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The Frontiers of Human Rights: Reflections on the Implications of the Supreme Court's Judgments in Omar Khadr 2008 and 2010

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I. INTRODUCTION

There are a number of important issues packed into the Supreme Court's relatively concise 48-paragraph judgment in Omar Khadr released on January 29, 2010.[1] In this paper, I will focus on one very important issue that arises in the case: the extraterritorial reach of the *Canadian Charter of Rights and Freedoms*.[2] In particular, I will consider the ramifications, if any, of just one sentence, one that is not a statement of the Court's conclusion on the question of extraterritoriality, but which may or may not be of considerable significance:

> As a general rule, *Canadians* abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the *Charter*.[3]

The Court went on of course to state an exception to this general rule and did find that the Charter had extraterritorial application in *Khadr 2010*. The question, though, is whether it is significant that the Court specified citizenship — it referred specifically to "Canadians abroad" — in stating the general rule, but not when framing the exception to the rule. Where does this leave non-citizens whose rights may be infringed by the actions of Canadian officials acting outside Canada?

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[1] *Canada (Prime Minister) v. Khadr*, [2010] S.C.J. No. 3, 2010 SCC 3 [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"].

[3] *Khadr 2010*, *supra*, note 1, at para. 14 (emphasis added).

This is a vitally important issue in human rights advocacy. Do human rights have frontiers? How far does a state's obligation to refrain from human rights violations extend? Does it begin and end at home? Does it reach out onto the world stage? Are there borders when it comes to the obligation to uphold human rights? If so, where should they be drawn?

For human rights advocates, the struggle to secure recognition of the principle that governments do indeed have very real and very serious obligations to protect human rights beyond their own borders is critical. It plays out in a variety of contexts.

- It arises with respect to the actions of law enforcement and security personnel, who may become directly or indirectly involved in the arrest, imprisonment and interrogation of individuals — perhaps their own nationals, perhaps not — in other countries, in situations where serious violations of the rights of those individuals, including torture, are a virtual certainty.
- It arises when soldiers go abroad and go to war, keep the peace or carry out other sorts of military operations — perhaps under a United Nations ("UN"), North Atlantic Treaty Organization or other banner, perhaps through a bilateral arrangement with another government — and find themselves, either on the battlefield or off, drawn into situations where violations of international human rights or international humanitarian law provisions are occurring.
- It arises when large companies, headquartered in one country and bound by the domestic laws and international obligations of that country, set up operations in another country, perhaps a country with a much weaker legal framework, and then become somehow implicated in human rights violations associated with their operations or even their mere presence.
- It arises through the aid and development policies and projects one government approves or launches in another country which may, well-intentioned or not, contribute to or even be the source of human rights violations.

In all of these situations, officials often insist that it would be inappropriate to interfere in another state's affairs by applying our own laws. It would be an affront to the sovereignty of the other state. Instead, the argument is generally made that we must look to the law of the country where the violations are taking place for a remedy.

The issue has received considerable legal, political and public attention in Canada in recent years, through a number of cases arising in a variety of contexts — with very different dynamics and outcomes. In the case of Maher Arar, for instance, the government accepted, without hesitation, the findings of a public inquiry as to the responsibility Canadian officials bore for the serious human rights violations Mr. Arar experienced in the United States, Jordan and Syria.[4] He received considerable compensation.

However, even though a judicial inquiry headed by former Supreme Court of Canada Justice Frank Iacobucci similarly found numerous instances of Canadian responsibility for human rights violations experienced by Abdullah Almalki, Ahmad Abou Elmaati and Muayyed Nureddin in Syria and/or Egypt,[5] government lawyers are this time aggressively fighting their claim for compensation and a lengthy legal battle looms. And court proceedings launched by Abousfian Abdelrazik, seeking compensation for the imprisonment and torture he experienced in the Sudan — in which the Canadian Security Intelligence Service ("CSIS") seems deeply implicated — also face strong government objections, including an insistence that it should not be allowed to go ahead because the violations occurred outside Canada.[6]

As we all know, the Supreme Court did extend human rights protection extraterritorially — through section 7 of the Charter in both *Khadr 2008*[7] and *Khadr 2010*. I am going to compare and contrast how the Supreme Court dealt with the issue of extraterritoriality in those cases with how the issue was handled in another recent high-profile case — prisoner transfers in Afghanistan.

In 2008, as part of an application launched by Amnesty International and the British Columbia Civil Liberties Association, the Federal Court[8]

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[4] Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar* (2006) (The Honourable Dennis O'Connor, Commissioner), online <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/26.htm>.

[5] *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmed Abou-Elmaati and Muayyed Nureddin* (2008) (The Honourable Frank Iacobucci, Q.C., Commissioner), online: <http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/iacobucci-e/final_report/final-report-copy-en.pdf>.

[6] Paul Koring, "Abdelrazik Sues Ottawa for $27 Million", *The Globe and Mail* (September 24, 2009); Paul Koring, "Abdelrazik's Lawyers Pressing Court to Hold Cannon Accountable", *The Globe and Mail* (April 11, 2010).

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

[8] *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, [2008] F.C.J. No. 356, 2008 FC 336, [2008] 4 F.C.R. 546 (F.C.).

and the Federal Court of Appeal[9] both concluded that the Charter did not travel abroad with Canadian soldiers when they headed off to Afghanistan. Unfortunately the Supreme Court declined to hear a further appeal.[10]

For Amnesty International, what is at stake in these cases is compliance with international human rights obligations. That necessitates understanding the nature and scope of those obligations. It also means considering the means to enforce those obligations, which inescapably requires looking to national level courts because of the lack of meaningful international-level mechanisms for enforcement. In a Canadian context, and many other countries as well, that further necessitates considering the role of national laws, such as the Charter, because international human rights standards cannot be independently enforced in Canadian courts.

II. BEYOND BORDERS: THE EXTRATERRITORIAL REACH OF INTERNATIONAL HUMAN RIGHTS LAW

Let me begin at the international level. It is becoming increasingly clear and accepted that international human rights obligations can and do extend beyond the borders of any one particular state. The treaties themselves envision that possibility.

The *International Covenant on Civil and Political Rights*, for instance, applies to all persons "within its territory and subject to its jurisdiction".[11] The UN Human Rights Committee, the expert body charged with responsibility for overseeing the Covenant, has clearly stated that "[t]his 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."[12] Furthermore, the Committee has made it very clear that "the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality

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[9] *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, [2008] F.C.J. No. 1700, 2008 FCA 401, [2009] 4 F.C.R. 149 (F.C.A.).

[10] Application for leave to appeal dismissed (May 21, 2009), *Amnesty International v. Canada (Canadian Forces)*, [2009] S.C.C.A. No. 63 (S.C.C.).

[11] *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, art. 2(1).

[12] United Nations Human Rights Committee, *General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (May 26, 2004), at para. 10.

or statelessness …, who may find themselves in the territory or subject to the jurisdiction of the State Party".[13] The Committee concludes that 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".[14]

Similarly, the UN Committee against Torture, charged with overseeing the *UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, has stated that the obligations under that Convention, which are framed as extending to "any territory under [a State Party's] jurisdiction"[15] means all areas where the state "exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law".[16] The Committee provides numerous examples therefore of where this may arise, including a "ship or aircraft registered to the state, during times of military occupation or peacekeeping operations, and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual control".[17]

The Committee applied this recently in a case involving Denmark, noting that Danish military forces may have violated the Convention against Torture when they handed prisoners apprehended during fighting in Afghanistan to the custody of allied forces in early 2002, prisoners who were allegedly then ill-treated in detention.[18] The Committee noted that the Convention applies to Danish forces "wherever situated" and even if they are under the operational command of another state.[19]

A recent groundbreaking study on secret detention and counter-terrorism, carried out by four UN human rights experts responsible for torture, arbitrary detention, enforced disappearances and counter-terrorism, makes it clear that international human rights treaties do have

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[13] *Id*.

[14] *Id*.

[15] *United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, art. 2(1).

[16] United Nations Report of the Committee against Torture 2008, General Assembly Official Records, 63rd session, Supplement No. 44, Annex VI, General Comment no. 2, 1, IV, at para. 16.

[17] Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, CAT/C/GC/2 (January 24, 2008), at para. 16.

[18] Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Denmark*, CAT/C/DNK/5 (July 16, 2007).

[19] *Id*., at para. 13.

extraterritorial reach.[20] The experts note, for instance, that a "State party must respect and ensure the rights laid down in the Covenant [on Civil and Political Rights] to anyone within the power or effective control of that State party, even if not situated within the territory of the State party".[21] They note as well the International Court of Justice's Advisory Opinion in the case dealing with construction of the wall in Occupied Palestinian Territory. In that case the court concluded that the International Covenant on Civil and Political Rights extends to "acts done by a state in the exercise of its jurisdiction outside of its own territory".[22]

So it is settled that international human rights obligations do indeed extend beyond a country's territory. The key is to determine whether the individual or individuals — nationals or non-nationals — whose rights are on the line are within the "power or effective control" or somehow have been caught up in the state exercising its jurisdiction, even though outside of its own territory.

Notably, the Supreme Court had no difficulty in concluding that when Canadian security and intelligence officials interrogated Omar Khadr at Guantánamo Bay on three different occasions between February 2003 and March 2004, they did participate in processes that violated Canada's international human rights obligations.[23] The Court reached that conclusion even though the agents were some 3,000 kilometres from home, operating in a prison facility under the jurisdiction of one foreign state, the United States, located within the territory of another foreign state, Cuba. The Court noted, in particular, violations of the Geneva Conventions by virtue of the denial of the right to challenge the legality of detention at Guantánamo Bay by way of a *habeas corpus* application.[24]

It is not so clear though when it comes to prisoners apprehended by Canadian soldiers in Afghanistan and held pending transfer to the custody of Afghan officials where they face a serious risk of being tortured,

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[20] Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; Working Group on Arbitrary Detention represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its Chair, Jeremy Sarkin; *Joint Study on Global Practices in relation to Secret Detention in the Context of Countering Terrorism*, A/HRC/13/42 (February 19, 2010).

[21] *Id.*, at para. 37.

[22] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, I.C.J. Report 2004 (July 9, 2004), at para. 111.

[23] *Khadr 2008*, *supra*, note 7, at paras. 21-27.

[24] *Id.*, at paras. 21 and 25.

particularly at the hands of Afghanistan's notorious National Directorate of Security. Neither the Federal Court[25] nor the Federal Court of Appeal[26] offered an opinion as to whether Canada's international human rights obligations have been violated. In the Federal Court judgment, Canada's international obligations are referenced as a preferable legal framework to the Charter, noting, for instance that the "appropriate legal regime to govern the military activities currently underway … is the law governing armed conflict — namely international humanitarian law".[27] Justice Mactavish noted in particular that while she has concluded that the Charter does not apply, the detainees do "have the rights conferred on them by international law, and, in particular, by international humanitarian law".[28] She noted as well that should the actions of Canadian soldiers in Afghanistan "violate international humanitarian law standards", they could, among other scenarios, "potentially face sanctions or prosecutions under international law"[29] including even the possibility of "proceedings before the International Criminal Court".[30] However, she reached no conclusion as to whether any of those international legal obligations have in fact been breached.

III. Enforcing International Obligations in a Domestic Context: The Charter and Extraterritoriality

There may well be, at least in the *Khadr* cases, violations of Canada's international human rights obligations. However, as we know in Canada's dualist system, that does not, on its own, offer a direct route to a Canadian court. If there was a meaningful system for enforcing human rights obligations at the international level, it might not be necessary to look for domestic avenues for enforcement. But there is very little available for holding the state itself, and its institutions, to the international obligations it has assumed. Thus, in a Canadian context, the Charter becomes key.

I would like to look at the progression of five key cases, with *Khadr 2008* and *Khadr 2010* being central, in considering this interplay be-

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25 *Supra*, note 8.
26 *Supra*, note 9.
27 *Supra*, note 8, at para. 276.
28 *Id.*, at para. 343.
29 *Id.*, at para. 344.
30 *Id.*, at para. 345.

tween international human rights obligations, extraterritoriality and the Charter.

It starts with the Supreme Court's 2007 decision in *Hape*.[31] Mr. Hape, convicted on two counts of money laundering, had argued that Charter guarantees against unreasonable search and seizure should protect him from the joint operations of the Royal Canadian Mounted Police ("RCMP") and Turks and Caicos police when they raided his company, downloaded computer information and seized some 100 boxes of material — all outside Canada — and that the evidence obtained should be excluded at trial. The Court ruled that the Charter did not apply and that RCMP conduct was governed by applicable Turks and Caicos laws.

But writing for the majority, LeBel J. famously left the door open for extraterritorial application of the Charter, noting that "deference [to the foreign state] ends where clear violations of international law and fundamental human rights begin".[32] He went on to state that "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".[33] And further:

> I would leave open the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s. 24(1) of the *Charter* because of the impact of those activities on *Charter* rights in Canada.[34]

In *Hape*, had the Court signalled some sort of international human rights exception to the general rule that the Charter does not apply outside Canada? It was unclear. Some of LeBel J.'s words seem clear ("deference ends"). But others seem permissive and uncertain ("may give way"; "I would leave open the possibility").

Next comes Federal Court Justice Anne Mactavish's ruling in the Afghan prisoner transfer case.[35] She was not prepared to accept that the *Hape* decision had created what she termed a "fundamental human rights exception to the general rule against the extraterritorial application of the *Charter*".[36] In her view, to conclude that the "nature or the quality of the

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31 *R. v. Hape*, [2007] S.C.J. No. 26, [2007] 2 S.C.R. 292 (S.C.C.).
32 *Id.*, at para. 52.
33 *Id.*, at para. 101.
34 *Id.*
35 *Supra*, note 8.
36 *Id.*, at para. 308.

Charter breach ... creates extraterritorial jurisdiction, where it does not otherwise exist ... would be a completely unprincipled approach to the exercise of extraterritorial jurisdiction".[37] She concluded instead that the *Hape* majority was simply saying that "Canadian officials operating outside of Canada cannot act in a way that violates Canada's international human rights obligations — quite independently of any obligations they might otherwise have under the *Charter*".[38]

Then the issue came before the Supreme Court once again, in *Khadr 2008*, with judgment rendered only two months after Mactavish J.'s Afghan prisoners ruling. And suddenly the uncertainty that was inherent in three different concurring opinions in *Hape*, and the less than certain language of the majority, gives way to remarkable certainty:

> In *Hape*, the Court stated an important exception to the principle of comity. While not unanimous on all the principles governing extraterritorial application of the *Charter*, the Court was united on the principle that comity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations. ...
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> If the Guantanamo Bay process under which Mr. Khadr was being held was in conformity with Canada's international obligatrions, the *Charter* has no application and Mr. Khadr's application for disclosure cannot succeed: *Hape*. However, if Canada was participating in a process that was violative of Canada's binding obligations under international law, the *Charter* applies to the extent of that participation.[39]

The Court then went on to assess whether the Guantánamo Bay process, at the time that CSIS officers handed over the products of its interviews with Omar Khadr to U.S. officials, was a process that violated Canada's binding obligations under international law.[40] The Court concluded that it was in violation of those obligations and that the Charter therefore does apply.[41]

The logic seemed to be on point with the Afghan prisoner situation. Applying the same reasoning — the same "important exception" — if the process of transferring prisoners to a situation where they faced a serious risk of torture was "violative of Canada's binding obligations

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37 *Id.*, at para. 311.
38 *Id.*, at para. 316.
39 *Khadr 2008*, *supra*, note 7, at paras. 18-19.
40 *Id.*, at paras. 19-26.
41 *Id.*, at para. 26.

under international law", then surely the Charter did apply. The *UN Convention against Torture*, for one, is very clear in prohibiting the *refoulement* of an individual to officials of another state if there is a serious risk he or she will be tortured.

Seven months later, the Afghan prisoners case was before the Federal Court of Appeal.[42] And the argument that in *Khadr 2008* the Court had clarified and enshrined a clear international human rights exception to the general rule that the Charter did not have extraterritorial reach was summarily dismissed. Justice Desjardins concluded that she understood

> the Supreme Court of Canada to say that deference and comity end where clear violations of international law and fundamental human rights begin. This does not mean that the Charter then applies as a consequence of these violations. Even though section 7 of the Charter applies to "[e]veryone ..." (compare with the words "[e]very citizen ..." in section 6 of the Charter) all the circumstances in a given situation must be examined before it can be said that the Charter applies.[43]

Is she signalling a distinction based on the fact that Omar Khadr is a Canadian citizen and prisoners apprehended by Canadian forces in Afghanistan are not? She had earlier emphasized, for instance, that "the factual underpinning of this [*Khadr 2008*] decision is miles apart from the situation where foreigners, with no attachment whatsoever to Canada or its laws, are held in [Canadian Forces] detention facilities in Afghanistan".[44] That comment seems discordant with the later acknowledgment that section 7 does apply to *everyone* whereas other Charter provisions that are limited to citizens are specifically worded in restricted terms.

Five months later, the Supreme Court denied leave to appeal in the Afghan prisoners case,[45] passing up an important opportunity to bring some coherence to this increasingly confusing line of cases on extraterritoriality.

Then the *Khadr 2010* appeal made its way to the Supreme Court, and once again extraterritoriality was in the spotlight. The Court reiterated a very straightforward and clear approach to extraterritoriality, noting that "as a general rule, Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the *Charter*" but stressing that "the jurisprudence leaves the door

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42 *Supra*, note 9.
43 *Id.*, at para. 20.
44 *Id.*, at para. 14.
45 *Supra*, note 10.

open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights norm".[46] For authority the Court referred to both *Hape* and *Khadr 2008*. As it did in *Khadr 2008*, the Court went on to conclude in *Khadr 2010* that as the "same underlying series of events at Guantánamo Bay (the interviews and evidence-sharing of 2003 and 2004)" were at the basis of the claim, the same rationale for applying the Charter governed.[47]

IV. EXTRATERRITORIALITY: IS IT A MATTER OF CITIZENSHIP?

Which leaves us where? Is there now a clearly articulated international human rights exception to the general rule that the Charter does not have extraterritorial application? If so, why was the Supreme Court not interested in hearing an appeal in the Afghan prisoners case so as to clarify and consolidate the law in this area? Is there an unexpressed distinction at play related to the citizenship of the individuals whose rights are at stake?

It has arisen recently in another case, very similar — almost identical to Omar Khadr — but for one key factor: the applicants lacked Canadian citizenship. And the Federal Court[48] and the Federal Court of Appeal[49] both concluded that citizenship is a key distinguishing factor when determining whether particular provisions of the Charter, and in particular section 7, apply in a given extraterritorial context. The issue arose in the case of Mohamedou Slahi and Ahcene Zemiri, both non-Canadians who lived in Canada for extended periods and both of whom, like Omar Khadr, ended up in detention at Guantánamo Bay. Both, again like Mr. Khadr, were questioned at Guantánamo Bay several times by Canadian officials — the same timeframe as Mr. Khadr in fact. Both brought Federal Court applications seeking disclosure of the information obtained during those interrogations, the same issue that was before the Supreme Court in *Khadr 2008*.

To situate these within the chronology of the other cases, the decisions in *Slahi and Zemiri* came down after *Khadr 2008* and also after the Federal Court and Federal Court of Appeal Afghan prisoners judgments

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46 *Khadr 2010*, *supra*, note 1, at para. 14.

47 *Id.*, at para. 18.

48 *Slahi v. Canada (Minister of Justice)*, [2009] F.C.J. No. 141, 2009 FC 160 (F.C.).

49 *Slahi v. Canada (Minister of Justice)*, [2009] F.C.J. No. 1120, 2009 FCA 259 (F.C.A.).

came down, but before the Supreme Court decided *Khadr 2010*. As with the Afghan prisoners litigation, the Supreme Court dismissed an application for leave to appeal the *Slahi and Zemiri* case, less than three weeks after releasing the *Khadr 2010* ruling.[50]

In *Slahi and Zemiri*, Federal Court Justice Blanchard concluded on the basis of the Court's *Khadr 2008* ruling that "the *Charter* would apply to the Canadian officers participating in the interviews of the Applicants in Guantanamo Bay, since they too were involved in a process that violates Canada's international law obligations".[51] Having found that the Charter applied, he then went on to determine the scope of section 7's extraterritorial reach and concluded that it did not extend to the applicants, because of their lack of citizenship. Justice Blanchard concluded that:

> What emerges from the noted jurisprudence is that, in the three cases of Canadian nationals claiming abroad, non-Canadians claiming within Canada, and non-Canadians claiming abroad, for section 7 *Charter* rights to apply, the circumstances must connect the claimant with Canada, whether it be by virtue of their presence in Canada, a criminal trial in Canada, or Canadian citizenship.[52]

The Federal Court of Appeal agreed, concluding that "*Khadr* is distinguishable on the ground that Mr. Khadr is a Canadian citizen, whereas the appellants are not. Further, there are no proceedings pending in Canada against the appellants which might provide a nexus to Canada."[53]

Unfortunately, *Khadr 2010* provides no further elucidation as to the Supreme Court's views as to whether a Canadian nexus is required and, if so, what sort of nexus that should be, in order for section 7 of the Charter to have extraterritorial application in a case where Canadian officials have been drawn into activities abroad that contravene Canada's international human rights obligations. The statement of the general rule against extraterritorial application of the Charter does specify citizenship: "Canadians abroad … cannot avail themselves of their rights under the *Charter*."[54] However, we have no indication as to whether the Court considers Canadian citizenship, which obviously was not an issue in Mr.

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[50] Application for leave to appeal refused (February 18, 2010); *Zemiri v. Canada (Justice)*, [2009] S.C.C.A. No. 446 (S.C.C.); application for leave to appeal refused (February 18, 2010); *Slahi v. Canada (Justice)*, [2009] S.C.C.A. No. 444 (S.C.C.).

[51] *Supra*, note 48, at para. 36.

[52] *Id.*, at para. 47.

[53] *Supra*, note 49, at para. 4.

[54] *Khadr 2010*, *supra*, note 1, at para. 14.

Khadr's case, to be a crucial element of the international human rights exception to the general bar on extraterritorial application of the Charter.

As a sidenote, Mr. Zemiri was released and returned to Algeria on January 20, 2010. On March 22, 2010, a U.S. District Court judge ordered Mr. Slahi's release. The U.S. government has filed a notice of appeal of that decision and he remained at Guantánamo Bay as of April 2010.

On the basis of both *Khadr 2008* and *Khadr 2010*, there does appear to be a clearly recognized principle that Canadian citizens can turn to the Charter for protection if Canadian officials have been drawn into violations of their internationally protected rights in a foreign country. That right has been circumscribed, however, by the Federal Court and Federal Court of Appeal rulings in *Slahi and Zemiri*, an almost identical case involving non-citizens. The Courts held that while the Charter applies in such situations, section 7 can only be invoked if the individual concerned has a sufficient nexus to Canada.

International human rights standards draw no distinction, however, when it comes to citizens and non-citizens.[55] If an individual is within the power, effective control or jurisdiction of a state, international human rights standards apply, even when the activity in question takes place abroad. Notably, the U.S. Supreme Court in *Boumediene*,[56] the British House of Lords in *Al-Skeini*,[57] and the European Court of Human Rights in *Loizidou*[58] (and also in *Bankovic*[59]) have all recognized versions of a test of effective control over an individual, in all instances non-citizens, as the basis for finding extraterritorial reach of human rights laws. The issue is once again before the European Court of Human Rights in the British case, *Al-Skeini*.

The Supreme Court has declined to take up this issue two times over the past year: dismissing an application for leave to appeal in the Afghan prisoner case in May 2009 and in *Slahi and Zemiri* in February 2010. One hopes that they will not pass a third time and will have the opportunity to clarify the nature and scope of the international human rights exception in the near future, and to do so in a manner that is consistent with international human rights standards and does not discriminate and set out two tiers of human rights protection for citizens and non-citizens.

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55 See text accompanying notes 11-22, *supra*.

56 *Boumediene v. Bush*, 553 U.S. 723 (2008).

57 *Al-Skeini v. Secretary of State for Defence*, [2007] UKHL 26 (H.L.).

58 *Loizidou v. Turkey* (1997), 23 E.H.R.R. 513 (E.C.H.R.).

59 *Bankovic v. Belgium* (2001), 11 B.H.R.C. 435 (E.C.H.R.).