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Jane M. Arbour

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Canada v. Khadr: Reflections on the Use of International Law in the Repatriation Litigation

Jane M. Arbour*

I. INTRODUCTION

This paper was conceived to be an examination of the use of international law by the Supreme Court of Canada in its soon to be released decision in the Omar Khadr repatriation litigation.[1] The examination can be brief as the Supreme Court made no more than passing reference to international law in *Khadr 2010* despite the decisions of the Federal Court employing Canada's obligations under international human rights law as an aid in the interpretation of the scope of his section 7 Charter rights. Nevertheless, the paper addresses in general terms the extraterritorial application of both the *Canadian Charter of Rights and Freedoms*[2] and international human rights law ("IHRL") treaties to which Canada is a party, using the differing approaches of the three levels of court in the Omar Khadr repatriation litigation in determining the relevant principles of fundamental justice as a backdrop to this discussion.

The discussion of extraterritorial application in this paper is limited to questions of the application of the Charter and IHRL treaties to the actions of Canadian officials that take place outside the territory of Canada. The removal of persons from Canada to alleged violations of human rights in a foreign state and the impact of foreign events on the fairness

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* General Counsel, Department of Justice Canada. The views expressed in this paper are the author's and cannot be attributed to the Department of Justice or the Government of Canada. This paper is current to April 14, 2010.

1 *Canada (Prime Minister) v. Khadr*, [2010] S.C.J. No. 3, 2010 SCC 3 (S.C.C.), revg in part [2009] F.C.J. No. 893, 2009 FCA 246 (F.C.A.), which had affirmed [2009] F.C.J. No. 462, 2009 FC 405 (F.C.A.) [hereinafter "*Khadr 2010*"].

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

of Canadian trials are two other types of fact situations in which questions of extraterritoriality arise, but these are not addressed here.

My first premise is that the Supreme Court of Canada, in limiting the application of the Charter to the territory of Canada, with certain limited exceptions, has taken an approach that is largely consistent with that of international courts and tribunals, the courts of other states and general academic commentary on the scope of state enforcement jurisdiction at international law. Part II of the paper considers the Supreme Court's decision in *R. v. Hape*[3] in this light.

Part III of the paper posits that this approach to the extraterritorial application of the Charter, based on general international law principles, applies equally well to general questions of the extent of the extraterritorial reach of a state's obligations under international human rights law treaties. In outlining the considerations underlying this position, no attempt is made to canvass the wealth of materials that discuss the question of whether IHRL treaties apply to the actions of states' parties outside their territory. Rather, several key sources will be referenced together with some of the more recent decisions.

Part IV of the paper looks at implications of the analysis in Parts II and III for the interpretation of the scope and reach of section 7 of the Charter. The differing approaches to the principles of fundamental justice taken by the two levels of the Federal Court and by the Supreme Court in the *Khadr* repatriation litigation are the focus of this part of the paper.

The paper concludes with a number of general observations on the implications of the limited scope of state enforcement jurisdiction for the advancement of the international project for the protection of human rights.

II. EXTRATERRITORIAL APPLICATION OF THE CHARTER

In 2007, the Supreme Court of Canada, through the majority reasons in *Hape*,[4] set a new direction for the analysis of the potential application of the Charter to the actions of Canadian officials outside of Canada. Relying on the foundational public international law principle of the sovereign equality of all states and on the principles of non-intervention and comity by which those states are called upon to respect each other's

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[3] [2007] S.C.J. No. 26, 2007 SCC 26, [2007] 2 S.C.R. 292 (S.C.C.) [hereinafter "*Hape*"].

[4] *Id.*, at paras. 1-122: Justice LeBel wrote the judgment of the majority. Justices Bastarache and Binnie wrote separate sets of reasons.

sovereignty, the Court tied the application of the Charter to its understanding of international rules governing the jurisdiction of states.

A number of commentators have rightfully noted that the word "jurisdiction" has a number of meanings even when restricted to matters of state competence as understood at international law.[5] State jurisdiction can be broken down into various categories, including state authority to make laws (legislative or prescriptive jurisdiction), to enforce those laws (executive or enforcement jurisdiction) and to have issues determined by domestic courts and tribunals (adjudicative jurisdiction).[6] Turning to the Supreme Court's decision in *Hape*, it is clear that section 32(1) of the Charter, which governs its application, is now to be read in a manner consistent with the approach taken at international law to the jurisdiction of states.[7] In particular, whether the Charter applies to Canadian officials conducting or participating in an investigation in a foreign state is now to be determined in a manner consistent with *enforcement jurisdiction* at international law.[8]

The *Hape* case dealt with the application of section 8 (search and seizure) of the Charter to the actions of Royal Canadian Mounted Police ("RCMP") officers in the Turks & Caicos Islands in furtherance of a Canadian criminal investigation. It is not entirely clear to what extent this criminal law context affected the Court's choice to rely on state enforcement jurisdiction for its analysis of the scope of extraterritorial application of the Charter and, indeed, whether aspects of the *Hape* analysis can be restricted to criminal investigation activities outside Canada. The Supreme Court appears to characterize the Charter as an enforcement document:

> The *Cook* approach therefore puts the focus in the wrong place, as it involves looking for a conflict between concurrent jurisdictional claims, whereas *the question should instead be viewed as one of extraterritorial enforcement of Canadian law*. The issue in these cases

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[5] See generally F.A. Mann, *The Doctrine of Jurisdiction in International Law*, Recueil Des Cours 1964-I (Leyde: A.W. Sijthoff, 1964) [hereinafter "Mann"] and *The Doctrine of International Jurisdiction Revisited After Twenty Years*, 186 Recueil Des Cours 1984-III (Boston: Martinus Nijhoff Publishers, 1985).

[6] See generally I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) [hereinafter "Brownlie"], at 297*ff* (and references at note 1*ff*) on state jurisdictional competencies. See also the Court's discussion in *Hape*, *supra*, note 3, at paras. 57-65. The Supreme Court makes reference to S. Coughlan *et al*., "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization" (2007) 6 C.J.L.T. 29 [hereinafter "Coughlan *et al*."].

[7] *Hape*, *supra*, note 3: see, *e.g*., paras. 93, 94, 96, 104 and 113.

[8] *Id.*: see in particular paras. 85, 87 and 105.

> is the applicability of the *Charter* to the activities of Canadian officers conducting investigations abroad. *The powers of prescription and enforcement are both necessary to application of the Charter.* The *Charter* is prescriptive in that it sets out what the state and its agents may and may not do in exercising the state's powers. Prescription is not in issue in the case at bar, but even so, *the Charter cannot be applied if compliance with its legal requirements cannot be enforced*. Enforcement of compliance with the *Charter* means that when state agents act, they must do so in accordance with the requirements of the *Charter* so as to give effect to Canadian law as it applies to the exercise of the state power at issue. However, as has already been discussed, Canadian law cannot be enforced in another state's territory without that state's consent. *Since extraterritorial enforcement is not possible, and enforcement is necessary for the Charter to apply, extraterritorial application of the Charter is impossible*.[9]

In *Hape*, the Supreme Court recognized that the power, authority, competence or "jurisdiction" of states to enforce their laws outside of their own territory, at international law, is quite limited.[10] As noted in the introduction, my starting premise is that this aspect of the Supreme Court's approach to the extraterritorial application of the Charter is largely consistent with general international law principles governing the exercise of state enforcement authority outside its territory.

Generally speaking, state enforcement jurisdiction is largely territorial in scope with certain limited exceptions.[11] A state may exercise authority (enforce its laws) in the territory of a foreign state only with the consent, acquiescence or approval of that foreign state. Other exceptional circumstances in which international law recognizes some extraterritorial exercise of state enforcement authority include foreign territory under military occupation, the territorial sea, embassies and consular offices as well as ships and aircraft registered in or flying the flag of the state.[12] It

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[9] *Id.*, at para. 85 (emphasis added).

[10] *Id.*, at para. 65.

[11] *Id*. The Supreme Court of Canada, in *Hape*, referenced a number of academic sources, including I. Brownlie, *supra*, note 6, and Mann, *supra*, note 5, as well as *Case of the S.S. "Lotus"* (1927) P.C.I.J. Ser. A, No. 10 and *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14.

[12] Brownlie, *supra*, note 6, at 113:

> ... the equation of territory and jurisdiction is theoretically sound. Abstract discussion as to whether ships, aircraft, territorial sea, and embassies are "territory" lacks reality, since in a legal context the word denotes a particular sphere of legal competence and not a geographical concept. Ultimately territory cannot be distinguished from jurisdiction for certain purposes. Both terms refer to legal powers, and, when a concentration of such

may be noted that, apart from consent, each category of exception arises within a different context and the principles governing the appropriate exercise of extraterritorial state jurisdiction derive from the laws and principles governing the relevant context.[13]

In *Hape*, the Court primarily addressed the issue of whether the Turks and Caicos could be said to have consented to the exercise of Canadian law on its territory such that a Canadian warrant for aspects of the criminal investigation would apply on its territory. No such consent was found and the Charter was held not to govern the actions of the RCMP in the Turks and Caicos in the circumstances of that investigation. While consent was the main consideration on the facts, the majority recognized other exceptions that exist at international law.[14]

Where the Supreme Court differs from these general international principles is in its recognition of a further, or exceptional exception based on participation by Canadian officials in activities of a foreign state where those foreign activities violate fundamental human rights.[15] It appears that the Supreme Court views comity as a discretionary rule affecting the scope of state jurisdiction such that states, or at least the courts of a state, may disregard the sovereignty of a foreign state which is engaged in violations of fundamental human rights. While much can be said about the Court's decision to retain a seemingly discretionary power to apply the Charter when it would not otherwise apply according to general international law principles regarding enforcement jurisdiction, this is not the focus of the paper.

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powers occurs, the analogy with territorial sovereignty justifies the use of the term "territory" as a form of shorthand.

[13] For example, the exception relating to military occupation of foreign territory is governed by international rules related to armed conflict. In determining whether or not the Charter applied to the actions of the Canadian Forces in detaining individuals in Afghanistan, the Federal Court, applying *Hape*, concluded that the Charter did not apply given that Canada was not an occupying power in any part of Afghanistan in the relevant timeframe and could not be said to be exercising enforcement jurisdiction over Afghan detainees: *Amnesty International Canada v. Canada (Canadian Forces)*, [2008] F.C.J. No. 356 (F.C.A.), affd [2008] F.C.J. No. 1700, 2008 FCA 401, [2009] 4 F.C.R. 149 (F.C.A.), leave to appeal refused [2009] S.C.C.A. No. 63 (S.C.C.).

[14] *Hape*, *supra*, note 3, at paras. 65 and 105.

[15] *Id.*, at para. 101.

III. EXTRATERRITORIAL APPLICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES

Much has been written about the extent of the application of international human rights law treaties beyond the territory of the states that are party to them. In the past 10 years, many articles have addressed and attempted to reconcile the jurisprudence of, among others, the International Court of Justice ("ICJ"), the European Court of Human Rights, the British House of Lords and the American Supreme Court speaking on the issue of the extraterritorial reach of legislative, constitutional or international human rights obligations.[16]

From the brief survey that follows, it will be clear that I am of the view that most of the jurisprudence to date is consistent, at least in its result, with the general approach of the limited extraterritorial reach of state enforcement jurisdiction at international law. This view underscores my second premise, that public international law suggests a limited application of a state's obligations under IHRL treaties to the actions of its officials outside of its territory, as a general rule. There may, of course, be exceptions to this general proposition, exceptions which may be set out expressly in the text of particular treaty provisions or which can be implied through an interpretation based on the purpose of the particular right.[17] Note also that this discussion of the limited extraterritorial reach of the IHRL treaties does not encompass peremptory norms of international law.

In short, treaties such as the *International Covenant on Civil and Political Rights*,[18] which make general reference to state parties' obligations

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[16] See, *e.g.*, the various papers in F. Coomans & M.T. Kamminga, eds., *Extraterritorial Application of Human Rights Treaties* (Antwerp-Oxford: Intersentia, 2004), as well as P.C. Cernadas, "European Migration Control in the African Territory: The Omission of the Extraterritorial Character of Human Rights Obligations" (2009) 10 Inter. J.H.R. 179; Coughlan *et al*., *supra*, note 6; M. Gondek, "Extraterritorial Application of the European Convention on Human Rights: Territorial Application in the Age of Globalization?" (2005) Nethl. Int'l L. Rev. 349; S. Miller, "Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention" (2009) 20 E.J.I.L. 122.

[17] An example of a specific right that necessarily has extraterritorial application can be found in *El Ghar v. Libya*, CCPR/C/82/D/1107/2002, a decision of the U.N. Human Rights Committee (November 15, 2004). This case discusses the obligation of a state party to the Covenant, under art. 12.2, to provide citizens outside its territory the documents necessary to allow the citizen to enter the state (a passport case).

[18] U.N. General Assembly Resolution 2200 A (XXI) (December 16, 1966). Canada acceded on May 19, 1976.

to individuals based on "territory" and/or "jurisdiction",[19] or which remain silent on the general scope of state obligation, should be read in light of general international law rules of state jurisdiction. Further, when one takes into account the often touted formula that states are obligated under international human rights treaties to respect, protect and promote[20] the human rights set out in those treaties to which they are a party, it can perhaps be more easily understood why states might object to being told they must protect the human rights of individuals in territories over which they lack the effective jurisdiction at international law to do so.

What follows is a brief mention of some decisions of the International Court of Justice and the European Court of Human Rights, as well as some commentary from the United Nations Human Rights Committee and the United Nations Committee Against Torture.

1. The International Court of Justice

The International Court of Justice discussed the question of the application of the IHRL treaty obligations of the State of Israel in respect of its actions in the Palestine territory in the *Wall* case.[21] The case was premised on the fact of Israeli military occupation of the territory in question. It is not surprising therefore that the ICJ held that Israel's IHRL treaty obligations applied. The case is more often cited for the Court's discussion of the relationship between IHRL and international humanitarian law.

A year later, the ICJ again found the application of IHRL treaty obligations of Uganda applied outside its territory on the basis of its effective military occupation of parts of the territory of the Democratic Republic of the Congo.[22] This case also discusses gross violations of international humanitarian law.

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[19] Article 2.1 of the ICCPR reads, in part, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized …".

[20] See generally the *Vienna Declaration and Programme of Action* adopted by the World Conference on Human Rights (June 25, 1993). See also various General Comments by U.N. human rights treaty bodies.

[21] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, I.C.J. Reports 2004, at 136. See, in conclusion on IHRL treaties, paras. 111-113.

[22] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, at 168. See, *e.g.*, para. 211.

2. United Nations Treaty Bodies

The Human Rights Committee has set out its interpretation of the scope of states parties' obligations under article 2 of the *International Covenant on Civil and Political Rights* in its General Comment No. 31.[23] Paragraph 10 of this general comment is often cited to support the view that a state party's obligations under the Covenant apply wherever the state has effective control over persons outside its territory. Paragraph 10 reads in part:

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party ... This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

It is unclear whether this paragraph asserts that Covenant obligations apply in all cases where state officials exercise effective control over a person outside the jurisdiction of the state or to all persons within the jurisdiction of the state outside its territory.[24] To the extent that this General Comment asserts the former, it arguably is inconsistent with public international law principles governing the scope of extraterritorial state enforcement jurisdiction. However, the General Comment is not clear and the Committee cites no authorities for this assertion.

The general comments of United Nations treaty bodies are not legally binding documents[25] and, to the extent that aspects of them are not derived from the text of the treaty in question, from the views of the

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[23] CCPR/C/21/Rev.1/Add.13, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant (May 26, 2004).

[24] The distinction between effective control over persons outside both the territory and the jurisdiction of a state and the control of a state over persons within its jurisdiction — where that jurisdiction lies outside the territory of the state — was important, for example, in the resolution of the Canadian Afghan detainees litigation: *supra*, note 13. See the discussion of international and comparative law sources by Mactavish J. at paras. 187-266.

[25] See, *e.g.*, the decision of Mactavish J. in the Afghan detainees litigation, *supra*, note 13, at para. 239.

treaty body under its individual complaint mechanism or from case law, their interpretive value is questionable. I am only aware of one more recent communication in which the Committee discusses the application of the Covenant to state actions outside its territory. No mention is made of General Comment 31 in the Committee's consideration of the merits of this complaint.

In *Munaf v. Romania*,[26] the Human Rights Committee considered the communication of an Iraqi-American dual national against Romania in which it was alleged that Romania violated its obligations under the Covenant *in Iraq* for failing to intervene on behalf of the author with Iraqi officials. The facts are complicated but two relevant factual elements are that the author passed through the Romanian Embassy in Iraq before being turned over by the Multinational Force — Iraq ("MNF-I") to the Iraqi government and Romania was participating in MNF-I at the time but its forces did not participate in the detention or transfer of the author. In its views on the merits, the Committee did not discuss whether Romania could be said to have had effective control over the person of Mr. Munaf even though it was argued. It appears that Romania did not have that control. Furthermore, the Committee did not discuss the relevance of Romanian participation in MNF-I. Rather, the Committee seems to have based its views on the presence of Mr. Munaf in the Embassy. The Committee relied on some of its jurisprudence dealing with state removal to serious violations of human rights in another state and found that the facts did not establish foreseeability of future harm by Iraq on the part of the Romanian officials at the time Mr. Munaf left the Embassy. Interestingly, the Committee concluded that it "cannot find that the State party exercised jurisdiction over the author in a way that exposed him to a real risk of becoming a victim of any violations under the Covenant".[27]

The Committee Against Torture ("CAT") has set out its interpretation of the obligations of states' parties to the *Convention Against Torture and Cruel, Inhuman and Degrading Treatment or Punishment*[28] in its General Comment No. 2[29] on article 2.[30] Paragraph 16 outlines the CAT Commit-

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[26] CCPR/C/96/D/1539/2006 (August 21, 2009). Note: two sets of dissenting views were written.

[27] *Id*., at para. 14.6.

[28] U.N. General Assembly Resolution 39/46 (December 10, 1984). Canada ratified the CAT on June 24, 1987.

[29] CAT/C/GC/2, General Comment No. 2: Implementation of article 2 by States parties (January 24, 2008).

tee's understanding of the phrase "any territory under its jurisdiction" in article 2.1. This paragraph states in part:

> … The Committee has recognized that "any territory" includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. The reference to "any territory" in article 2 … refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control … The Committee considers that the scope of "territory" under article 2 must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention.

It will be seen from this that the CAT Committee's discussion of jurisdiction is fairly close to what has been described in this paper as the approach of general public international law,[31] but arguably takes a broader approach in certain respects, such as its references to peacekeeping operations in juxtaposition with military occupation and to the "*de facto* control of persons in detention" without additional explanation.

The CAT Committee provides no sources for its interpretive approach, beyond references to various articles of the CAT. It is doubtful whether the Committee has had many, if any, occasions in the course of deliberating on individual communications to actually consider jurisdiction in light of specific fact situations.

3. The European Court of Human Rights

The jurisprudence of the European Court of Human Rights on questions of the extraterritorial application of the *European Convention on Human Rights*[32] ("ECHR") is extensive and growing. The leading case is *Bankovic*.[33] This decision of the Grand Chamber clearly states that the obligations of a state party to the European Convention are generally

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[30] Article 2.1 of the CAT reads: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

[31] See also M. Nowak & E. McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford: University Press, 2008), at 116-17, in particular, on the meaning to ascribe to the words "any territory under its jurisdiction" in article 2 of the CAT.

[32] Canada is not a party to this regional instrument.

[33] *Bankovic and Others v. Belgium and 16 Other Contracting States*, [GC] ECHR No. 52207/99, ECHR 2001-XII.

speaking limited to the territory of the state. The exceptions to this rule include the consent of a state to the exercise on its territory of jurisdiction by a state party to the ECHR, military occupation of foreign territory and other exceptions recognized at international law.[34]

Two more recent decisions of the European Court examining the question of extraterritoriality are of interest.

In the *Case of Al-Saadoon and Mufdhi*,[35] the Fourth Section of the European Court addressed the scope of the ECHR obligations of the United Kingdom in respect of two individuals detained by its military forces in Iraq. The European Court held that article 3 of the European Convention applied to the transfer by U.K. forces of two individuals in Iraq for prosecution and therefore to a risk of the imposition of the death penalty by Iraq. It appears that the basis for the extraterritorial application of the Convention in this case was the fact that both Al-Saadoon and Mufdhi had been captured and detained by the U.K. military forces in 2003, during the period of U.K. military occupation of parts of Iraq,[36] and remained in U.K. custody until they were transferred to Iraq in 2008. As noted above, military occupation of foreign territory is one of those exceptions in which states are found to exercise extraterritorial enforcement jurisdiction. This decision can be seen as an example of both the military occupation exception and the application of the idea of a continuity of action to which obligations will attach. In this case, although the military occupation ceased before transfer, the U.K. obligations to protect the human rights of persons in that occupied territory extended beyond the end of the occupation to apply to U.K. actions to extricate itself from obligations which arose at that earlier period in time.

In the *Case of Medvedyev and Others*,[37] the Grand Chamber of the European Court had occasion to consider the application of the European Convention to the interception by a French naval vessel of a ship registered in Cambodia. The ship, which was thought to be engaged in drug trafficking, was intercepted by France on the high seas. At issue was whether France had violated the rights of the individuals on board to be

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[34] *Id*. See, *e.g*., para. 71.

[35] *Case of Al-Saadoon and Mufdhi v. United Kingdom*, European Court of Human Rights, Application No. 61498/08, decision of the Fourth Section (March 2, 2010). A request for referral to the Grand Chamber is pending.

[36] *Al-Saadoon and Mufdhi*, *id*. The significant timing is set out at paras. 129-130.

[37] *Case of Medvedyev and Others v. France*, European Court of Human Rights, Application no. 3394/03, decision of the Grand Chamber (March 29, 2010).

brought promptly before a judicial officer upon detention given that it had taken some 13 days to bring their ship into a French port.

Noting the "essentially territorial notion of jurisdiction" and that in "specific situations, customary international law and treaty provisions have clearly recognized and defined the extraterritorial exercise of jurisdiction by the relevant State", the Court based its application of the Convention on the fact that French officials "exercised full and exclusive control" over the intercepted ship and its crew "at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner" until they were charged and tried in France.[38]

The approach of the European Court in *Medvedyev* is interesting in several ways. Readers will note its affirmation of its approach in *Bankovic* and other earlier decisions. In addition, the Court chose not to rely on the fact that France had the consent of Cambodia to intercept and board the vessel, preferring instead to assess the facts as one continuous event which resolved itself within French territory. In my view, the threads of this analytical approach can be seen in a number of treaty body decisions regarding states that have taken control illegally of individuals outside their territory and brought them forcibly within their territory.[39]

The cases highlighted in this part of the paper focus on extraterritorial exercises of state jurisdiction based on some measure of state control over territory or place and not just over persons. As I hope has been made apparent, effective state control over persons outside the territory of the state is an alternate and more expansive approach to the scope of extraterritorial state enforcement jurisdiction. The litigation involving Omar Khadr, which is discussed in Part IV, does not raise the issue of effective control over the person as Canada had no such control over the person of Omar Khadr.

IV. THE REPATRIATION LITIGATION

The question of the extraterritorial reach of Canada's IHRL obligations has some relevance to the Supreme Court of Canada's recent

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[38] *Id.* The Court's discussion of the jurisdiction of France for the purposes of Article 1 of the Convention is found at paras. 62-67.

[39] One example from the jurisprudence of the European Court of Human Rights is *Öcalan v. Turkey* (2005), 41 EHRR 985; ECHR No. 46221/99, although extraterritorial jurisdiction could also be rooted in the acceptance or acquiescence of officials of the Kenyan government.

decision in *Khadr 2010*.[40] As already noted, the genesis for this paper was anticipation of a discussion of international human rights law by the Supreme Court in *Khadr 2010* given the approach taken at the Federal Court in referencing IHRL in its analysis of the principles of fundamental justice under section 7 of the Charter. As the Supreme Court did not discuss international law in its decision, this paper is left to observe that there was no take-up of the Federal Court approach and to discuss why that matters.

The decision of the Supreme Court in *Khadr 2010* has its origins in the judicial review application brought by Omar Khadr to challenge the Canadian government's refusal to seek his repatriation from the government of the United States. This application for judicial review followed the disclosure of information ordered by the Supreme Court in its 2008 decision. The disclosed information revealed that the last interview of Mr. Khadr by Canadian officials, in March 2004, was conducted by an official of the Department of Foreign Affairs who had been told, just prior to the interview, that American officials had subjected Mr. Khadr to a program of sleep deprivation in order to prepare him.[41]

At this point, it is useful to recall that in *Khadr 2008*,[42] the Supreme Court applied the Charter to the actions of Canadian officials interviewing Omar Khadr, a Canadian youth, in U.S. detention in Guantánamo Bay. The Court relied on decisions of the U.S. Supreme Court to find that the U.S. detention of Omar Khadr during the period of the Canadian interviews was contrary to U.S. law and to fundamental international human rights law. The Charter was found to apply to the extraterritorial actions of the Canadian officials because through their actions, the Canadian government participated in the U.S. violations of Mr. Khadr's rights:

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[40] *Supra*, note 1.

[41] See *Khadr v. Canada (Attorney General)*, [2008] F.C.J. No. 972, 2008 FC 807, 331 F.T.R. 1 (F.C.). Justice Mosley, the Federal Court judge tasked with applying the decision of the Supreme Court in *Khadr 2008*, *infra*, note 42, ordered the full disclosure of the report of the March 2004 interview which had been written by the DFAIT official. The Canadian government had released almost the entire report but sought to protect the paragraph containing the information provided in confidence by a U.S. official as well as a "side comment by the DFAIT official" (at para. 85). As the interrogation techniques used at Guantánamo Bay at the time were in a recent and public report of the U.S. government, as the techniques were considered to be cruel and inhuman treatment, and as Canada was "implicated in the violation when the DFAIT official was provided with the redacted information and chose to proceed with the interview", Mosley J. ordered the government to remove the redactions: *id.*, at paras. 85-89.

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

> We conclude that the principles of international law and comity that might otherwise preclude application of the *Charter* to Canadian officials acting abroad do not apply to the assistance they gave to U.S. authorities at Guantanamo Bay. Given the holdings of the United States Supreme Court, the *Hape* comity concerns that would ordinarily justify deference to foreign law have no application here. The effect of the United States Supreme Court's holdings is that the conditions under which Mr. Khadr was held and was liable for prosecution were illegal under both U.S. and international law at the time Canadian officials interviewed Mr. Khadr and gave the information to U.S. authorities. Hence no question of deference to foreign law arises. The Charter bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations.[43]

While there may be several ways to characterize what the Supreme Court meant when it held that the Charter applied to the actions of Canadian officials, in my view the Court founded the application of the Charter on Canadian participation in the activities of a foreign state that violated international human rights law that Canada itself was bound to respect. As the United States was violating international law, the Canadian courts owed no deference and could apply the Charter directly to the actions of the Canadian officials outside Canada in this situation. Arguably, the Court did not find or even consider that Canada's international human rights obligations applied in Guantánamo Bay. Rather, the Court seems to have been saying that if Canadian officials outside Canada take part in foreign state violations of international human rights, which parenthetically Canada is obligated to respect in Canada, then the Charter may apply.[44]

In *Khadr 2010*, the Supreme Court relied on its 2008 decision[45] to support the extraterritorial application of the Charter. The new twist in the repatriation litigation comes in the analysis under section 7 of the Charter. At the first stage of the section 7 analysis, the Court explained that the liberty interest of Omar Khadr was engaged on the basis of its assumption that the information shared with the U.S. government as a consequence of the Canadian interviews was contributing to his continuing detention.[46]

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[43] *Id.*, at para. 26.

[44] Note that this approach seems consistent with the concepts of state responsibility at international law.

[45] *Khadr 2008*, *supra*, note 42, at para. 18.

[46] *Khadr 2010*, *supra*, note 1, at para. 21.

In order to constitute a violation of section 7 rights, however, the contribution to the continued detention of Omar Khadr had to be determined to be contrary to principles of fundamental justice as those are understood in Canada. As the Supreme Court noted, and this part of the discussion attempts to describe, the three levels of court took three different approaches to the quest for the applicable principles of fundamental justice.

At first instance,[47] O'Reilly J. stated four main issues to be resolved in the application. Of particular interest to this discussion is the third issue: "Does the Canadian Government have a legal duty to protect Mr. Khadr?"[48] The Court had first to determine whether the application was *res judicata* and whether there was any "decision" of the government that properly could be the subject of judicial review. The final issue was one of determining the appropriate remedy.

In order to determine whether the refusal to seek his repatriation was a subject for judicial review, O'Reilly J. canvassed some recent decisions of the courts of the United Kingdom[49] as well as *Hicks v. Ruddock*,[50] a decision of the Federal Court of Australia, and *Kaunda v. President of South Africa*,[51] a decision of the Constitutional Court of South Africa. Justice O'Reilly concluded that the cases did not identify any clear duty on the part of these states, under either international law or the common law, to protect their nationals held in detention by foreign states. That conclusion, however, did not help him determine what duties, if any, are owed by the Canadian government "to citizens whose constitutional rights … are engaged".[52]

Relying on the Supreme Court's decision in *Khadr 2008*, O'Reilly J. held that the Charter applied to the actions of the Canadian officials in interviewing Mr. Khadr and that his liberty interest was engaged. Justice O'Reilly situated his analysis of whether there existed a Charter duty to protect Mr. Khadr at the second stage of the section 7 analysis. Three international human rights treaties, to which Canada is party, were cited in this part of his analysis: the *Convention Against Torture and Other*

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47 [2009] F.C.J. No. 462, 2009 FC 405 (F.C.A.).

48 *Id.*, at para. 4.

49 *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] E.W.J. No. 4947 (C.A.); *Al Rawi*, *Secretary of State for Foreign and Commonwealth Affairs*, [2006] EWCA Civ 1279 and *Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2048 (Admin).

50 [2007] FCA (Australia) 299.

51 CCT 23/04.

52 *Supra*, note 47, at para. 47.

Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"),[53] the *Convention on the Rights of the Child* ("CRC")[54] and the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* ("OP CRC Armed Conflict").[55]

Justice O'Reilly's analysis of the scope of Canada's obligations under the CRC contributed significantly to his conclusion that the substantive principles of fundamental justice impose a duty on the Canadian government "to protect persons in Mr. Khadr's circumstances".[56] In the outlining of the obligations to which Canada is bound as a party to the CRC, there is no discussion of whether or why these obligations apply to young persons outside Canadian territory and, perhaps more pointedly, no discussion of the extraterritorial extent of the effective jurisdiction of Canada.

There is no doubt that obligations to protect children from the circumstances faced by Omar Khadr are IHRL duties of the Canadian government *in respect of children and youth in Canada*. But, it is submitted, there is in reality no way for the Canadian government to actually protect the rights of anyone within the territory or jurisdiction of the United States.

As noted in Part III, state parties to international human rights treaties are said to be obligated to respect, protect and promote the human rights set out in the relevant treaty. An examination of the situation of Omar Khadr raises all three categories of obligations. One sentence from O'Reilly J.'s decision can be used to highlight all three:

> In Mr. Khadr's case, while Canada did make representations regarding his possible mistreatment, it also participated directly in conduct that failed to respect Mr. Khadr's rights, and failed to take steps to remove him from an extended period of unlawful detention among adult prisoners, without contact with his family.[57]

In real terms, the rules and realities of state jurisdiction at international law are no impediment to Canadian officials *respecting* the rights of individuals outside Canada. However, while Canada may request, and thereby try to *promote*, foreign state respect for the rights of others

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[53] *Supra*, note 28.

[54] General Assembly resolution 44/25 (November 20, 1989); Canada ratified the CRC on December 13, 1991.

[55] General Assembly resolution 54/263 (May 25, 2000); Canada ratified the OP CRC Armed Conflict on July 7, 2000.

[56] *Supra*, note 47, at para. 71.

[57] *Id.*, at para. 64.

within the jurisdiction of the foreign state, Canada cannot itself effectively *protect* those rights. Short of the use of force, no state can stop another state that is engaged in the violation of the rights of individuals within its territory or subject to its effective jurisdiction. Canada can ask that Mr. Khadr receive certain types of treatment, as it has done,[58] and it could seek the repatriation of Mr. Khadr, which it has declined doing, but it cannot "remove him from an extended period of unlawful detention" in the United States. In short, the duties or obligations to protect under the CRC cannot be said to extend outside the territory or effective jurisdiction of states.

While the decision at first instance appears to ground a duty to protect individuals outside Canada, at least those who might find themselves in situations similar to Omar Khadr, on an extraterritorial application of international human rights treaty obligations, a government *request* for his repatriation was held to be the extent of government action required to comply with the duty.[59] With respect, the duty found by O'Reilly J. perhaps could be reformulated as either "a duty to take steps to encourage a foreign State to respect human rights" or "a duty to take steps to try to protect".

At the Federal Court of Appeal,[60] the question of whether the government violated the section 7 rights of Omar Khadr was more closely focused on the implications of a Canadian official proceeding with the March 2004 interview with knowledge that Omar Khadr had been subjected to inhumane treatment by U.S. officials.

The majority, made up of Evans and Sharlow JJ.A., did not address directly whether O'Reilly J. had erred in finding a duty to protect. They relied instead on the proposition that "questioning a prisoner to obtain information after he has been subjected to cruel and abusive treatment to induce him to talk does not accord with the principles of fundamental justice".[61] To support their stated principle of fundamental justice, the majority cited section 269.1 of the *Criminal Code*[62] as well as the CAT and the CRC, both of which prohibit subjecting individuals to inhumane treatment. Canada's ratification of the Convention Against Torture was

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[58] [2009] F.C.J. No. 893, 2009 FCA 246 (F.C.A.). See the dissenting reasons of Nadon J.A., at para. 88, in which he reproduces several paragraphs of the factum filed on behalf of the Attorney General of Canada.

[59] *Supra*, note 47, at para. 92.

[60] *Supra*, note 58.

[61] *Id.*, at paras. 50 and 54.

[62] R.S.C. 1985, c. C-46.

found to clearly demonstrate its "acceptance of the general prohibition on cruel, inhuman or degrading treatment as a principle of fundamental justice".[63] Canadian officials were found to have acted inconsistently with this principle of fundamental justice because they knew about the foreign abuse and "sought to take advantage of it".[64] The closest the Federal Court of Appeal gets to a discussion of any duty to protect persons outside Canada is to state that "Canada had an obligation in the unusual circumstances of this case to request Mr. Khadr's repatriation".[65]

In his dissenting reasons, Nadon J.A. took issue with the finding of a duty to protect at first instance. He pointed out that O'Reilly J. failed to take into account the limited ability of Canada to protect Omar Khadr and did not address the question of extraterritoriality:

> … nowhere in his Reasons does the Judge consider the steps taken by Canada, nor does he, in my respectful opinion, consider the context of Mr. Khadr's detention and the extent to which Canada's ability to protect him was limited. More particularly, in imposing obligations on Canada, on the basis of international instruments to which Canada is a party, O'Reilly J. failed to recognize the territorial limitation of these instruments.[66]

The reasons of the Supreme Court on the question of the applicable principles of fundamental justice take a slightly different tack from either level of the Federal Court. While the judgment of the Supreme Court takes up a listing of the various aspects of the difficult circumstances in which Omar Khadr finds himself and to Canadian contributions to that situation in the course of its interviews,[67] there is no mention of either a duty to protect or any of Canada's international human rights treaty obligations.[68] The Court states that the conduct of the Canadian officials "establishes Canadian participation in state conduct that violates the principles of fundamental justice" and goes on to state the relevant principle as follows:

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[63] *Supra*, note 58, at para. 52.

[64] *Id*., at para. 54. Note that Nadon J.A., in dissent, does not agree with this characterization and did not consider that Canada could be said to have participated in the foreign abuse.

[65] *Id*., at para. 66.

[66] *Id*., at para. 95.

[67] Compare O'Reilly J.'s reasons, *id*., at para. 70, with the Supreme Court's decision, *supra*, note 1, at paras. 24 and 30.

[68] The Supreme Court does note, *supra*, note 1, at para. 23, that the principles of fundamental justice are "informed by Canadian experience and jurisprudence, and take into account Canada's obligations and values, as expressed in the various sources of international human rights law by which Canada is bound", but it does not refer to any specific IHRL obligations.

> 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.[69]

It is again difficult to be certain of the exact analytical approach of the Supreme Court. In my view, the Court appears to be indicating that interrogation in these circumstances *in Canada* would be inconsistent with the principles of fundamental justice and, where the Charter is found to apply to extraterritorial actions of Canadian officials, such interrogations may violate section 7. That is, the approach is one of "if you could not do it in Canada (in terms of the principles of fundamental justice), it will be a violation of the Charter to act in this way outside Canada too, if the Charter applies".

Again, much could be said about the implications of this approach, if it is indeed what the Supreme Court means by its decision. For the purposes of this paper, it is sufficient to observe that the Supreme Court's analysis did not require it to either find or imply an extraterritorial reach for Canada's IHRL obligations. That is, the approach taken by the Supreme Court in *Khadr 2010* is not inconsistent with the implications of its *Hape* analysis and of the application of the scope of state enforcement jurisdiction at international law to questions of the extraterritorial reach of IHRL.

It should be noted that the Court, nevertheless, could have used the domestic scope of Canada's IHRL obligations to inform the principle of fundamental justice it stated in *Khadr 2010*. It appears that the Court had no need to call on IHRL obligations to assist it in identifying the applicable Canadian principles of fundamental justice governing interrogations.

V. CONCLUDING OBSERVATIONS

This discussion has attempted, admittedly in an abbreviated way, to explain the general rules of public international law addressing the extraterritorial scope of state enforcement jurisdiction and the relationship between the extraterritorial reach of international human rights treaties and the Supreme Court of Canada's approach to the extraterritorial application of the Charter.

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[69] *Id.*, at para. 25.

I am very aware that the paper may read as a general apology for violations of human rights by states outside their territories. But this it most certainly is not. The fact that a state's international human rights treaty obligations may not apply to all state actions outside its territory does not mean that a state or its officials can act with impunity. Some violations of human rights will be violations of *jus cogens* or of international humanitarian law, which do not have the same territorial limitations. Some extraterritorial actions will attract criminal law consequences within the state in question, within other states that take extended criminal jurisdiction over the acts in question, or even at international criminal law in the case of the most serious forms of human rights violations. Moreover, states are responsible, in certain circumstances, where they participate in violations of another state's international human rights law obligations.

So, is this paper merely a discussion of a distinction without a difference? In my view, it is not. International human rights law treaties set out legally binding obligations for states parties. The understandable desire to read an expansive extraterritorial reach into IHRL treaties requires, in my view, an interpretative approach that takes IHRL outside the greater body of international law. This approach, in my view, risks furthering the tendency of some states and of some lawyers within all states to view international law, and in particular human rights law, as incapable of creating binding obligations — as not, in fact, law. An interpretive approach that suggests that IHRL treaties are hortatory documents setting out ideals that can be adapted and expanded as required to fit new contingencies risks debasing the importance of these treaties and the obligations of states under them.

The United Nations system for the protection of human rights is a project which is still ongoing. There remain gaps in protection and in state accountability that need to be addressed and, if possible, filled. In this era of a seemingly interminable global struggle against terrorism, it is important to take a hard look at what law is in place and what law still needs to be written.

This paper, then, is a plea for careful scholarship on the extent of international human rights law treaty obligations both at international law and in Canadian law as Canadian courts look to Canada's IHRL obligations to assist them in the interpretation of Canadian statutes and the Charter.