

Comment on Canada (Prime Minister) v. Khadr (2010)

Audrey Macklin

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](http://creativecommons.org/licenses/by-nc-nd/4.0/).

Citation Information

Macklin, Audrey. "Comment on Canada (Prime Minister) v. Khadr (2010)." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 51. (2010).

<http://digitalcommons.osgoode.yorku.ca/sclr/vol51/iss1/12>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

Comment on *Canada* (*Prime Minister*) v. *Khadr* (2010)

Audrey Macklin*

I. INTRODUCTION

Early in 2010, the Supreme Court of Canada declared that Canada was violating the rights of Omar Khadr, the lone Canadian citizen detained at Guantánamo Bay, Cuba. Unlike the Federal Court and the majority of the Federal Court of Appeal, the Supreme Court of Canada declined to order the Prime Minister to request Omar Khadr's repatriation to Canada. The Court did not absolve the government of the obligation to remedy the violation. Nor did it stipulate any specific remedial action, or reserve jurisdiction to adjudicate a failure by the government to provide an adequate remedy.

Canadian citizen Omar Khadr was 15 years old when he was severely wounded and captured by U.S. forces in Afghanistan in July 2002. U.S. forces detained, treated and interrogated him at Bagram Air Base in Afghanistan for about three months, then transferred him to Guantánamo Bay in September 2002, where he remains. Khadr alleges in affidavit that in Bagram and later in Guantánamo Bay, he was subjected to interrogation methods that constituted torture, and cruel, inhuman or degrading treatment. Khadr's allegations of abuse are consistent with documentation from human rights organizations, media reports, other detainees, a few former U.S. interrogators and the so-called "torture memos" issued by the Office of the Legal Counsel of the President of the United States.¹

* Faculty of Law, University of Toronto, co-counsel for interveners Human Rights Watch, University of Toronto International Human Rights Program, Asper Centre for Constitutional Rights. The author warmly thanks David Dyzenhaus, Richard Moon, Kent Roach and Bruce Ryder for constructive input and suggestions.

¹ The torture memos are reproduced in David Cole, ed., *The Torture Memos: Rationalizing the Unthinkable* (New York: New Press 2009). A subsequent memo from July 2007 was released after Cole's book: "Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees", July 20, 2007, available online: <http://www.usdoj.gov/olc/docs/memorawarcrimesact.pdf>. See also University of California (Davis) Center for the Study of Human Rights in

Khadr was held for five years without charge. He was detained for significant periods in solitary confinement. Although a minor, he was detained with adults. He received no education or treatment that took his youth into account. During his detention, the Canadian government made various inquiries and requests, most of which elicited no response from the United States. However, in 2003 and 2004, Canada requested and obtained permission to interrogate Khadr on several occasions for purposes of intelligence gathering. In 2004, Khadr's Canadian counsel sought an injunction to prevent further interrogation, on the grounds that Canadian officials were acting unconstitutionally. Canadian officials managed to squeeze in one more interrogation before the application was heard and granted in 2005.

Khadr was charged with war crimes in 2007 by the Office of the Convening Authority for the Military Commissions. The offences were created under the *Military Commissions Act* subsequent to his capture and applied retroactively, and remain unknown to international humanitarian law. The charges of "murder by an alien unprivileged combatant" and "providing material assistance to terrorism" arise from two main allegations: first, that he threw a grenade that killed one U.S. soldier and wounded another on the battlefield on July 27, 2002; second, that he participated in the assembly of improvised explosive devices ("IEDs") in Afghanistan. Khadr's case is scheduled to be the first case to go before the Military Commissions since President Barack Obama took office in 2008. It will also be the first case since the Second World War in which an accused is tried for war crimes based on acts allegedly committed while a minor. Even if Khadr is acquitted of the offences, the United States claims authority to detain him indefinitely.

Omar Khadr was 15 years old when captured, and 23 when the Supreme Court of Canada heard his appeal in November 2009. He has spent one-third of his life in U.S. custody, mostly without charge, and all without trial. His U.S. military defence team from 2007 to 2009

the Americas, The Guantánamo Testimonials Project, <<http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/index>>; McClatchy News Service, Guantánamo: Beyond the Law, <<http://www.mcclatchydc.com/detainees/>>; American Civil Liberties Union, The Torture Report, <<http://www.thetorturereport.org/>>. Not all interrogators used abusive techniques. So-called "clean teams", often composed of Federal Bureau of Investigation investigators, would interview detainees between abusive interrogations, and obtain the same or similar statements without contemporaneously inflicting torture, or cruel and inhuman or degrading treatment. Omar Khadr's prosecutors intend to selectively admit into evidence statements made to the clean teams on the grounds that they are voluntary and non-coerced. Canadian officials went to Guantánamo Bay on several occasions to interrogate Khadr.

(Lieutenant Commander William Kuebler and Rebecca Snyder) and his Canadian counsel (Nathan Whitling and Dennis Edney), waged an unsuccessful public campaign to press the Canadian government to request his repatriation. Among other things, they devised detailed re-integration plans — involving separation from family, close supervision, as well as support and rehabilitation programs — in order to assuage any public anxiety that Khadr might pose a security risk to Canadians. A similar strategy succeeded in gaining widespread public support for the repatriation of Australian David Hicks from Guantánamo Bay. Election campaign pressure induced Australian Prime Minister John Howard to seek and obtain Hicks' repatriation. In the face of divided public opinion in Canada, Prime Minister Stephen Harper remains implacably opposed to seeking Khadr's repatriation, despite evidence of the United States' willingness to return Khadr if asked.

Who is Omar Khadr? His identity in law is a function of multiple jurisdictional claims: under international humanitarian law (the laws of war), Omar Khadr is a combatant, possibly an unprivileged combatant, perhaps a child soldier. According to international human rights law, Omar Khadr is not only a human being, but was also a child — possibly a child soldier — at the time of his capture and his detention. Under the United States domestic laws of war, as formulated in the *Military Commissions Act*, Omar Khadr is an alien unlawful enemy combatant and accused war criminal. An alien to the United States, Omar Khadr is a citizen to Canada. And according to section 7 of the *Canadian Charter of Rights and Freedoms*,² Omar Khadr is everyone. As in “Everyone has the right to life, liberty, and security of the person, and the right not to be deprived thereof, except in accordance with fundamental justice.”

The dimensions of this section 7 claim were addressed in the Supreme Court of Canada's recent judgment in *Canada (Prime Minister) v. Khadr* (“*Khadr 2010*”).³ Khadr's lawyers and various interveners argued that Canada had violated Khadr's right to liberty and security of the person by conduct through a sequence of actions and inactions, that the government's conduct did not accord with fundamental justice, and that the appropriate remedy under section 24(1) of the Charter was an order that the Prime Minister request Omar Khadr's repatriation from his U.S. counterpart. The government denied the violations and, in the alternative,

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

³ [2010] S.C.J. No. 3, 2010 SCC 3 (S.C.C.) [hereinafter “*Khadr 2010*”].

argued that any violation had already been remedied by the disclosure order in *Khadr 2008*.⁴ It argued strenuously that exercise of the executive prerogative over foreign affairs effectively lay beyond the grasp of the Constitution, whether as a matter of substantive Charter provisions or under the remedial provision of section 24(1). *Khadr* thus brought to the surface the recurrent tension between the powers of elected officials to act in the name of the public will, as against the authority of the Supreme Court of Canada to restrain that power within the constitutional obligation to respect individual rights. Omar Khadr's vilified status as son of a pariah family (dubbed "Canada's first family of terror") means that the risk of majoritarian tyranny is particularly high. There is no doubt that the government's refusal to request Khadr's repatriation enjoys a measure of vocal popular support. Apart from ideological motives for refusing to request repatriation, the Prime Minister could confidently calculate that inaction would not cost him votes, and action would be unlikely to net him additional votes. With no political motive to intercede, the only domestic incentive would be an order from the Supreme Court of Canada. In institutional terms, the question was whether the Supreme Court of Canada would risk a political attack on its own legitimacy by requiring the Prime Minister to vindicate the rights of a person stamped with the toxic label "terrorist". The short answer was "no".

Almost two years prior to *Khadr 2010*, the Supreme Court of Canada ruled in *Khadr 2008* that the Charter applied to the interrogations by Canadian officials in Guantánamo Bay because it amounted to participation in a process that violated Canada's international legal obligations under the Geneva Conventions. Section 7 required disclosure to Khadr of the records of the interviews, subject to vetting by a Federal Court judge on grounds of national security.

Following the Court's decision in *Khadr 2008*, Mosley J. reviewed the documents and ordered disclosure to Khadr's counsel.⁵ Among the disclosed documents was e-mail correspondence within the Department of Foreign Affairs indicating knowledge that in the weeks prior to the last interrogation by Canadian officials, his U.S. captors subjected Khadr to torture in the form of extended sleep deprivation ("frequent flier program"). This confirmation of Canadian knowledge became a springboard

⁴ *Canada (Justice) v. Khadr*, [2008] S.C.J. No. 28, [2008] 2 S.C.R. 125 (S.C.C.) [hereinafter "*Khadr 2008*"].

⁵ *Khadr v. Canada (Attorney General)*, [2008] F.C.J. No. 972, 2008 FC 807 (F.C.).

into *Khadr 2010*, which confronted directly the question of Canada's constitutional obligation to seek Khadr's repatriation.

Before one even engages with the content of the Supreme Court's decision in *Khadr 2010*, the Court reveals its institutional diffidence through form. First, the judgment is very brief, only 48 short paragraphs. Second, against a jurisprudence that makes Canada's adherence to its international legal obligations crucial in the context of extraterritoriality,⁶ the Court does not engage with a single international legal instrument, norm or decision. Instead, it reproduces from *Khadr 2008* a morsel of international humanitarian law pre-digested by the U.S. Supreme Court in *Hamdan v. Rumsfeld*⁷ in the service of assessing U.S. compliance with U.S. constitutional obligations concerning *habeas corpus*. The Court refused to conduct its own evaluation of the conformity of the Military Commissions process with international law in relation to elements of the regime directly pertinent to Omar Khadr, none of which were addressed in the U.S. Supreme Court judgment in *Hamdan v. Rumsfeld*. Nor did it address possible violations of international law committed by Canadian officials in their interactions with Omar Khadr. Similarly, the Court did not advert to international law or jurisprudence regarding remedies for violations of international human rights.⁸ In fairness to the Court, Khadr's lawyers requested an expedited hearing and judgment. The Court released the judgment less than three months after hearing the appeal.

My comment proceeds in the following stages. First, I will summarize the judgments of the lower courts. Next, I will examine the jurisprudential basis for the Supreme Court's conclusions regarding section 7 and the section 24(1) remedy. I argue that the obvious deficiency in the Court's judgment, namely, its refusal to provide a remedy, is enabled by a section 7 analysis that tacitly steers the government toward a specious remedial option that falls short of a request for repatriation. This judicial manoeuvre enables the government to comply with the Court's expectation that the executive would act in response to the Court's declaration, while eliminating the risk that the executive might have to do something that could actually vindicate Khadr's rights. It preserves the veneer of the rule of law, with none of the content.

⁶ See *R. v. Hape*, [2007] S.C.J. No. 26, [2007] 2 S.C.R. 292 (S.C.C.) [hereinafter "*Hape*"].

⁷ 126 S. Ct. 2749, 548 U.S. 557 (2006).

⁸ For an incisive analysis of the actual remedy ordered by the Supreme Court of Canada from an international legal perspective, see Lorna McGregor, "Are Declaratory Orders Appropriate for Continuing Human Rights Violations? The Case of *Khadr v. Canada*" (2010) 10 *Hum. Rts. Law Rev.* 487.

II. JUDGMENTS OF THE FEDERAL COURT AND FEDERAL COURT OF APPEAL

To summarize the judicial history from the applicant's perspective, Khadr obtained a clear victory before the Federal Court,⁹ a narrow victory before the Federal Court of Appeal,¹⁰ and a hollow victory before the Supreme Court of Canada.¹¹ From the respondent's vantage point, the Federal Court trespassed on the domain of executive prerogative over foreign relations, the Federal Court of Appeal retreated but did not depart, while the Supreme Court of Canada wagged its finger disapprovingly at the occupant, and then left the building.

*Khadr 2008*¹² had already established that the Charter applied to the actions of Canadian officials toward Omar Khadr, and that his liberty interest was clearly engaged through Canada's participation in the unlawful regime in effect in Guantánamo Bay. This permitted O'Reilly J. of the Federal Court to move quickly to the issue of whether the infringement of the liberty interest accorded with fundamental justice. He ruled that the relevant principle of fundamental justice is "a duty to protect persons in Mr. Khadr's circumstances".¹³ He derives the principle from a combination of international obligations binding on Canada under the *Convention Against Torture* and the *Convention on the Rights of the Child*, broad principles contained in the *Optional Protocol on the Involvement of Children in Armed Conflict*, and the specific circumstances of Khadr's situation. These are Khadr's "youth; his need for medical attention; his lack of education; [lack of] access to consular assistance and legal counsel; his inability to challenge his detention or conditions or confinement in a court of law; and his presence in an unfamiliar, remote and isolated prison, with no family contact".¹⁴ He concludes that the principles of fundamental justice "obliged Canada to protect Mr. Khadr by taking appropriate steps to ensure that his treatment accorded with international human rights norms".¹⁵

In considering the appropriateness of an order requiring the government to request repatriation, O'Reilly J. comments that "no other remedy

⁹ *Khadr v. Canada (Prime Minister)*, [2009] F.C.J. No. 462, 2009 FC 405 (S.C.C.).

¹⁰ *Khadr v. Canada (Prime Minister)*, [2009] F.C.J. No. 893, 2009 FCA 246, 310 D.L.R. (4th) 462 (F.C.A.).

¹¹ *Supra*, note 3.

¹² *Supra*, note 4.

¹³ *Supra*, note 9, at para. 71.

¹⁴ *Id.*, at para. 70.

¹⁵ *Id.*, at para. 75.

would appear to be capable of mitigating the effect of the *Charter* violations in issue or accord with the Government's duty to promote Mr. Khadr's physical, psychological and social rehabilitation and reintegration".¹⁶ Moreover, the government proposed no alternative remedy. He noted that many other states had sought and obtained repatriation of their citizens from Guantánamo Bay, and that the government had proffered no evidence about how a request would jeopardize its foreign relations. After reciting the range of potential diplomatic steps, from consular action to the severance of diplomatic relations and economic pressure, O'Reilly J. describes "the presentation of a request for the return of a Canadian citizen as being at the lower end of this spectrum of diplomatic intervention and, therefore, minimally intrusive on the Crown's prerogative in relation to foreign affairs".¹⁷

The majority of the Federal Court of Appeal (Evans and Sharlow JJ.A.) upheld O'Reilly J.'s judgment, but on a narrower conception of the section 7 violation. Canada breached fundamental justice by questioning Omar Khadr at Guantánamo Bay with knowledge that he had been subjected to cruel, inhuman and degrading treatment by U.S. officials prior to his interrogation. The fact that U.S. officials had perpetrated the abuse did not absolve Canadian officials for exploiting Omar Khadr's vulnerability:

[T]he principles of fundamental justice do not permit the questioning of a prisoner to obtain information after he has been subjected to cruel and abusive treatment to induce him to talk. That must be so whether the abuse was inflicted by the questioner, or by some other person with the questioner's knowledge. Canada cannot avoid responsibility for its participation in the process at the Guantánamo Bay prison by relying on the fact that Mr. Khadr was mistreated by officials of the United States, because Canadian officials knew of the abuse when they conducted the interviews, and sought to take advantage of it.¹⁸

On the section 24(1) issue, the majority declines to intervene in the exercise of remedial discretion by O'Reilly J., finding that "Justice O'Reilly considered the relevant factors in order to tailor the remedy to the facts, and cannot be said to have weighed them in such a manner as to reach an unreasonable outcome."¹⁹

¹⁶ *Id.*, at para. 78.

¹⁷ *Id.*, at para. 89.

¹⁸ *Supra*, note 10, at para. 54.

¹⁹ *Id.*, at para. 74.

Justice Nadon vigorously dissented from his colleagues. Although he evidently disagrees with O'Reilly J.'s decision that the principles of fundamental justice included a duty to protect Omar Khadr in the circumstances, he rules that in any case, the government had fulfilled its duty through the various inquiries it had made of the United States regarding Khadr's welfare and requests that he not be mistreated.²⁰

Justice Nadon also addresses the remedy, and criticizes O'Reilly J. on two grounds. First, he characterizes an order to request repatriation as an extravagant judicial incursion into the executive prerogative over the conduct of foreign relations. Adopting the language of the U.K. courts in *Abbasi*,²¹ *Al Rawi*²² and *Rehman*,²³ Nadon J.A. insists that how Canada conducts its foreign affairs should be left to the judgment of those who have been entrusted by the democratic process to manage these matters on behalf of the Canadian people.²⁴ (Notably, in none of these U.K. cases did the applicants lead evidence that U.K. government officials had attended and actively participated in interrogations at Guantánamo Bay.)

Second, Nadon J.A. protests the absence of a link between the breach of fundamental justice as characterized by the majority of the Federal Court of Appeal (interviewing Khadr with knowledge of his prior torture and handing the fruits of interrogation to the United States) and the remedy ordered by O'Reilly J. In a passage that presages the Supreme Court of Canada's judgment, Nadon J.A. stated:

With respect, I cannot see the link between the inappropriateness of the interviews and the remedy of repatriation, a remedy which is, in my view, totally disproportionate in the circumstances. In *Khadr, supra*, the Supreme Court dealt with Canada's breach by ordering that it provide Mr. Khadr with the information which it had passed on to US authorities. Perhaps an Order could have issued prohibiting Canada from using the information obtained from Mr. Khadr, should Canada ever decide to prosecute him in Canada. That remedy would have at least some connection to the alleged breach. It might also suffice, in the

²⁰ *Id.*, at paras. 86 and 99-103.

²¹ *Abbasi & Anor, R (on the application of) v. Secretary of State for Foreign & Commonwealth Affairs & Secretary of State for the Home Department*, [2002] EWCA Civ. 1598 [hereinafter "*Abbasi*"].

²² *Al Rawi & Ors, R (on the application of) v. Secretary of State for Foreign & Commonwealth Affairs & Anor*, [2006] EWCA Civ. 1279 [hereinafter "*Al Rawi*"].

²³ *Secretary of State for the Home Department v. Rehman*, [2003] 1 A.C. 153 (H.L.) [hereinafter "*Rehman*"].

²⁴ *Supra*, note 10, at para. 106.

circumstances, for the Court to grant, as Canada suggests, a declaration indicating which actions of Canada are unconstitutional.²⁵

The Supreme Court of Canada heard the appeal in November 2009 and rendered its decision in January 2010.

III. THE SUPREME COURT JUDGMENT

In *Khadr 2008*,²⁶ the Court ruled that the Charter applied extraterritorially to the actions of Canadian officials who interviewed Khadr in 2003 and 2004. In so doing, the Court applied the exception carved out of the general rule in *R. v. Hape*²⁷ that the Charter would not apply extraterritorially without the consent of the state exercising territorial jurisdiction. According to the *Hape* majority, cooperation by Canadian officials in investigations abroad through means that would otherwise violate the Charter is justified under the principle of comity. However, “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”.²⁸ Rather than determine directly whether the regime in Guantánamo Bay violated fundamental human rights protected by international law, the Court in *Khadr 2008* relied exclusively on judgments and *dicta* of the U.S. Supreme Court in *Rasul v. Bush*²⁹ and *Hamdan v. Rumsfeld*.³⁰ The Court summarized the U.S. Supreme Court’s findings that:

... the detainees had illegally been denied access to *habeas corpus* and that the procedures under which they were to be prosecuted violated the *Geneva Conventions*. Those holdings are based on principles consistent with the *Charter* and Canada’s international law obligations. In the present appeal, this is sufficient to establish violations of these international law obligations, to which Canada subscribes.³¹

²⁵ *Id.*, at para. 114.

²⁶ *Supra*, note 4.

²⁷ *Supra*, note 6. *Hape* appears to have overruled *R. v. Cook*, [1998] S.C.J. No. 68, [1998] 2 S.C.R. 597 (S.C.C.).

²⁸ *Id.*, at para. 101.

²⁹ 542 U.S. 466 (2004).

³⁰ *Supra*, note 7.

³¹ *Khadr 2008*, *supra*, note 4, at para. 21. In *Hamdan v. Rumsfeld*, *supra*, note 7, the U.S. Supreme Court identified the following specific violations of Common Article 3 of the Geneva Conventions: non-disclosure of evidence to the accused; exclusion of accused from proceedings; the fact that the Military Commissions Court was not a “regularly constituted court . . . established and organized in accordance with the laws and procedures already in force in a country”. In *Rasul v.*

In *Khadr 2008*, Canada's participation for purposes of Charter application consisted of transmitting the fruits of its interrogations of Khadr to U.S. authorities. The Court expressly refrained from ruling on whether the act of interviewing Khadr would constitute participation: "Merely conducting interviews with a Canadian citizen held abroad under a violative process may not constitute participation in that process. Indeed, it may often be essential that Canadian officials interview citizens being held by violative regimes to provide assistance to them."³²

In *Khadr 2010*, the Court proceeds from this same starting point. It notes that subsequent litigation (*Boumediene v. Bush*)³³ and legislative intervention had altered the Military Commissions process,³⁴ indeed, on the day of the hearing before the Supreme Court of Canada, Khadr's counsel advised the Court of the most recent changes imposed by the Obama administration. The Court declines to express any view about the conformity of the current process with fundamental human rights under international law, nor does it comment on the human rights significance of any aspect of the regime in Guantánamo Bay beyond those addressed by the U.S. Supreme Court in *Hamdan v. Rumsfeld*. The Court simply reiterates that it is "satisfied that the rationale in *Khadr 2008* for applying the *Charter* to the actions of Canadian officials at Guantánamo Bay governs this case as well".³⁵

In *Khadr 2008*, it was not necessary for the Court to determine whether Canada had violated Khadr's section 7 rights by interrogating him; the question was whether Canada had a Charter obligation to divulge evidence that it extracted from Khadr, regardless of the legality of how it was obtained. In *Khadr 2010*, the Court was compelled to rule on whether the interrogations violated Khadr's Charter rights. It does so in three paragraphs.³⁶ It does not address whether Canadian officials violated his right to security of the person by the fact and the manner of the interrogation. Instead, it regards the United States as the sole violator of his right to liberty and security of the person, and asks whether Canadian

Bush, supra, note 29, the Court said nothing about international law. Indeed, U.S. international law scholar Michael Reisman assails the judgment as "completely oblivious to international law. Indeed, none [of the opinions in *Rasul*] even discusses international law or the Geneva Convention." W. Michael Reisman, "Rasul v. Bush: A Failure to Apply International Law" (2004) 2 Journal of International Criminal Justice 973-80, at 980.

³² *Khadr 2008, supra*, note 4, at para. 27.

³³ 128 S. Ct. 2229 (2008).

³⁴ *Khadr 2010, supra*, note 3, at para. 17.

³⁵ *Id.*, at para. 18.

³⁶ *Id.*, at paras. 19-21.

actions were causally connected to the perpetuation of those rights deprivations by the United States.

The Court struggles to infer the requisite connection. There was no direct evidence about the novelty or utility of the evidence obtained by Canada, apart from the Canadian Security Intelligence Service's ("CSIS") own assessment that its 2003 interrogations were "highly successful, as evidenced by the quality of intelligence information".³⁷ The 2004 interrogation was less productive because Khadr refused to answer questions. The Court obliquely suggests that the perceived success of the 2003 interrogations might have encouraged Canadian officials to undertake the March 2004 interrogation, undeterred by knowledge that Khadr had been subject to the "frequent flier program". The relaxed rules of evidence for the Military Commission would make the evidence obtained by Canada following his subjection to the frequent flier program potentially admissible before the Military Commission.

The Court considers it "reasonable to infer" from the interrogation and subsequent information transfer that "Canada's active participation in what was at the time an illegal regime has contributed and continues to contribute to Mr. Khadr's current detention".³⁸ This satisfied the required causal connection between Canada and the liberty and security violating conduct of another state.

The Court then devotes four paragraphs to the question of whether the deprivation of liberty and security of the person accords with the principles of fundamental justice. The Federal Court had identified a positive principle of fundamental justice, namely, a circumstantially specific duty to protect. The Federal Court of Appeal reasoned that since fundamental justice clearly prohibits inflicting torture to elicit information, it follows that it would also preclude questioning a person with knowledge that he has been tortured by a third party to induce his compliance. The Supreme Court does not address the Federal Court's theory that the state owed citizens a positive duty to protect, nor does it respond to the narrower reasoning of the Federal Court of Appeal. Instead, it rehearses its general criteria for establishing a principle of fundamental justice: it must be a legal principle, there must be a consensus on its character as fundamental to the fair operation of a legal system, and it must be sufficiently precise to "yield a manageable standard".³⁹ It

³⁷ *Id.*, at para. 20.

³⁸ *Id.*, at para. 21.

³⁹ *Id.*, at para. 23.

reiterates the factors that justified the extraterritorial application of the Charter a few paragraphs earlier, adding mention of Khadr's youth and isolation from anyone concerned about his best interests. Next, it describes Canadian officials' knowledge, motives and conduct through the interrogations.⁴⁰ In a single, perfunctory sentence, the Court concludes that the section 7 deprivation did not comport with principles of fundamental justice:

Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.⁴¹

Having arrived at the finding of a section 7 violation, the Court proceeds to the final task of reviewing the remedy ordered by O'Reilly J. and affirmed as reasonable by a majority of the Federal Court of Appeal. The Court bifurcates its inquiry into two questions:

- (1) Is the remedy sought sufficiently connected to the breach? and (2) Is the remedy sought precluded by the fact that it touches on the Crown prerogative power over foreign affairs?⁴²

The Court answers the first question in the affirmative. The Court identifies a potential obstacle in the apparent gap between the breach and the remedy. Canadian officials took the opportunity to interrogate Khadr one last time in March 2004, shortly after his lawyers sought an injunction to prevent further interrogations and before the application was heard and granted. The illegally obtained evidence was disclosed to Khadr as a consequence of the Court's ruling in *Khadr 2008*. How is a request for repatriation responsive to the wrong of past interrogations and evidence sharing? The Court bridges the temporal gap by declaring that the "effect of the breaches ... continues to this day" because the evidence gathered by Canadian officials and shared with U.S. military authorities could be adduced at a future U.S. trial.⁴³ A remedy is required because

⁴⁰ *Id.*, at para. 24.

⁴¹ *Id.*, at para. 25.

⁴² *Id.*, at para. 27.

⁴³ *Id.*, at para. 30.

the “past acts violate present liberties”⁴⁴ and a request for repatriation “could potentially vindicate those rights”.⁴⁵

The Court also answers the second question in the affirmative — sort of. It spends about a third of the judgment (15 paragraphs) explaining why it can but will not order the government to request Khadr’s repatriation.⁴⁶

The Crown prerogative over foreign affairs “includes the making of representations to a foreign government”.⁴⁷ The Court states and restates the yin and yang of respect for the “constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada’s broader national interests”,⁴⁸ and the authority and duty of the courts to “make orders ensuring that the government’s foreign affairs prerogative is exercised in accordance with the constitution”.⁴⁹ The Court had previously rejected the U.S. “political questions doctrine” in *Operation Dismantle*.⁵⁰ Also, it explicitly subjected executive discretion over foreign affairs to Charter constraints in *Burns*,⁵¹ when it required the Canadian government to seek and obtain assurances that capital punishment would neither be sought nor imposed as a precondition to extradition of two accused murderers, Burns and Rafay, to the United States. Therefore, the Court could not evade the fact that principle and precedent authorized it to order a remedy that plainly touched on the executive prerogative over foreign affairs. Instead, the Court attempts to distinguish *Burns*. Without repudiating the principle holding executive action to constitutional account, it hollows it out by offering two justifications for the departure from precedent. First, unlike the circumstances that obtained in *Burns*, “Mr. Khadr is not under the control of the Canadian government; the likelihood that the proposed remedy will be effective is unclear; and

⁴⁴ *Id.*, at para. 31.

⁴⁵ *Id.*, at para. 30. According to Kent Roach, this follows the Court’s general reluctance to impose strict causal analysis to remedies — for example, in rejecting the need to find a causal link between a Charter violation and the discovery of evidence when considering whether to exclude evidence pursuant to section 24(2) of the Charter, rulings such as *R. v. Strachan*, [1988] S.C.J. No. 94, [1988] 2 S.C.R. 980, at para. 39 (S.C.C.) [hereinafter “Strachan”] and *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at paras. 120-121 (S.C.C.) [hereinafter “Grant”] have described causation analysis as inherently speculative.

⁴⁶ *Khadr 2010*, *supra*, note 3, at paras. 33-47.

⁴⁷ *Id.*, at para. 35.

⁴⁸ *Id.*, at para. 39.

⁴⁹ *Id.*, at para. 37.

⁵⁰ *Operation Dismantle Inc. v. Canada*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441 (S.C.C.).

⁵¹ *United States of America v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.) [hereinafter “Burns”].

the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court.”⁵²

Next, the record in Khadr’s case is deemed inadequate, insofar as the Court was not apprised of the “range of considerations currently faced by the government in assessing Mr. Khadr’s request”.⁵³ Given the Court’s ignorance of what negotiations the government had or was having with the United States with respect to Khadr, “it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr’s *Charter* rights”.⁵⁴

The differences between Burns and Rafay’s and Khadr’s situation, and the indeterminacy of the record, underwrite the primacy given to “the need to respect the prerogative powers of the executive”. In the result, the Court decides that the “prudent course at this point” is to grant Khadr “a declaration advising the government of its option on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*”.⁵⁵

IV. ANALYSIS OF THE JUDGMENT

1. Section 7 from Application to Violation

One of the doctrinal riddles posed by the judgment in *Hape* concerns the relationship between the threshold test for the extraterritorial application of the Charter and the subsequent determination of whether the Charter has been violated. The animating idea behind *Hape* seems to be that international human rights obligations binding upon Canada provide a floor beneath which Canadian conduct abroad must not sink, either by direct action or by participation in rights-violating conduct by officials of another (presumably the territorial) state. When Canadian officials descend below this minimum standard, the Charter applies. This immediately raises the question of what lies between committing or participating in the violation of a binding international human rights norm and the violation of a Charter right. One must imagine the possibility of doing the former without also committing the latter, or else proof of the

⁵² *Khadr 2010, supra*, note 3, at para. 43.

⁵³ *Id.*, at para. 44.

⁵⁴ *Id.*

⁵⁵ *Id.*, at para. 47.

threshold question also proves the Charter violation, and the two tests collapse into one another. Indeed, this is what happened in *Khadr 2008*, where the Court simply asserted that the principles of fundamental justice apply where “an individual’s s. 7 right to liberty is engaged by Canada’s participation in a foreign process that is contrary to Canada’s international human rights obligations”.⁵⁶ In other words, section 7 is violated for the same reason that the Charter applies.

Apart from deportation to torture — which international human rights prohibits absolutely but, according to *Suresh*,⁵⁷ the Charter does not — it is difficult to imagine situations where violation of an international human right binding upon Canada would not also breach the Charter. The Court does not explain what logic might drive a distinction between participating in a human rights violation (the threshold question) and breaching a Charter right (the violation question). In *Khadr 2010*, the Supreme Court appears to resolve this by invoking *Suresh* as the source of a supplementary requirement of a “sufficient causal connection” between Canada’s participation (the threshold question) and the U.S.’ deprivation of Khadr’s liberty and security of the person.⁵⁸ The reference to *Suresh* invites us to construe Canada’s role as facilitating the violation of Khadr’s section 7 rights by another party (the United States), in the same way as deportation from Canada would facilitate *Suresh*’s torture by Sri Lanka.

However, the analogy is inapt in two ways: first, the contribution of Canadian officials’ interrogations to facilitating Khadr’s ongoing detention in Guantánamo Bay cannot remotely approximate the “but for” causation that was present in *Suresh*, wherein *Suresh* would not face torture in Sri Lanka but for deportation by Canada. So, the Court strains to find a causal connection by claiming that it is reasonable to infer that the evidence extracted by Canadian officials and shared with U.S. officials contributed to the decision by U.S. officials to continue detaining Khadr. This seems highly implausible, and hangs on little more than a self-aggrandizing assessment by Canadian officials of the quality of the information they extracted from Khadr in 2003. A more damning and more plausible inference — but one which the Court only hints at obliquely — is that Khadr’s upcoming scheduled interrogations by Canadian officials in March 2004 motivated U.S. officials to subject Khadr to the frequent

⁵⁶ *Khadr 2008*, *supra*, note 4, at para. 31.

⁵⁷ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3 (S.C.C.) [hereinafter “*Suresh*”].

⁵⁸ *Khadr 2010*, *supra*, note 3, at paras. 19 and 21.

flier program in the period leading up to those interrogations in order to make him more compliant.⁵⁹

While the reference to *Suresh* overstates any likely causal connection between Canada's interrogations and Khadr's detention by the U.S., it simultaneously suppresses the direct violation of his security of the person by Canadian officials. The Court does not advert to the interrogations themselves as engaging Khadr's section 7 rights. This seems odd. A decision by state officials to interrogate a minor citizen who has been detained for years by a foreign government under conditions of extreme, pervasive and unremitting oppression, for purposes of intelligence gathering and law enforcement, with no regard for his age, health, treatment or welfare, would seem to exemplify state-imposed psychological stress severe enough to engage security of the person. Any equivocation on this point might be resolved by viewing the video in which 16-year old Omar Khadr pleads with the CSIS official for help, and then slumps over, sobbing and calling his mother's name over and over, once he finally realizes the futility of his entreaties: Canadian officials scorn his complaints of mistreatment, and have not come to provide support or assistance; their sole purpose is to extract intelligence.⁶⁰

Unlike the hypothetical scenario floated in *Khadr 2008*, in which the Court speculates on potentially lawful motives for interviewing citizens detained abroad in abusive circumstances, these interrogations were indisputably motivated solely by intelligence and criminal law enforcement objectives.⁶¹ Canadian officials displayed no concern for Khadr's protection or welfare *qua* citizen and/or child. Nevertheless, the Court conspicuously refuses to address whether Canadian officials' interrogations of Khadr in Guantánamo Bay constituted a deprivation of his security of the person.

Only at the stage of fundamental justice does the Court turn to the actual interrogations. Here, the Court finds that the means by which Canadian officials obtained statements from Khadr did not accord with principles of fundamental justice: Canada interrogated Khadr knowing he was a minor, who was detained unlawfully and previously subject to sleep deprivation. The record does not disclose what other abuse Canadian officials knew, suspected or ought to have suspected. Canadian officials chose to interrogate Khadr without counsel, and with the

⁵⁹ *Id.*, at para. 21.

⁶⁰ A 10-minute excerpt of a 2003 interrogation is available on YouTube: <http://www.youtube.com/watch?v=yNCyrFV2G_0>.

⁶¹ *Khadr 2010*, *supra*, note 3, at para. 24.

intention of transferring the fruits of the interrogation to U.S. prosecutors for potential use in a future trial. Yet the cumulative effect of these facts points to the very conclusion that the Court's analysis resists, which is that the interrogation by Canadian officials in and of itself directly violated Khadr's security of the person.

Shunting the interrogation to principles of fundamental justice means that Canadian conduct toward Khadr enters the analysis only at the periphery. The actions of Canadian officials operate as the circumstances that made it fundamentally unjust to share the fruits of their interrogation with the U.S. officials who were in turn depriving Khadr of his liberty and security of the person. Not only is this convoluted narrative sequence difficult to follow as a matter of legal reasoning, it fails to cohere for at least two reasons. First, to conclude that Canadian officials breached fundamental justice by interrogating Khadr in circumstances of oppression is to say, in effect, that they breached fundamental justice by depriving him of security of the person.⁶² Second, the model proposed by the Court implies that had the interrogations been demonstrably fruitless, or had they yielded nothing new or relevant to eventual U.S. prosecution, Canadian officials would not have violated Khadr's Charter rights. Indeed, the final interrogation in 2004, performed with knowledge of prior torture, apparently produced no new or otherwise useful information; Khadr begged officials to help him instead of answering their questions. His requests and that interview were both futile. The Court's focus on the putative contribution of the information to Khadr's continued detention should lead to the conclusion that the 2004 interrogation did not violate his Charter rights. The Court slides over this troubling product of its own logic by advertent to Canadian officials' prior knowledge of torture, while omitting the officials' assessment that the interview was unproductive.⁶³

The problem is traceable to the fact that the Court unaccountably launches its Charter analysis *in medias res*, at the point where Canada shares information with the United States. From Charter application, to deprivation of liberty and security of the person, to the breach of funda-

⁶² Properly understood, the inquiry into fundamental justice would ask whether, having decided to interrogate Omar Khadr in the circumstances and for the purposes that engaged security of the person, the interrogation itself complied with fundamental justice. Here, one would look at how Canadian officials interrogated him (in the absence of counsel or support, with no regard for his youth), and also consider whether it would be possible for any interrogation under the circumstances to meet the requirements of fundamental justice.

⁶³ *Khadr 2010*, *supra*, note 3, at para. 20.

mental justice, the Court consistently regards the sharing of information with rights-violating U.S. authorities as the hub of the wrong, from which everything else radiates. Sharing information constituted participation in an unlawful U.S. regime; sharing information was causally connected to the ongoing deprivation of liberty and security of the person by U.S. authorities; the shared information was obtained in a manner that breached principles of fundamental justice, in part because of what the United States did to Omar Khadr prior to the Canadian interviews. The effect of this distorted legal narrative is to displace and deflect the conduct of Canadian officials to the margins of the analysis, and to deflect the question of Canadian culpability for deliberate choices about whether and how to engage with the options presented by the detention of a minor citizen in Guantánamo Bay. A few — but not all — elements of a possible response are sprinkled in the judgment, but since the Court never poses the question directly, it never answers it.

Careful search for a principled basis for the Court's analytical structure does not repay the effort. A superficially appealing rationale might be that the Charter analysis tracks the empirical fact that the United States, not Canada, is the primary perpetrator of the violations of Omar Khadr's human rights. But to make the Charter analysis revolve around the contribution of information sharing to U.S. violations is to confuse an empirical with a legal analysis. The task of the Supreme Court of Canada is not to apportion factual causation or legal liability for rights violations as between Canada and the United States. It is the constitutional relationship between Omar Khadr and Canada that matters here; the Charter does not regulate the relationship between Omar Khadr and the United States, or the relationship between Canada and the United States. The Court's jurisdiction both permits and requires it to adjudicate the compliance of the Canadian government with constitutional obligations binding upon it (and no other state), toward a single person (and no one else).

It is difficult to find a label for this defect of judicial reasoning. The Court's misrepresentation of the salient constitutional issue is perhaps best described as a failure of what U.S. constitutional theorist Lawrence Solum terms "constitutional vision":

In the context of constitutional adjudication, the virtue of justice requires the ability to perceive the salient features of particular situations. ... [W]e might say that a sense of justice requires "constitutional vision," the ability to size up a constitutional case and discern its constitutionally salient dimension. This requires an intellectual grasp of the content of the law, an understanding of the

underlying purposes the law serves, and an ability to pick out the features of particular cases that are important for those rules and purposes.⁶⁴

The Court's job is to adjudicate the conduct of Canadian officials in relation to Omar Khadr as against the obligations imposed on Canadian actors by the Charter. Obviously, the context for that assessment includes the egregious and pervasive rights-violating regime operated by the United States, into which Canada inserted itself as participant. But if one begins from the question of Canada's legal obligations under the Charter toward Omar Khadr, then it makes little sense to construe the Charter violation primarily in terms of information sharing.⁶⁵

One might not be overly troubled with how the Court formulates the threshold, liberty/security of the person violations and fundamental justice analyses respectively. Assembling a Charter violation from assorted spare parts culled from *Hamdan*, *Khadr 2008* and *Suresh* may not actually produce a juridically coherent or stable machine, but if it works, perhaps it is best not to examine it too closely.⁶⁶ After all, the Court does arrive with celerity at the conclusion that the Charter applies and section 7 is violated, and so it might seem churlish to cavil about how they got there.

Rather than belabour an internal critique of the reasoning, I want to pose a slightly different question: what work does the tight focus on information sharing do for the Court? Most obviously, it retains the emphasis on the U.S. as the perpetrator of rights violations against Khadr and on Canada as an ancillary player whose ostensibly benign action — sharing information — is tainted only in a contingent sense, depending on how it is used by the main perpetrator. This has two related effects. First, it supplements the Court's apparent abstention from directing the government to provide a specific remedy for its unconstitutional conduct by pointing in the direction of a remedy focused on the fate of the evi-

⁶⁴ Lawrence B. Solum, "The Aretaic Turn in Constitutional Theory" (2005) 70 *Brook. L. Rev.* 475, at 518. See also SSRN, online <<http://ssrn.com/abstract=512882>> (at 34).

⁶⁵ Another explanation for the Court's approach might invoke a crude path dependence: having focused on information sharing in *Khadr 2008* for purposes of disclosure obligations, the Court considers it expedient to simply pick up where it left off in *Khadr 2008* and build upon the existing foundation laid in the earlier case, rather than develop an analytical structure appropriate to the specific legal issues at stake in *Khadr 2010*.

⁶⁶ In his account of "judicial minimalism", Cass Sunstein defends this type of jurisprudential jerry-rigging as a pragmatic mechanism for building judicial consensus. See Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999) [hereinafter "Sunstein"]. I thank Kent Roach for bringing this point to my attention.

dence. Second, it saps any potency from the Court's express acknowledgment than a request for repatriation "could potentially vindicate" Omar Khadr's rights.⁶⁷

2. The Remedy

The Court begins this section of its analysis by reviewing the requirements for a remedy under section 24(1) of the Charter. It asks whether the remedy sought is "sufficiently connected to the breach".⁶⁸ Information sharing lies at the core of the Court's account of the Charter violation, but *Khadr 2008* already ordered disclosure of that information. The government argued that the acquisition and sharing of information stopped in 2004 and the disclosure of that information to defence counsel pursuant to the order in *Khadr 2008* obviates the need for further remedy. The Court responds by extending the Charter violation into the present. It states that, to the extent that the evidence may be used against Khadr in an eventual trial by the U.S., the "effect of the breaches cannot be said to have been spent".⁶⁹

The best explanation for how it accomplishes this is that it treats *Khadr 2008* as a *Stinchcombe*⁷⁰ problem, familiar in the law of Canadian criminal procedure. The Crown has a duty to disclose relevant evidence — lawfully obtained or otherwise — to defence counsel, and a court will order disclosure if the Crown has breached its duty. In *Khadr 2008*, Canada obtained evidence that could be used against Khadr in a trial, albeit in a U.S. trial, and so had to disclose it to defence counsel. *Khadr 2010*, in turn, raises the different problem of illegally obtained evidence, which was neither addressed nor resolved in *Khadr 2008*, partly because the evidence proving the illegality was only revealed as a result of the disclosure pursuant to *Khadr 2008*. This problem of illegally obtained evidence is typically resolved in Canadian law by exclusion of evidence from trial. *Khadr 2010* thus becomes a section 24(2) problem.

This implicit framing of the section 7 issues by the Court demonstrates a methodological domestication of Khadr's legal position in both senses of the word. First, it assimilates the rights violations occurring in Guantánamo Bay into the nearest *local* analogues within the Canadian

⁶⁷ *Khadr 2010*, *supra*, note 3, at para. 30.

⁶⁸ *Id.*, at para. 29.

⁶⁹ *Id.*, at para. 30.

⁷⁰ *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.).

criminal justice system — non-disclosure by the Crown (*Khadr 2008*) and improperly obtained evidence (*Khadr 2010*). Second, it *tames* the rights violations by suppressing what it adverted to at the outset of the judgment: the very regime into which the Canadian officials enthusiastically inserted themselves as interrogators breaches fundamental norms of international law.

Within a legal order that is presumptively compliant with the rule of law, rights violations are *ex hypothesi* aberrant. The rights violation can and must be remedied in order to restore the health of the system. The remedy closes the wound inflicted by the breach and enables the system to resume intact. That is a plausible account of the Canadian legal order, the civilian criminal justice system of the United States, and arguably even the ordinary courts martial systems of both states. It does not apply to the Military Commissions process in Guantánamo Bay; indeed, this legal fact is the foundation of the Court's ruling that the Charter applies to Canadian officials in Guantánamo Bay. Illegality saturates the entire Military Commissions apparatus, from indefinite detention, to the infliction of torture and cruel, inhuman and degrading treatment, to the mistreatment of minors, to the lack of judicial independence, to the content of retroactive (and ersatz) "war crimes", to the trial process itself. Canadian officials in Guantánamo Bay did not participate in deviant rights-violating conduct; they engaged in rights-violating conduct that was entirely typical and constitutive of the Military Commission system. The evidence disclosed after *Khadr 2008* proves they knew of the frequent flier program. It is also plain from the transcript of their interactions with Khadr that he complained to them of torture. Only the most naive of observers could imagine that Canadian officials did not know or suspect that the frequent flier program was not the only torture, or cruel, inhuman or degrading treatment inflicted on Khadr.

The point is that one cannot transpose the remedy of evidence exclusion at trial from a functional legal order to a dysfunctional legal regime. To suggest that the Charter breach persists as long as improperly obtained evidence is admissible at trial presupposes that the trial would otherwise be lawful if inadmissible evidence were excluded. Yet, in no way could evidence exclusion at trial rescue the legality of a Military Commission proceeding.

This domestication of the Charter breach appears particularly anomalous next to the Court's subsequent trepidation about judicial encroachment on the foreign affairs prerogative of the executive. But on reflection, the former serves the latter by belittling the remedial implica-

tions flowing from a genuine recognition of the nature and scope of Canadian officials' Charter violations, as well as the depth and breadth of the Military Commissions' departure from international law and legality. The Court's unwillingness to engage with any of the specific features of the Military Commissions regime that make it unlawful under international law allows the character of the regime to slip from view once it has fulfilled its function in relation to Charter application. In combination with the section 7 analysis' tight focus on the sharing of evidence, the Court creates the misleading impression that disclosure of evidence previously concealed (as in *Khadr 2008*) or exclusion of evidence improperly obtained (in *Khadr 2010*) are capable of providing complete remedies for discrete and self-contained wrongs in the Military Commissions process to which Omar Khadr is subject.

One might counter by conceding that any trial Khadr faces will be irredeemably contaminated by the violations that preceded it and the violations entailed in the trial process itself. However, excluding evidence shared by Canadian officials will wipe Canada's fingerprints off the process. This, of course, revives the question of the validity of the Court's characterization of the section 7 violation and the identification of information sharing as definitive and exhaustive of Canadian officials' engagement with a section 7 interest. A constitutional remedy must be responsive to the violation, but a fractional depiction of the violation demands less by way of remedial response than would a more complete account. The remedial landscape looks different if one takes seriously that the choice by Canadian officials to piggyback on U.S. violations by interrogating Khadr, as well as the actual conduct of those interrogations, violated Khadr's Charter right to security of the person. Following this path necessarily leads to a broader characterization of Canadian complicity that includes but is not limited to the violations entailed in information sharing.

In 2009, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the U.K. House of Lords and House of Commons Joint Committee on Human Rights each addressed the issue of state complicity in human rights violations perpetrated by, *inter alia*, the United States in Guantánamo Bay.⁷¹ The House of Lords report is confined to complicity

⁷¹ House of Lords House of Commons Joint Committee on Human Rights, *Allegations of UK Complicity in Torture* (London: The Stationery Office Ltd., August 4, 2009), online: <<http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152.pdf>>. See also Martin Scheinin, "Report of the Special Rapporteur on the promotion and protection of human rights and

in torture, but its definition of complicity would also apply more broadly to the panoply of egregious human rights violations to which Omar Khadr has been subject:

[F]or the purposes of State responsibility for complicity in torture, however, “complicity” means simply one State giving assistance to another State in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place.

.....

We are in no doubt that ... the sending of interrogators to question a suspect who is being tortured and of observers to sit in on interrogations, are all forms of assistance and facilitation capable of amounting to complicity in torture by the State concerned when those things are done in the knowledge that the person concerned is being, has been or will be tortured by the State which is detaining him, or where that ought to be obvious to the State providing the assistance.⁷²

The word “complicity” appears nowhere in the Court’s section 7 analysis in *Khadr 2010*, and it signifies the Court’s determination to avoid grappling substantively with the fundamental issue lying at the heart of this case. Had the Court addressed Canadian complicity in any meaningful sense, it would have been driven inexorably to an account of the section 7 breach that could not be remedied simply by exclusion of improperly obtained evidence at a hypothetical future trial. A plausible account of the Charter violation would speak unequivocally to the need to seek Khadr’s repatriation.

Identifying the interrogations as a direct violation of Khadr’s security of the person would have obviated the need to contrive a causal connection between the statements transferred by Canadian to U.S. authorities and the continuation of Khadr’s detention. It would also have shone a direct spotlight on the legality of the successive choices by Canadian officials about whether and how to act in relation to Omar Khadr’s detention and, specifically whether and how to exploit U.S. violations of

fundamental freedoms while countering terrorism”, U.N. Doc. A/HRC/10/3 (February 4, 2009), at para. 55:

The Special Rapporteur emphasizes that not only active participation in interrogations where people are tortured would constitute a violation of human rights law, but also taking advantage of the coercive environment. At a minimum, States which know or ought to know that they are receiving intelligence from torture or other inhuman treatment, or arbitrary detention, ... are complicit in the human rights violations in question.

⁷² *Id.*, at paras. 35, 37.

his rights to Canadian advantage. In short, it would have framed the totality of Canada's actions and possibly inactions toward Omar Khadr in terms of complicity in the flagrant and egregious rights violations committed by the United States.

Thus, the existence of a section 7 violation would not be contingent on how much or what kind of evidence was extracted, what was done with it, or how useful it was to the United States. That is not to deny that the sharing of evidence also constitutes a wrong, but rather to observe that it is not exhaustive of the rights violation. Therefore, it cannot define the extent of a remedy that will be responsive to the broader violation. And if the violation is not dependent on the sharing of evidence, then the continuity of the violation cannot depend entirely on the fate of that evidence. Instead, the continuity of the violation would reside in the failure to take steps to remedy the violations committed by Canada through its complicity with the United States.

If one attempted to understand the remedial issue through the lens of domestic analogues, more apposite examples exist than exclusion of evidence for improperly obtained evidence: if Omar Khadr was in Canada, and the United States requested his extradition to face what he has endured already and faces in the future before the Military Commissions apparatus, no Canadian court could conceivably authorize his surrender. Alternatively, if a Canadian court had jurisdiction over a trial of Omar Khadr, the sheer enormity and severity of the procedural and substantive rights violations already committed would constitute an abuse of process so massive that a judge would be compelled to stay the proceedings.⁷³ Obviously, Omar Khadr is not in Canada, and no Canadian court exercises adjudicative jurisdiction over him. But within the existing jurisdictional constraints imposed by extraterritoriality, a request for repatriation is the functional equivalent of a refusal to surrender or a stay of proceedings. In other words, an appropriate remedy would be one directed at terminating Khadr's exposure to the process. Relevant Supreme Court of Canada jurisprudence sets the bar high for a stay of proceeding: an abuse of process will justify a stay only where

⁷³ Indeed, the Ontario Superior Court of Justice stayed the extradition of Abdullah Khadr (Omar's brother) to the United States based on U.S. complicity in Abdullah's treatment by Pakistani authorities. *United States of America v. Khadr*, [2010] O.J. No. 3301, 2010 ONSC 4338 (Ont. S.C.J.).

- (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
- (2) no other remedy is reasonably capable of removing that prejudice.⁷⁴

Using these criteria, one could hardly imagine a clearer case for a stay of proceedings or, by implication, its functional analogue in the circumstances, namely, a request for Omar Khadr's repatriation to Canada.

Rather than follow through on the implications of its own analysis and oblige the Prime Minister to request exclusion of evidence obtained by Canadian officials, the Court resiled from ordering any remedy.⁷⁵ The Court invokes the Crown prerogative over foreign affairs to justify why the Court will declare that Canadian officials have violated Omar Khadr's rights, but will not order the Prime Minister to do anything in particular about it. The prerogative refers to those powers reserved to the executive (formally, the Governor General; practically, the Prime Minister and the Cabinet) that the legislature has not (yet) circumscribed or supplanted. The perennial debate about the prerogative turns on whether, in Dicey's words, the "residue of discretionary or arbitrary authority ... legally left in the hands of the Crown",⁷⁶ is accountable in substance to the rule of law and institutionally to the courts on judicial review.

The Court's analysis can best be summarized as a Canadian performance of what, in U.K. jurisprudence, legal scholar Thomas Poole dubs the "prerogative two-step":

[S]tep 1, the refusal to countenance the idea of a gap in the normal framework of the law and the assertion that ordinary principles apply to prerogative law-making;

Step 2, the accommodation of government interests ('act of state'; 'national security') and equivocation or uncertainty in the application of those principles.⁷⁷

In Step 1, the Court gestures in the direction of its own *dicta*, to the effect that the "executive is not exempt from constitutional scrutiny",

⁷⁴ *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411, at para. 75 (S.C.C.). See also *R. v. Regan*, [2002] S.C.J. No. 14, [2002] 1 S.C.R. 297, at para. 54 (S.C.C.).

⁷⁵ Although as I argue below, the Court's s. 7 analysis hints at the minimum that the government can get away with doing.

⁷⁶ Quoted in *Khadr 2010*, *supra*, note 3, at para. 34.

⁷⁷ Thomas Poole, "Judicial Review at the Margins: Law, Power and the Prerogative" (2010) 60 U.T.L.J. 81, at 103.

citing *Operation Dismantle*.⁷⁸ It gestures broadly at the rule of law in a constitutional democracy wherein “all government power must be exercised in accordance with the Constitution”.⁷⁹

Consistent with Poole’s depiction of the U.K. courts, the Court does not formally repudiate its earlier jurisprudence and replace it with a U.S. style political question doctrine that immunizes foreign relations from judicial scrutiny. On the contrary, the Court cites the extradition case of *Burns* for the proposition that “in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government’s foreign affairs prerogative is exercised in accordance with the constitution”.⁸⁰ In *Burns*, the Court ordered the Minister of Justice to seek assurances that the death penalty would neither be sought nor imposed on a fugitive as a precondition to extradition.

In Step 2, the Court bows to its executive partner in the separation of powers: each assertion of the rule of law in Step 1 is met with the equal and opposite assertion in Step 2 that the executive possesses the authority and the expertise over the conduct of foreign relations. The government is “better placed [than the judiciary] to make such decisions within a range of constitutional options” and must retain “flexibility in deciding how its duties under the power are to be discharged”.⁸¹

The Court diffuses the tension by retaining the substantive idea that the executive prerogative must be exercised in conformity with the Charter, and jettisoning the Court’s institutional responsibility for ensuring that it does so. This in turns requires a means of rationalizing why the Court should resile from its remedial jurisdiction in this case, unlike prior cases. The judgment relies explicitly on two traditional jurisprudential techniques for isolating and distinguishing Khadr’s situation.

First, it distinguishes its precedent in *Burns* in the following concise passage:

The specific facts in *Burns* justified a more specific remedy. The fugitives were under the control of Canadian officials. It was clear that assurances would provide effective protection against the prospective Charter breaches: it was entirely within Canada’s power to protect the fugitives against possible execution. Moreover, the Court noted that no public purpose would be served by extradition without assurances that would not be substantially served by extradition with assurances, and

⁷⁸ *Khadr 2010, supra*, note 3, at para. 36.

⁷⁹ *Id.*, at para. 37.

⁸⁰ *Id.*

⁸¹ *Id.*

that there was nothing to suggest that seeking such assurances would undermine Canada's good relations with other states: *Burns*, at paras. 125 and 136.

The present case differs from *Burns*. Mr. Khadr is not under the control of the Canadian government; the likelihood that the proposed remedy will be effective is unclear; and the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court.⁸²

The Court here indulges in the classic tactic of invoking a distinction without a difference. *Burns* was under the control of Canadian officials, whereas Khadr is not. True, but so what? The Court seems to attach significance to the fact that Canada can fully protect fugitives from the death penalty by securing assurances, or by refusing to extradite in the absence of assurances. In Khadr's case, Canada can only protect him if the U.S. agrees to repatriate. With neither warning nor explanation, the Court here introduces a legal rule for constitutional remedies that the perfect shall be the enemy of the good: an effective remedy is one that fully vindicates the rights of the individual; therefore, the Court should do nothing rather than grant a remedy that *may* only have that effect. This would seem inconsistent with any plausible account of the Court's remedial jurisdiction under section 24(1) of the Charter. Remedial efficacy must be calibrated to the options available where the state enjoys nationality but not territorial jurisdiction over the person concerned.

A deeper flaw in the reasoning is that the Court conflates the U.S. violations of Khadr's international human rights with Canada's violation of his Charter rights. A request for repatriation may indeed fail to terminate U.S. violations if the request is refused, but the task is to conclude Canada's ongoing complicity in those rights violations. Of course, the open secret is that the Canadian government does not fear that a genuine repatriation request, made in good faith, with a view to negotiating a mutually acceptable outcome, will cause friction with a recalcitrant United States; what the government has really and realistically feared all along is that the request would be granted. The risk that the Prime Minister would not execute his legal duty in good faith, and that the Court would be called upon to engage in the task of evaluating executive compliance, hardly amounts to an intrusion into executive conduct of foreign affairs so inevitable as to warrant pre-emptive denial of the remedy.

⁸² *Id.*, at paras. 42-43.

The Court's reference to public purpose is directed at the specific remedy of repatriation (as opposed to judicial constraints on the foreign affairs prerogative), but beyond that, it is ambiguous. The Court does not identify a public purpose that would be served by refusing to request Khadr's repatriation. In *Kindler*,⁸³ the government successfully argued that mandatory assurances created a pressing and substantial risk that "Canada might become a safe haven for criminals in the United States seeking to avoid the death penalty".⁸⁴ Less than a decade later, the Court in *Burns* repudiated what the *Kindler* dissent described as an "*in terrorem* argument put forward without any evidentiary basis".⁸⁵ In *Khadr 2010*, the government made no submissions, tendered no evidence and received no questions from the bench about any public purpose that would be served by denying Khadr a judicial remedy. The Court did not ask the government to explain why it refused to request repatriation, and the government supplied no reasons for its refusal to request repatriation.⁸⁶

The Court remarks that there was no evidence in *Burns* to suggest that requests for death penalty assurances would damage foreign relations with the United States, whereas the Court in *Khadr 2010* was putatively unable to properly assess the impact of a repatriation request on Canada-U.S. relations. The evidence before the Court in *Burns* was that other countries systematically requested and obtained death penalty assurances prior to extradition, and Canada had twice requested and twice obtained such assurances, with no adverse diplomatic consequences. The evidence before the Court in *Khadr 2010* was that all other Western states had already requested and obtained repatriation of their citizens (and even permanent residents). The Court's precedent in *Burns* belies rather than supports its institutional incapacity to assess the diplomatic impact of a request for repatriation. The government adduced no evidence indicating that a request for repatriation would damage diplomatic relations and, as the Federal Court of Appeal observed "when

⁸³ *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779 (S.C.C.).

⁸⁴ *Id.*, at para. 188.

⁸⁵ *Id.*, at para. 112.

⁸⁶ If the public purpose is to subject Omar Khadr to "justice" before a U.S. court, the Court's starting proposition that the entire Military Commission apparatus constitutes a breach of international humanitarian law, invalidates that purpose. If the public purpose is to obstruct Omar Khadr's return to his country of citizenship in the name of Canadian security, the Court chose not to validate it explicitly, leaving it instead as a blank to be filled in by the workings of a post-September 11 imagination. Of course, the Supreme Court of Canada has travelled down this road in *Suresh*, *supra*, note 57, at para. 78, where it concluded that in exceptional circumstances, it may be constitutionally permissible for a non-citizen to be deported to face a serious risk of torture.

pressed in oral argument, counsel for the Crown conceded that the Crown was not alleging that requiring Canada to make such a request would damage its relations with the United States”.⁸⁷

The Court’s professed inability to assess the evidence before it seges smoothly into its second concern, namely, the inadequacy of the evidentiary record. Here, the Court emphasizes that it possesses an “incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr’s request”.⁸⁸ According to the Court, Khadr is trapped on unstable and shifting legal terrain, and the Court is ignorant of past and ongoing negotiations between Canada and the United States in relation to his evolving “legal predicament”.⁸⁹ These factors “signal caution in the exercise of the Court’s remedial jurisdiction”.⁹⁰

The Court does not indicate why it would be impossible or inappropriate for the government to furnish an adequate evidentiary record because of diplomatic or foreign relations concerns. Nor does it elaborate on what the Court would need to know about the range of considerations at play. One wonders if it overstates the inadequacy of the record, given the fact that every other U.S. ally successfully obtained repatriation of its citizens (and, in some cases, permanent residents). More importantly, for the Court to cite the inadequacy of the record as a reason to deny a remedy, when the government alone is responsible for this deficiency, is to reward the government for withholding evidence. This seems perverse.

This attention to the record seems like a diversionary tactic in any case. The situation of other Canadians abroad seeking Canada’s assistance may raise a range of potential considerations and possible responses, but the Court could easily and appropriately have confined its examination to the specific facts of Khadr’s case: The Court knew enough of the facts to make a finding that the Canadian government is violating his Charter rights. Khadr asked the Canadian government to request his repatriation, the government refused, and Khadr sought a judicial remedy that would compel the government to seek his return.

⁸⁷ *Supra*, note 10, at para. 59. One cannot but suspect that a combined *in personem*, *in terrorem* argument (“Omar Khadr is a terrorist, and his presence in Canada would jeopardize national security”) is so powerful that the government need not (indeed could not) utter it in order for the Court to succumb to it.

⁸⁸ *Khadr 2010*, *supra*, note 3, at para. 44.

⁸⁹ *Id.*, at para. 45.

⁹⁰ *Id.*

For purposes of exercising remedial discretion, the relevant “unknown” in the record before the Court was not evidence but reasons. Why did the Prime Minister refuse to request repatriation? The script, from which the government never strays, declares only that “Omar Khadr faces very serious charges, including murder, attempted murder, conspiracy, material support for terrorism, and spying. The Government of Canada continues to provide consular services to Mr. Khadr.” These are not reasons.

Before the Court, the government took the position that the decision to refuse to seek Khadr’s repatriation fell outside the purview of constitutional review; in oral argument, the government disavowed any obligation to explain the refusal. After all, if the Charter does not hold government accountable for how it exercises the foreign affairs prerogative, principles of legality should not require the government to justify when, why or how it exercises that power.

The Court evidently rejected the proposition of unfettered and unaccountable executive prerogative for purposes of constitutional review, yet neglected to consider an ensuing burden of justification on the government at the remedial stage. The Supreme Court of Canada has, for over a decade, oriented its administrative law doctrine toward a “culture of justification” as a normative touchstone for testing the legality of government action.⁹¹ Thus, in *Baker*, the Supreme Court of Canada recognized a common law procedural duty to give reasons for decisions where important individual interests were at stake.⁹² In *Dunsmuir*, the Court ruled that when judicially reviewing the substance of a decision, be it the exercise of discretion or the application of a legal rule, a court should examine the existence of “justification, transparency and intelligibility within the decision-making process”, in addition to evaluating the outcome itself.⁹³ In 1999, McLachlin C.J.C. elaborated on her understanding of the connection between the rule of law and a culture of justification as follows:

Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in

⁹¹ The phrase comes from South African scholar Etienne Mureinik, but the concept is most associated with, and most thoroughly elaborated by, David Dyzenhaus. See, e.g., David Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 14 S.A.H.R. 11.

⁹² *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817, at paras. 35-44 (S.C.C.).

⁹³ *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190, at para. 47 (S.C.C.).

terms of *rationality and fairness*. ... Rule by fiat is unaccepted. ... Indeed, most importantly, the ability to call for such a justification as a precondition to the legitimate exercise of public power is regarded by citizens as their *right*, a right which only illegitimate institutions and laws venture to infringe. The prevalence of such a cultural expectation is, in my view, the definitive marker of a mature Rule of Law.⁹⁴

In *Suresh*, the Supreme Court of Canada imposed upon the Minister of Citizenship and Immigration a reasons requirement in relation to a decision to deport a non-citizen deemed a threat to national security back to a country where he would face a substantial risk of torture.⁹⁵ So, the Supreme Court of Canada's *dicta* sustain Charter accountability for the exercise of the foreign affairs prerogative and a duty upon Ministers to give reasons for the exercise of statutory discretion. One could thereby infer that a prerogative decision by a Minister to abandon a citizen to a regime that has already subjected that citizen to torture, and/or cruel, inhuman and degrading treatment, and which intends to subject him to an unfair trial, would attract no less a requirement of principled reasons.⁹⁶ In the context of a section 24(1) remedy, the fact that the government offered neither reasons for its refusal to request repatriation, nor a proposal of an alternative remedy, would logically support a negative inference against the government. The absence of justification for denial of the remedy should operate as a factor militating in favour of granting the remedy sought. The Court's reliance upon the inadequacy of the evidentiary record as a factor militating against any remedial order has it precisely backwards.

It requires no effort to understand the political motivation behind the government's preference for letting Omar Khadr languish in Guantánamo Bay. Why request the return of a man whose surname is synonymous with

⁹⁴ Chief Justice Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-99) 12 C.J.A.L.P. 171, at 174.

⁹⁵ *Suresh*, *supra*, note 57, at para. 126:

The Minister must provide written reasons for her decision. These reasons must articulate and rationally sustain a finding that there are no substantial grounds to believe that the individual who is the subject of a s. 53(1)(b) declaration will be subjected to torture, execution or other cruel or unusual treatment, so long as the person under consideration has raised those arguments. The reasons must also articulate why, subject to privilege or valid legal reasons for not disclosing detailed information, the Minister believes the individual to be a danger to the security of Canada as required by the Act. In addition, the reasons must also emanate from the person making the decision, in this case the Minister. ...

⁹⁶ I mean by this that reasons based on self-regarding political interests of elected officials would not satisfy the requirement of reasoned justification. One could also refer to this as "public reason".

terrorism? However, articulating legally valid reasons for inertia in the face of grotesque and ongoing human rights violations is rather more difficult. Indeed, the inability to discharge the burden of justification is the sole means by which the *Suresh* exception (permitting deportation to torture “in exceptional circumstances”) has been neutralized in practice: the government has been unable to come up with reasons capable of satisfying a court that the severity or nature of the national security risk posed to Canada by a specific non-citizen in a given case warrants deporting that person to a substantial risk of torture.⁹⁷ The Prime Minister’s calculus is thoroughly comprehensible within a realist account of role morality. The Court in *Khadr 2010* permits the government to indulge these impulses by exempting the government from the requirement to justify its rights violations. Since the Court has elsewhere indicated that the culture of justification encompasses the executive in relation to the Charter, even in matters of foreign relations, the only other available explanation is that Omar Khadr is undeserving of reasons: he resides outside of the culture of justification, somewhere in the state of exception.

V. CONCLUSION

The Court stated in *R. v. 974649 Ontario Inc.* (and reiterated in *Doucet-Boudreau*⁹⁸) that “a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach”.⁹⁹ One might transpose the point to say that the Court’s declaration that Omar Khadr’s Charter rights are being breached, no matter how sincere in theory, is only as meaningful as the remedy it engenders.

Although the Court coyly insisted that it was leaving the choice of remedial options to the executive, legal commentators in the media were instantly able to connect the dots between the Court’s account of the section 7 violation and a remedy consisting of a request for exclusion of Canadian evidence from the Military Commission proceedings. It was, therefore, predictable that the Canadian government would eventually deliver such a request to the United States government. It was equally predictable that the U.S. government would reject it. After all, attempting

⁹⁷ See *Re Jaballah*, [2006] F.C.J. No. 1706, 2006 FC 1230 (F.C.), *per* Mackay J. (no exceptional circumstances warranting deportation to Egypt).

⁹⁸ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3, at para. 25 (S.C.C.).

⁹⁹ *R. v. 974649 Ontario Inc.*, [2001] S.C.J. No. 79, [2001] 3 S.C.R. 575, at para. 20 (S.C.C.).

to tamper with the trial process of another state (by excluding evidence that the judge would otherwise deem admissible) constitutes a significantly greater intrusion into the sovereignty of another state than a request from one executive branch to another to repatriate the accused before a trial commences.¹⁰⁰ So, a remedy consisting of a request for the exclusion of evidence managed — predictably — to be both unresponsive and ineffective from Khadr’s perspective, and unacceptable from the U.S. perspective. This is not an undesirable outcome for a government with no political motive to do anything that might benefit, or even appear to benefit, Omar Khadr.¹⁰¹ The videotape of Canadian officials’ interrogation of Khadr at Guantánamo Bay was entered into evidence at a pre-trial hearing before the Military Commission in May 2010.

A more sympathetic reader of the Court’s judgment in *Khadr 2010* might defend the decision as an exemplar of Cass Sunstein’s model of judicial minimalism, whereby the Court decided the case in appropriately narrow and shallow terms, leaving it to the executive to determine a suitable appropriate course of action.¹⁰² For instance, the Court did not indicate what role (if any) Khadr’s citizenship played in the existence or scope of the Charter obligations owed to him. The Court adverted to the fact that he is a citizen, but his status did not do any explicit normative work in the judgment. The Court thus avoided ruling on the relevance of citizenship. One might endorse the Court’s reticence, and insist that resolution should await a case actually involving non-citizens, but for the fact that the Court denied leave in two cases involving appellants denied extraterritorial Charter protection on precisely that basis.¹⁰³

¹⁰⁰ Even a request for assurances that the death penalty neither be sought nor imposed as a precondition to extradition does not purport to interfere in the process by which guilt or innocence is determined.

¹⁰¹ Since Omar Khadr was interrogated hundreds of times by U.S. officials, it seems unlikely that the Canadian interviews yielded relevant evidence otherwise unavailable to U.S. prosecutors.

¹⁰² Sunstein, *supra*, note 66; Cass Sunstein, “Minimalism at War” (2004) Sup. Ct. Rev. 47.

¹⁰³ As it happens, the Afghan detainee case, among others, raised precisely that issue. Unlike Khadr, the public interest applicants in each case failed before the Federal Court and the Federal Court of Appeal, in part on the grounds that the Charter did not protect the detainees *qua* non-citizens. *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, [2008] F.C.J. No. 1700, [2009] 4 F.C.R. 149 (F.C.A.), leave to appeal refused, May 21, 2009, online: <http://scc.lexum.umontreal.ca/en/news_release/2009/09-05-21.3a/09-05-21.3a.html>. See also *Slahi v. Canada (Minister of Justice)*, [2009] F.C.J. No. 1120, 2009 FCA 259 (F.C.A.) (Charter does not apply to non-citizens interrogated by Canadian officials at Guantánamo Bay), leave to appeal refused February 18, 2010, online: <http://scc.lexum.umontreal.ca/en/news_release/2010/10-02-18.3/10-02-18.3.html>. Alexander Bickel’s account of the “passive virtues” (whereby courts decide not to decide certain cases or issues) provides the vehicle for Kent Roach’s insightful and helpful analysis of the Supreme Court of Canada’s denial of leave in the Afghan detainee case and the denial of the remedy

The judgment in *Khadr 2010* also avoids the question of whether Canada owes a positive duty under section 7 of the Charter to protect its citizens — including citizens abroad — and the contours and scope of any such duty. Again, a predilection for minimalism can explain the Court's silence. Since Canadian officials had affirmatively acted by interrogating Khadr in Guantánamo Bay, the Court could confine its inquiry to whether the conduct constituted a Charter violation. In order to resolve the case, the Court did not have to rule on whether Canada would also have violated Khadr's Charter rights had it simply chosen not to intervene in any way while the United States violated his rights.

Whatever the merits of judicial minimalism as a theory of constitutional adjudication, minimalism is ultimately unhelpful in characterizing (or defending) the remedial portion of the judgment. As I have argued, the Court's express acknowledgment that a repatriation request would be a viable remedy, as well as its abstention from imposing a remedy, both mask the remedy invited by the section 7 analysis. This complicates an attempt to describe the Court's handling of the remedial issue in the simplified typology of minimalism versus maximalism.

From another vantage point, one might also recognize the *Khadr 2010* judgment as creating what David Dyzenhaus describes as a legal "grey hole", which he defines as:

a legal space in which there are some legal constraints on executive action — it is not a lawless void — but the constraints are so insubstantial that they pretty well permit government to do as it pleases. In addition, since such grey holes permit government to have its cake and eat it too, to seem to be governing not only by law but in accordance with the rule of law, they and their endorsement by judges and academics might be even more dangerous from the perspective of the substantive conception of the rule of law than true black holes.¹⁰⁴

Here is how the judgment in *Khadr 2010* creates a "grey hole": first, the Court insists that the Charter does apply to Canadian officials in Guantánamo Bay. Second, it devises a section 7 analysis capable of extruding a specious remedy in the form of a request for evidence exclusion. Third, it issues a declaration of unconstitutionality, while indicating that it expects the government to take some kind of unspecified

in *Khadr*. See Kent Roach, "The Supreme Court at the Bar of Politics: The Afghan Detainee and Omar Khadr Cases" (National Journal of Constitutional Law, forthcoming).

¹⁰⁴ David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), at 42. Elsewhere (at 50), Dyzenhaus observes that a grey hole is in substance a black hole.

remedial action. After all, the rule of law binds the executive, even if a Court declines to use its authority to enforce it. The Court thus lets the government have its cake and eat it too: the executive can claim to be rule of law compliant because it has provided a remedy in the face of a declaration of unconstitutionality, even though not compelled to do so by court order. And it does not have to request Omar Khadr's repatriation.

Khadr 2010 exposes the dual character of the Supreme Court of Canada as a forum of principle and as an actor in institutional politics. The conventional wisdom is that as the events of September 11 recede, Anglo-European courts grow more willing to cast critical judgment on the executive's extravagant assertions that the war on terror and protecting national security trumps human rights. But the track record of the Supreme Court of Canada post-September 11 is consistent in its relative timidity: wherever possible, the Supreme Court of Canada has resolved constitutional challenges on procedural grounds¹⁰⁵ and evaded any substantive determination of unconstitutionality. In 2002, the Court did not prohibit deportation to torture;¹⁰⁶ in 2007, it did not prohibit indefinite detention;¹⁰⁷ and in 2010, it refused to issue a meaningful remedy for a citizen who was both tortured and indefinitely detained.

In *Khadr 2010*, the Court was asked to assert its jurisdiction to retrieve the most fundamental human rights of a single vilified individual from forfeiture by the institutions of majoritarian politics. No doubt the Prime Minister would have sharply criticized the Court had it actually done so, and some segment of the Canadian population would have agreed with the Prime Minister. Perhaps the Prime Minister would have flouted a Court's order to request repatriation, and with it the executive's fidelity to the rule of law. Or maybe not. We will never know. The only things we know for certain are that the government can act and will not (unless compelled by external pressure), the Supreme Court of Canada could have compelled the government to act and did not, and Omar Khadr's rights are still being violated. For purposes of Canadian law, Khadr has been buried in the mother of all legal grey holes, the place of right without remedy. And a legal grey hole is really little more than a black hole decorated with judicial wallpaper.

¹⁰⁵ *Suresh, supra*, note 57; *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.); *Khadr 2008, supra*, note 4.

¹⁰⁶ *Suresh, id.*

¹⁰⁷ *Charkaoui, supra* note 105.

POSTSCRIPT

On July 5, 2010, Zinn J. of the Federal Court ruled that the government did not accord Omar Khadr procedural fairness in responding to his request for repatriation.¹⁰⁸ He ordered the government to advise Khadr within seven days of “all untried remedies that it maintains would potentially cure or ameliorate its breach of Mr. Khadr’s Charter rights”.¹⁰⁹ The government announced that it would appeal the order. Against Khadr’s rapidly approaching trial before the Military Commission, Blais C.J. of the Federal Court of Appeal granted a stay of enforcement of Zinn J.’s remedy. Chief Justice Blais stated, “I have no hesitation to conclude that the balance of convenience and the interest of justice favor the [Prime Minister’s]” interests in protecting incursion into the executive prerogative over foreign relations.¹¹⁰ On September 24, 2010, Stratas J.A. of the Federal Court of Appeal denied an application to expedite the appeal from Zinn J.’s judgment in order that it be heard before the scheduled resumption of the Military Commission trial on October 18, 2010.¹¹¹

The actual resumption of the Military Commission trial was delayed until October 25, 2010. Plea negotiations occurring prior to resumption led to Omar Khadr pleading guilty to all charges when the trial resumed. The terms of the plea negotiation apparently contemplate an eight-year sentence. He will spend an additional year imprisoned in Guantánamo Bay, and then serve the remainder of his sentence in a Canadian prison. As of the date of writing, Canada officially denies its cooperation in a plea deal, and the diplomatic notes exchanged between Canada and the United States have not yet been publicly disclosed.

Canada’s actual commitment to transfer Khadr to a Canadian prison will prove crucial, as the current Canadian government has refused requests by Canadian prisoners in foreign prisons for transfer to Canadian prisons even where the detaining state consents. The constitutionality of these refusals is currently before the courts, and legislation has been introduced to give the Minister of Public Safety and Emergency Preparedness even wider and less accountable discretion to refuse requests.¹¹² One suspects that litigation will be required to effectuate timely

¹⁰⁸ *Khadr v. Canada*, [2010] F.C.J. No. 818, 2010 FC 715 (F.C.).

¹⁰⁹ *Id.*, at clause 3 of Order.

¹¹⁰ *Canada (Prime Minister) v. Khadr*, [2010] F.C.J. No. 901, 2010 FCA 199 at para. 33 (F.C.A.).

¹¹¹ *Canada (Prime Minister) v. Khadr*, [2010] F.C.J. No. 1203, 2010 FCA 245 (F.C.A.).

¹¹² See, e.g., *DiVito v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2009] F.C.J. No. 1158, 2009 FC 983 (F.C.); Bill C-59, *An Act to amend the International Transfer*

compliance by the current Canadian government with any undertaking regarding Omar Khadr. If so, it seems likely that the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada will once again confront the choice between institutional self-interest and fidelity to the rule of law. One hopes that all courts — including and especially the Supreme Court of Canada — will make the principled choice.

