsfeld*, 548 U.S. __, Opinion of the Court at pp. 62, 66-67. **[Tab 32]**

> Art 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> [...]
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

114. In *Hamdan*, Stevens J. writing for a plurality of 4 members held that the standard in CA3(1)(d) above at least incorporates those "barest" of trial protections contained in Article 75 of Protocol I. Although the U.S. has declined to ratify Protocol I, its objections were not to Article 75, which is reflective of customary international law. Stevens J. therefore held that the MCO violated CA3 by dispensing with the requirement that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.[146] Kennedy J., concurring, found it unnecessary to determine this issue.[147]

115. Stevens J. also expressed deep concern respecting the MCO's allowance for the admissibility of hearsay and evidence derived from coercion.[148] However, since both the plurality and Kennedy J. agreed that this rule violated the UCMJ §821,[149] it was unnecessary to determine the issue of its compliance or non-compliance with CA3.

116. The violations of the *Geneva Conventions* created by the MCO and the Presidential Memorandum were in existence and in effect at the time of the CSIS interviews of the Respondent, and were known or ought to have been known at that time. By conducting interrogations, and by sharing the product of those interrogations without caveats on their

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[146] *Hamdan v. Rumsfeld*, 548 U.S. __, Opinion of the Court at pp. 70-71. **[Tab 32]**
[147] *Hamdan v. Rumsfeld*, 548 U.S. __, Opinion of Kennedy J. concurring in part at pp. 18-19. **[Tab 32]**
[148] *Hamdan v. Rumsfeld*, 548 U.S. __, Opinion of the Court at p. 51. **[Tab 32]**
[149] *Hamdan v. Rumsfeld*, 548 U.S. __, Opinion of the Court at p. 71, Opinion of Kennedy J. concurring in part at pp. 16-17. **[Tab 32]**

use, the Crown participated in violations of the Respondent's human rights under international law.

K. Discrimination on the Basis of Nationality

117. As noted above, the Presidential Order directing the detention of prisoners in GTMO is strictly limited to persons who are not citizens of the United States.[150] Consequently, U.S. citizens may not be detained in Guantánamo Bay pursuant to this authority. In *United States v. Lindh*, a U.S. citizen charged with participating in the activities of the Taliban and Al Qaeda while in Afghanistan was brought to the continental United States and tried before the U.S. District Court for the Eastern District of Virginia.[151]

118. Article 2 of the *International Covenant on Civil and Political Rights* reads:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[152]

119. In the *amicus* brief filed by a coalition of distinguished Canadian Parliamentarians and law professors before the Supreme Court of the United States in the pending *Boumediene* case, it is convincingly argued that the denial of the right of *habeas corpus* and other basic trial protections on the basis of a prisoner's nationality constitutes a violation of international law. Among other authorities, the brief cites the following commentary from the American Law Institute's *Restatement (Third) of Foreign Relations Law* §711:

> *c. Obligation to respect human rights of foreign nationals as customary law.* A state's responsibility to individuals of foreign nationality under customary law includes the obligation to respect the civil and political rights articulated in the principal international human rights instruments -- the Universal Declaration and the International Covenant on Civil and Political Rights -- as rights of human beings generally (see Introductory Note to this Part), but not political rights that are recognized as human rights only in relation to a person's country of citizenship, such as the right to vote and hold office, or the right to return to one's country (Universal Declaration, Articles 13(2), 21; Covenant on Civil and Political Rights, Articles 12(4), 25)). See § 701, Reporters' Note 6. Thus, a state party to the Covenant on Civil and Political Rights is responsible for any violation of any of its

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[150] Exhibit 'F' to the Affidavit of Richard Wilson, A.B. Vol. II, p. 158, title, and p. 159 s. 2(a).
[151] *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) **[Tab 73]**.
[152] *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, Art. 2 **[Tab 38]**. [Emphasis added]

> provisions in relation to any human being subject to its jurisdiction, regardless of the individual's nationality; but every state, whether or not a party to the Covenant, is responsible for denying to nationals of another state any right specified in the Covenant that is guaranteed by rules of customary law relating to the protection of foreign nationals.[153]

120. Rather than objecting to the United States' discriminatory treatment of the Respondent on the basis of his Canadian nationality, the Canadian government chose to take advantage of this discriminatory treatment, and to participate in it. This conduct constituted a violation of Canada's obligations under international human rights law.

L. Policy Considerations and Other Crown Arguments

121. At paragraph 42, the Crown argues that no s. 7 right to disclosure can exist in the present case since there is no trial court to determine relevance. This is simply not the case. Firstly, the issue of relevance is the first issue to be determined by the designated judge of the Federal Court in the s. 38 proceeding directed by the Court of Appeal.[154] Secondly, should an issue arise as to the Crown's compliance with the order granted by the Federal Court of Appeal, the Federal Court would be more than capable of determining such an issue in the context of enforcement proceedings.

122. The Crown's reliance at paragraphs 44 and following upon authorities arising in the extradition context is misplaced. As such cases as *Dynar* confirm, the general absence of *Stinchcombe* disclosure rights in the extradition context results from the highly circumscribed role of an extradition court, as well as the particular need for expediency of extradition proceedings.[155] Further, this Court held in *Kwok* that even in the extradition context, rights to disclosure under s. 7 may arise where Canadian officials assisted the requesting state in gathering some of the evidence contained in the Record of the Case.[156]

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[153]Brief Of *Amici Curiae* Canadian Parliamentarians And Professors Of Law In Support Of Reversal, Brief Filed In *Boumediene et al. v. Bush et. al.*, and *Al Odah et al. v. United States Of America et. al.* **[Tab 11]** *Restatement (Third) of Foreign Relations Law*, § 711 (1987). **[Tab 67]**

[154] *Canada v. Khawaja*, 2007 FC 490 at paras. 112-116, **[Tab 14]** aff'd: 2007 FCA 342. **[Tab 15]**

[155] *United States of America v. Dynar*, [1997] 2 S.C.R. 462 at paras. 122, 128-129. [Crown Authorities, Vol. II, Tab 31]

[156] *United States of America v. Kwok*, [2001] 1 S.C.R. 532 at para. 106. *Purdy v. Canada (Attorney General)* (2003), 230 D.L.R. (4th) 361 (B.C.C.A.) at para. 21.

123. The Crown argues at paragraph 63 that a *Charter* based right to disclosure of materials relevant to the Respondent's trial would compromise Canada's ability to maintain the confidentiality of national security information, and thereby adversely affect Canada's ability to obtain such information from foreign governments. However, these concerns are not relevant to the issues before this Court. The order of the Federal Court of Appeal explicitly acknowledges that the information at issue is to be reviewed by the Federal Court under ss. 38 – 38.16 of the *Canada Evidence Act*. Those proceedings are now ongoing, and it is in those proceedings that the Crown's ostensible confidentiality concerns may be weighed and assessed against the Respondent's right to raise full answer and defence.

124. At paragraph 54 and elsewhere, the Crown now suggests, for the first time, that the Respondent has failed to prove that the Crown is in possession of documents relevant to the charges he faces. In fact, this fact has been proven in the Affidavit of Richard Wilson.[157] No cross-examination on this evidence was conducted. The Crown has never led evidence to contradict this evidence, and has never before suggested that it is not in possession of relevant materials.

125. At paragraph 65 and elsewhere the Crown writes: "When the Respondent left Canada with his family six years before the alleged conduct before Afghanistan giving rise to the charges,[158] he left Canadian law and legal procedures behind." This argument refers to this Court's frequent observation that a Canadian who chooses to go abroad must generally be deemed to have accepted the degree of protection that the foreign law affords. However, in the present case, the Respondent did not choose to go to GTMO, and cannot be said to have submitted to the law of that jurisdiction. Further, whatever choice was made to take the Respondent to Afghanistan was made at a time when he was less than 15 years old and in the custody of his parents.

126. At paragraphs 87 to 89, the Crown advances an unusual interpretation of s. 38 of the *Canada Evidence Act* and suggests that it cannot be applicable to a foreign proceeding.

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[157] Affidavit of Richard Wilson, A.B. Vol. I, p. 59 at paras. 24-27. Exhibits 'N' and 'O' to Affidavit of Richard Wilson, A.B. Vol. II, pp. 223-232.

[158] This statement is factually inaccurate in that the Respondent had stayed with his grandparents in Canada for several months the previous year: Exhibit 'C' to Cross-Examination of William Johnston, A.B. Vol. II, p. 309.

Firstly, the interpretation of s. 38 has little or nothing to do with the interpretation of s. 7 of the *Charter*. Secondly, the authority of a designated judge to order disclosure pursuant to s. 38.06 is in no way dependent upon the authority conferred upon a trial judge by s. 38.14.

127. At paragraph 58, the Crown argues that the Respondent has failed to meet the evidentiary burden applicable to *Stinchcombe* disclosure demands as reflected in *Chaplin*. The Crown fails to note that the standard there established does not require any evidence, much less the unreasonable burden that the Crown seeks to impose:

> Although the obligation cast upon the defence which I have characterized as "a basis" is in the nature of an evidentiary burden, I prefer not to call it that because it can, and in many cases will, be discharged not by leading or pointing to evidence but by oral submissions of counsel without the necessity of a *voir dire*. Accordingly, I avoid the terms "air of reality" or "live issue" and other terms used in some of the cases that are more appropriate when used to describe a true evidentiary burden. *Viva voce* evidence and a *voir dire* may, however, be required in situations in which the presiding judge cannot resolve the matter on the basis of the submissions of counsel.[159]

128. In *Stinchcombe*, Sopinka J. conducted a review of the pros and cons with respect to disclosure by the Crown and concluded that "there is no valid practical reason to support the position of the opponents of a broad duty of disclosure."[160] It is submitted that this comment applies equally to the circumstances of the case at bar. At the end of the day, the Crown has not identified any valid justification for its refusal to respond to the Respondent's demand for *Charter*-based disclosure.

Part IV: Submissions Concerning Costs

129. The Crown does not seek costs of this proceeding against the Respondent should the Crown succeed. The Respondent submits that an award of costs payable to the Respondent is appropriate should the Respondent succeed.

Part V: Order Sought

130. The Respondent requests an order dismissing this appeal with costs throughout.

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[159] *R. v. Chaplin*, [1995] 1 S.C.R. 727 at paras. 30-33.
[160] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at para. 17. [Crown Authorities, Vol. I, Tab 22]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of February, 2008.

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Part VI: Table of Authorities

1. *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] E.W.J. No. 4947, [2002] EWCA Civ. 1598.

2. *Access to Information Act*, R.S., 1985, c. A-1, s. 50.

3. *African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, *entered into force* 21 October 1986.

4. *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948).

5. *Anderson v. Canada (Armed Forces)*, [1996] F.C.J. No. 1370 (C.A.).

6. *Beharry v. Reno*, 183 F. Supp.2d 584, 600 (E.D.N.Y. 2002).

7. *Beharry v. Ashcroft*, 329 F.3d 51 (2003).

8. *Blank v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 1844, 2001 FCA 374.

9. *Boumediene v. Bush*, 549 U.S. __ (2007).

10. *Boumediene v. Bush*, Certiorari Granted, Order List: 551 U.S., Friday June 29, 2007.

11. Brief Of *Amici Curiae* Canadian Parliamentarians And Professors Of Law In Support Of Reversal, Brief Filed In *Boumediene et al. v. Bush et. al.*, and *Al Odah et al. v. United States Of America et. al.*

12. D. Brown & J. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: DJMB Publishing Inc., looseleaf, updated July 2007).

13. *Canada Evidence Act*, R.S. 1985, c. C-5, s. 38.06.

14. *Canada v. Khawaja*, 2007 FC 490.

15. *Canada v. Khawaja*, 2007 FCA 342.

16. *Casariego v. Uruguay*, No.56/1979, Views of the HRC, CCPR/C/13/D/56/1979, 29 July 1981.

17. *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9.

18. *Coard v. United States*, Case 10.951, Inter-Am. C.H.R. Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. at 1283 (1999).

19. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Ruling on National Security Confidentiality.

20. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar*, Analysis and Recommendations.

21. *Convention on the Rights of the Child*, Can. T.S. 1992, No. 3, Art. 37.

22. *Currie v. Jamaica*, Communication No. 377/1989, U.N. Doc. CCPR/C/50/D/377/1989 (1994).

23. Department of Defense, Military Commission Instruction No. 2, April 30, 2003.

24. M. Denbeaux and J. Denbeaux, "No-Hearing Hearings, CRST: The Modern Habeas Corpus?", Seton Hall Law, Public Law and Legal Research Paper Series.

25. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

26. *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.

27. *Geneva Conventions Act*, R.S., 1985, c. G-3, s. 2.

28. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003).

29. *Gherebi v. Bush*, 542 U.S. 952.

30. *H. v. The Queen.*, [1986] 2 F.C. 71 (T.D.).

31. *The Haitian Centre for Human Rights et al. v. United States*, Case 10.657, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. (1996).

32. *Hamdan v. Rumsfeld*, 548 U.S. ___.

33. *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561.

34. *Hicks v Ruddock*, [2007] FCA 299.

35. Human Rights Committee, General Comment No. 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶11 (2001).

36. Human Rights Watch, *The Omar Khadr Case, A Teenager Imprisoned in Guantanamo*, (June 2007).

37. Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of 30 January 1987.

38. *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47.

39. Melissa A. Jamison, Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children, 9 UC Davis J. Juv. L. & Pol'y 127 (Winter, 2005).

40. *Khadr v. Canada*, T-536-04, Order of von Finckenstein J. dated June 20th, 2005.

41. *Khadr v. Canada (Minister of Foreign Affairs)*, [2004] F.C.J. No. 1391, 2004 FC 1145.

42. *Khadr v. Canada (Attorney General)*, [2004] F.C.J. No. 1700, 2004 FC 1394.

43. *Khadr v. Canada (Minister of Foreign Affairs)*, [2005] F.C.J. No. 160, 2005 FC 135.

44. *Khalid v. Bush*, 355 F. Supp. 2d 311 (2005) (D.D.C. 2005).

45. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418.

46. *Legality of the Threat of Use of Nuclear Weapons,* (Advisory Opinion), 1996 I.C.J. 226, 257 (Jun 24).

47. *López Burgos v. Uruguay,* No.52/1979, Views of the Human Rights Committee, CCPR/C/13/D/52/1979.

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49. Memorandum of George W. Bush to the Vice President et al., Re: Humane Treatment of Taliban and al Qaeda Detainees, February 7, 2002.

50. Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600.

51. *Minister of Justice et al. v. Omar Ahmed Khadr*, Court File No. 32147, Order of McLachlin C.J. dated December 19, 2007.

52. *Minister of Justice et al. v. Omar Ahmed Khadr*, Court File No. 32147, Order of McLachlin C.J. dated January 23, 2008.

53. *O.K. v Bush*, 344 F. Supp. 2d 44 (D.D.C. 2004).

54. *O.K. v. Bush*, 377 F. Supp. 2d 102 (D.D.C. 2005).

55. *Omar Khadr v. Robert M. Gates*, No. 07-1156 (D.C.Cir.), Order of May 30, 2007.

56. *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* U.N.G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49), U.N. Doc. A/54/49 (2000), *entered into force* February 12, 2002.

57. Parliamentary Assembly of Europe's Resolution No. 1340 (2003) (Adopted June 26, 2003).

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59. *Purdy v. Canada (Attorney General)* (2003), 226 D.L.R. (4th) 761 (B.C.S.C.).

60. *R. v. McCallen* (1999), 131 C.C.C. (3d) 518 (Ont.C.A.).

61. *R. v. Mater* (1988), 47 C.R.R. 351 (Ont.Dist.Ct.).

62. *R. v. Mills*, [1986] 1 S.C.R. 863.

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65. *Rasul v. Bush*, 542 U.S. 466.

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72. *United States of America v. Ferras; United States of America v. Latty*, [2006] 2 S.C.R. 77, 2006 SCC 33.

73. *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).

74. *United States of America v. Omar Ahmed Khadr*, Order on Jurisdiction, June 4, 2007.

75. *United States of America v. Omar Ahmed Khadr*, Disposition of Prosecution Motion for Reconsideration, June 29, 2007.

76. *United States of America v. Omar Ahmed Khadr*, CMCR 07-001, September 24, 2007.

77. *United States of America v. Omar Ahmed Khadr*, Schedule for Trial, 28 November 2007.

78. *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty : resolution / adopted by the General Assembly.*, 14 December 1990. A/RES/45/113.

79. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, 29 November 1985, A/RES/40/33.

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81. Vienna Convention on the Law of Treaties, U.N.T.S., vol. 1155, p. 331, *entered into force* 27, Art. 18.

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Part VII: Statutes

None