

**Dangerous Deference: The Supreme Court of Canada in *Canada v. Khadr***

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American troops captured Omar Khadr, a Canadian citizen, in Afghanistan when he was fifteen years old.<sup>1</sup> The United States accused Khadr of killing an American medic by throwing a grenade at American troops during a July 2002 ambush.<sup>2</sup> Today, a twenty-four year-old Omar Khadr resides in Camp Delta at Guantanamo Bay,<sup>3</sup> where he is the only detainee charged with war crimes<sup>4</sup> who is also a citizen of a Western country.<sup>5</sup> The United States continues to hold Khadr and asserts that his family's "significant terrorist ties" make him a "threat and a valuable informant."<sup>6</sup> On November 13, 2009, Attorney General Eric Holder announced that the government would prosecute Khadr and nine other detainees at Guantanamo before a military commission.<sup>7</sup> The selection of the military jury for Khadr's trial began in August 2010,<sup>8</sup> but a plea deal reached by the two sides in late October 2010 led to a guilty plea and avoided the necessity of a military commission trial.<sup>9</sup>

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<sup>1</sup> Melissa A. Jamison, *Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of Children*, 9 U.C. DAVIS J. JUV. L. & POL'Y 127, 139 (2005).

<sup>2</sup> Clifford Krauss, *THREATS AND RESPONSES: DETAINEE; Canadian Teenager Held by U.S. in Afghanistan in Killing of American Medic*, N.Y. TIMES, Sept. 14, 2002, at A8.

<sup>3</sup> Jamison, *supra* note 1, at 141.

<sup>4</sup> Charges: Conspiracy; Murder by an Unprivileged Belligerent; Attempted Murder by an Unprivileged Belligerent; Aiding the Enemy, United States v. Omar Ahmed Khadr, No. 05-0008 (M.C.R. July 20, 2005), available at [www.defense.gov/news/Nov2005/d20051104khadr.pdf](http://www.defense.gov/news/Nov2005/d20051104khadr.pdf).

<sup>5</sup> Dahlia Lithwick, Supreme Court Dispatch, Eh, SLATE, Nov. 13, 2009, <http://www.slate.com/toolbar.aspx?action=print&id=2235467>.

<sup>6</sup> Jamison, *supra* note 1, at 140.

<sup>7</sup> *Khadr to face U.S. military commission*, CBC NEWS, Nov. 13, 2009, <http://www.cbc.ca/canada/story/2009/11/13/omar-khadr-supreme-court-hearing.html>.

<sup>8</sup> Michael Isikoff, *Officer off Gitmo jury for agreeing with Obama*, MSNBC, Aug. 11, 2010, [http://www.msnbc.msn.com/id/38667591/ns/us\\_news-security/](http://www.msnbc.msn.com/id/38667591/ns/us_news-security/).

<sup>9</sup> Charlie Savage, *Deal Averts Trial in Disputed Guantanamo Case*, N.Y. TIMES, Oct. 26, 2010, at A12.

On January 29, 2010, the Supreme Court of Canada issued the latest in a series of decisions related to Khadr's detention. In *Prime Minister of Canada v. Khadr*,<sup>10</sup> the Court agreed with the Federal Court of Appeal that Canada's participation in Khadr's interrogation had violated his rights to life, liberty, and security of the person under Section 7 of the Canadian Charter of Rights and Freedoms.<sup>11</sup> However, the Court denied Khadr's request that it order the Canadian Executive to seek his repatriation, despite finding repatriation to be an appropriate, just, and sufficiently connected remedy to the Charter violation.<sup>12</sup> Instead, the Court found that the Canadian government's decision not to request Khadr's repatriation was an exercise of the Executive's "prerogative power" over foreign relations—a power that is exclusive to the executive and subject only to minimal judicial interference.<sup>13</sup> The Court relied in part upon the "evolving" nature of Khadr's legal status as a reason that it should not intercede.<sup>14</sup> Thus, the Court only granted declaratory relief.<sup>15</sup>

Wary of a potential constitutional crisis, the Court's holding demonstrated an excess of restraint. The Court largely ignored some of the most troubling aspects of the case, such as Khadr's status as a juvenile under international law at the time of his capture. Moreover, the decision distorts precedent and ignores historical facts that undermine its reasoning. Finally, the Court's restraint did not even avoid separation of powers concerns. The Executive's continued failure to provide Khadr with an effective remedy disregards the Court's finding of a Charter violation, thus raising similar concerns to those that led the Court to avoid ordering repatriation in the first place.

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<sup>10</sup> 2010 SCC 3, [2010] 1 S.C.R. 44 (Can.).

<sup>11</sup> *See id.* para. 19-21.

<sup>12</sup> *Id.* at para. 27-47.

<sup>13</sup> *Id.* at para. 37-39.

<sup>14</sup> *Id.* at para. 45.

<sup>15</sup> *Id.* at para. 39.

## I. FACTUAL BACKGROUND

Omar Khadr was born on September 19, 1986 in Toronto, Canada.<sup>16</sup> The son of Ahmed Sa'id Khadr, allegedly a high-ranking member of the terrorist group Egyptian Islamic Jihad, Omar spent the first few years of his life in suburban Toronto with his maternal grandparents.<sup>17</sup> In 1988, he moved from Toronto to Peshawar, Pakistan,<sup>18</sup> where Ahmed worked for a charity known as Human Concern International, a post from which he would allegedly funnel money to al-Qaeda.<sup>19</sup>

Omar spent the majority of his youth in Pakistan. In 1996, Pakistani intelligence arrested Ahmed Khadr for his involvement in the 1995 Egyptian embassy bombing in Pakistan.<sup>20</sup> Ahmed spent four months in prison for his alleged financial connection to the attacks. Ahmed was tortured for much of his imprisonment and was hospitalized when he emerged from prison, crippled from both his torture and a hunger strike he had undertaken to protest his continued detention.<sup>21</sup> When Omar saw his father, he no longer recognized him. Omar's sister described her brother as having been "traumatized" by the experience.<sup>22</sup> A Toronto imam, who had known Omar when he was seven, described the effect another way: "radicalized."<sup>23</sup>

By the age of twelve, Omar had already undergone formal military training in bomb-making, assault-rifle marksmanship, and combat tactics.<sup>24</sup> After Ahmed's release from prison,

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<sup>16</sup> Isabel Vincent, *The Good Son: Omar Khadr: From Toronto's Suburbs to bin Laden's Army*, THE NAT'L POST, Dec. 28, 2002, at A1.

<sup>17</sup> *Id.*

<sup>18</sup> Jeff Tietz, *The Unending Torture of Omar Khadr*, ROLLING STONE, Aug. 24, 2006, at 60.

<sup>19</sup> Vincent, *supra* note 15.

<sup>20</sup> Sixteen died and over sixty were injured when militant Islamic groups attacked the Egyptian embassy in Islamabad on November 19, 1995. *Pakistan Arrests 10 in Embassy Bombing*, N.Y. TIMES, Nov. 24, 1995, at A13.

<sup>21</sup> Ironically, Ahmed Khadr's release from jail followed a request from the Canadian government to dismiss the case. Tietz, *supra* note 17.

<sup>22</sup> Vincent, *supra* note 15.

<sup>23</sup> Tietz, *supra* note 17.

<sup>24</sup> *Id.*

the family moved to Osama bin Laden's compound in Jalalabad, Afghanistan. Between 1996 and 2001, Omar allegedly visited al Qaeda training camps and met senior members of al Qaeda, including Ayman Al-Zawahiri and Mohammed Atef.<sup>25</sup> After experiencing the September 11<sup>th</sup> terrorist attacks from bin Laden's inner circle, Omar faced a choice: join his father and bin Laden in the mountains and fight, or defect with his brother who had grown disillusioned with al Qaeda's tactics. Omar chose to take up arms against the American invasion of Afghanistan.<sup>26</sup>

On July 27, 2002, American Special Forces raided a compound where Omar was hiding with other al Qaeda fighters.<sup>27</sup> As he hid in the bombed-out remains of the building, Omar, then fifteen, allegedly threw a grenade at the American contingent that exploded and killed Sergeant First Class Christopher Speer.<sup>28</sup> Omar was then shot twice in the chest, and also suffered shrapnel wounds to his head and eye.<sup>29</sup> After his recovery at Bagram Air Base, Omar was taken to Camp X-Ray at Guantanamo Bay, Cuba in October 2002.<sup>30</sup> The United States has never

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<sup>25</sup> United States v. Omar Khadr, Case No. 05-0008 at ¶¶ 16-18 (July 30, 2005), *available at* [www.defense.gov/news/Nov2005/d20051104khadr.pdf](http://www.defense.gov/news/Nov2005/d20051104khadr.pdf) (.).

<sup>26</sup> In response to the September 11<sup>th</sup> terrorist attacks, Congress passed a joint resolution empowering the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks," Authorization for Use of Military Force, Pub. L. No. 107-40, §§ 1-2, 115 Stat. 224 (2001). Pursuant to this congressional authorization, President Bush sent American troops into Afghanistan on October 7, 2001 to wage war against the country's Taliban regime, which had supported the al Qaeda terrorist network responsible for the attacks. Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, ARMY LAW., June 2010, at 9.

<sup>27</sup> Vincent, *supra* note 15.

<sup>28</sup> *Id.* Khadr disputes these allegations. Reuters, *Defense Disputes Claim of Confession by Detainee*, NY TIMES, Aug. 12, 2010, at A15.

<sup>29</sup> Khadr is now blind in his left eye as a result of shrapnel wounds he suffered. *Omar Khadr: The Youngest Terrorist?*, 60 Minutes, Nov. 18, 2007, <http://www.cbsnews.com/stories/2007/11/16/60minutes/main3516048.shtml>.

<sup>30</sup> During the three-month wait before he was transported to Guantanamo, Omar reached his sixteenth birthday. The delay may have been designed to allow the United States to treat him as an adult upon his arrival at Guantanamo, rather than as a juvenile. As he was fifteen years old at the time of his capture, Khadr would be considered a juvenile under most international laws. See U.N. Office of the High Commissioner for Human Rights, *General Comment No. 21*, ¶ 13 (April 10, 1992). Under international law, states must: bring juveniles for adjudication "as speedily as possible," International Covenant on Civil and Political Rights, art. 10.2(b), Dec. 16, 1966,

allowed Omar Khadr to leave Guantanamo and Canada has never requested his release or repatriation. As a result, Khadr has spent the past eight years—one-third of his life—at Guantanamo.

At Guantanamo, Khadr has spent nearly every minute either alone in his cell or undergoing interrogation. The interrogators have subjected him to stress positions, used attack dogs to scare him during interrogations, and used him as a human mop to clean up his own urine. Khadr has also intermittently been part of Guantanamo's so-called “frequent-flier program,” wherein guards move prisoners from cell to cell during the night to deprive the prisoners of sleep.<sup>31</sup>

The United States first contacted the Canadian government to confirm Khadr’s identity on August 20, 2002, while he was still in detention in Bagram.<sup>32</sup> In February 2003, Canadian Security and Intelligence Service (“CSIS”) agents and an officer from the Department of Foreign

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999 U.N.T.S. 171 [hereinafter ICCPR]; separate juvenile inmates from adult inmates, ICCPR art. 10.3; provide specialized procedures focusing on rehabilitation, ICCPR art. 14(4); and allow contact with family (“save in exceptional circumstances”), Convention on the Rights of the Child, art. 37(c), , Nov. 20, 1989, 1577 U.N.T.S. 3. Numerous other international obligations apply to the treatment of juveniles. *See, e.g.*, UN Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990).

However, although the Human Rights Committee defines “juvenile” as anyone under the age of 18, it allows each State party to determine the limits of juvenile age itself, which the United States has set at 16. According to Thomas Lee, Deputy Assistant Attorney General at the time, “individuals under the age of 16 are accorded differential treatment than persons who are older. As a matter of policy, the Department of Defense has treated individuals assessed upon their arrival at Guantanamo Bay to be younger than age 16 in a manner appropriate to their age and to the military mission.” Matthew Haggold, *Child Soldiers: Victims or Perpetrators?*, 29 U. LA VERNE L. REV. 56, 60 (quoting letter from Deputy Assistant Attorney General Thomas R. Lee to Honorable Joyce Hens Green (Sept. 3, 2004) (on file with author of original article)). Khadr has never received any special treatment or legal status because of his age.

<sup>31</sup> Tietz, *supra* note 17. In July 2008, Khadr’s defense attorneys released interrogation footage wherein he sobs uncontrollably while describing the conditions of his detention and interrogation at Guantanamo. ‘You don’t care about me,’ Omar Khadr Sobs in Interview Tapes, CBC NEWS, July 15, 2008, <http://www.cbc.ca/canada/story/2008/07/15/khadr-tapes.html>. To view the video footage, see *Guantanamo Bay Child Soldier CSIS Interrogation – Omar Khadr*, YOUTUBE.COM, [http://www.youtube.com/watch?v=aQHFFbD\\_-Pg](http://www.youtube.com/watch?v=aQHFFbD_-Pg) (last visited June 10, 2010).

<sup>32</sup> John J. Lumpkin, *Canadian Teen in U.S. Military Custody after Afghan Firefight*, ASSOCIATED PRESS, Sept. 5, 2002.

Affairs and International Trade (“DFAIT”) visited Khadr at Guantanamo. These visits were not diplomatic or consular in nature: rather, they were for law enforcement and intelligence gathering. The CSIS and DFAIT agents provided information obtained from Khadr to American authorities, even after being told of the sleep deprivation tactics used against Khadr.<sup>33</sup> Not until 2005 would Canadian officials visit Khadr to ensure his welfare.

## II. LEGAL BACKGROUND

The United States government took no legal action following Khadr’s detention until July 30, 2005—almost three years after his imprisonment began. President Bush, acting pursuant to a November 13, 2001 military order,<sup>34</sup> determined that Khadr was “triable by a military commission” on four charges: conspiracy, murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, and aiding the enemy.<sup>35</sup>

But the United States did not try Khadr. While he awaited trial, the United States Supreme Court issued a series of decisions that delayed any trial before a military commission and profoundly affected later determinations made by the Canadian Supreme Court. In *Rasul v. Bush*,<sup>36</sup> the Court held that foreign nationals captured abroad may challenge the legality of their detention at Guantanamo Bay.<sup>37</sup> Two years later the Court held that the original military

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<sup>33</sup> Prime Minister of Canada v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44, ¶ 5 (Can.).

<sup>34</sup> *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001). In brief, the order allows detention and trial by military commission of any non-U.S. citizen who there is reason to believe may be affiliated with al Qaeda, or if that person’s detention and trial under the order is “in the interest of the United States.” *Id.* at 57,834.

<sup>35</sup> Charge Sheet, *United States v. Khadr* (U.S. Military Comm’n Nov. 4, 2005) at ¶ 2., available at [www.defense.gov/news/Nov2005/d20051104khadr.pdf](http://www.defense.gov/news/Nov2005/d20051104khadr.pdf) (last visited June 10, 2010).

<sup>36</sup> 542 U.S. 466 (2004).

<sup>37</sup> Writing for the Court, Justice Stevens held that U.S. Federal District Courts should have jurisdiction over Guantanamo detainee challenges because: the United States exercises exclusive territorial jurisdiction over Guantanamo Bay, the detainees were nationals of countries not at war with the United States, they deny any involvement in acts against the United States, and they have been held for two years without an opportunity to challenge their detentions. *Id.* at 470-85. Justice Scalia dissented, arguing that the holding was not only divorced from precedent, but would also have “a potentially harmful effect upon the Nation’s conduct of a war.” *Id.* at 506 (Scalia, J., dissenting).

commissions established to prosecute detainees such as Khadr were unlawful.<sup>38</sup> In *Hamdan v. Rumsfeld*, the plurality concluded that the military commissions' procedures did not meet the minimum standards required by the Uniform Code of Military Justice and the Geneva Conventions.<sup>39</sup> Accordingly, Khadr's prosecution before a military commission was put on hold until after passage of the Military Commissions Act in October 2006.<sup>40</sup> Shortly thereafter, in April 2007, American prosecutors referred his case to the new military commission on charges including murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying.<sup>41</sup>

Just three days after Khadr's lawyer announced that Khadr would not enter into a plea bargain with the U.S. government,<sup>42</sup> a military judge dismissed the case against Khadr for lack of jurisdiction on technical grounds.<sup>43</sup> However, the United States Court of Military Commission Review quickly reversed the decision.<sup>44</sup>

Until recently, the American military commission system had taken little further action

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<sup>38</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

<sup>39</sup> *Id.* at 620-35. The United States has implemented all four Geneva Conventions via 18 U.S.C. § 2441(1996). Therefore, under the Supremacy Clause, the treaties are a part of American law. See U.S. CONST. art. VI, § 2. However, Justice Kennedy, the critical fifth vote, did not reach this question of violation of the Geneva Conventions. See *Hamdan*, 548 U.S. at 654-55 (Kennedy, J., concurring in part).

<sup>40</sup> United States Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. §§ 948a-950w). The Military Commissions Act skirts the Geneva Conventions issue, as it requires that "[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights." *Id.* at § 948b(g). The preceding section of the Act, however, states that the military commissions "afford[] all the necessary 'judicial guarantees[]' required by the Geneva Conventions." *Id.* at § 948b(f). The Act thereby requires the military commissions to adhere to the Geneva Conventions, but removes the check of Geneva Convention challenges—an important right lacking any possibility of a remedy.

<sup>41</sup> Office of the Chief Prosecutor, Department of Defense, *United States v. Khadr*, No. 07-001, available at <http://www.defenselink.mil/news/d2007Khadr%20-%20Notification%20of%20Sworn%20Charges.pdf>.

<sup>42</sup> No Plea Deal for Khadr, Canadian Lawyer Says, CTV NEWS, June 1, 2007, [http://www.ctv.ca/CTVNews/Canada/20070601/khadr\\_deal\\_070701/](http://www.ctv.ca/CTVNews/Canada/20070601/khadr_deal_070701/).

<sup>43</sup> Sara Wood, Charges Dismissed Against Canadian at Guantanamo, AMERICAN FORCES PRESS SERVICE, June 4, 2007, <http://www.defense.gov/news/newsarticle.aspx?id=46281>.

<sup>44</sup> *United States v. Khadr*, No. 07-001, (M.C.R. Sep. 24, 2007) available at [http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20\(24%20Sep%2007\)\(25%20pages\).pdf](http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20(24%20Sep%2007)(25%20pages).pdf).

on Khadr's case.<sup>45</sup> However, in August 2010, Khadr's trial by military commission began anew at Guantanamo.<sup>46</sup> In the meantime, Khadr had turned to the Canadian courts to challenge his detention.

### III. THIS CASE

The groundwork for this case was laid in a 2008 case brought by Khadr ("Khadr II"), in which the Supreme Court of Canada ("SCC") concluded that "the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS interviews constituted a clear violation of fundamental human rights protected by international law."<sup>47</sup> The SCC agreed with the *Hamdan* plurality that the detention system in place at that time had violated the Geneva Conventions,<sup>48</sup> and further held that Canada had participated in this unlawful process by making information from the CSIS and DFAIT interviews available to U.S. authorities.<sup>49</sup> The SCC thereupon ordered the release to Khadr's defense counsel of all records of interviews conducted by Canadian officials, and all information given to the United States from these interviews.<sup>50</sup> The relief requested in this first case—the release of documents necessary to prepare a defense—offered Khadr no immediate hope of leaving his cell in Guantanamo. But the Court's expansive ruling set the stage for another constitutional confrontation when the SCC's holding in *Khadr II* did not spur the Canadian Executive to demand Khadr's release or repatriation.

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<sup>45</sup> Until the trial began the most noteworthy development occurred on April 30, 2008, when the military judge denied Khadr's motion to dismiss the case for lack of jurisdiction on the basis of his juvenile status. The judge concluded that the Military Commission Act does not differentiate between combatants by age and international law does not preclude the prosecution of child soldiers for violations of the laws of war. Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of Child Soldier, *United States v. Khadr*, No. D-022 (April 30, 2008). All post-2007 filings and rulings are available at: <http://www.defense.gov/news/commissionsKhadr.html>.

<sup>46</sup> See *Isikoff*, *supra* note 8.

<sup>47</sup> *Minister of Justice of Canada v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125, ¶ 24 (Can.).

<sup>48</sup> See *Hamdan*, 548 U.S. at 625 (2006).

<sup>49</sup> *Minister of Justice of Canada v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125, ¶ 27 (Can.). In 2005, Khadr won an injunction to prevent further interrogations by Canadian authorities. *Khadr v. Canada*, (2006) 2005 FC 1076, [2006] 2 F.C.R. 505 (Can.).

<sup>50</sup> *Minister of Justice of Canada v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125, ¶ 34 (Can.).



Relying upon the Court's finding in *Khadr II* that his Section 7 rights had been violated, Khadr challenged his government's continued refusal to request his repatriation. He launched his challenge on August 8, 2008. Both the trial and the intermediate appellate court held that Khadr's continued detention violated international law and the Charter, and accordingly ordered the Executive to request Khadr's repatriation.<sup>51</sup> The Government appealed to the SCC.

On November 13, 2009, the very same day the SCC heard the appeal, Attorney General Eric Holder announced that Khadr would face a trial by military commission.<sup>52</sup> Neither side mentioned this formal announcement before the SCC during oral argument.<sup>53</sup>

In its *per curiam* opinion, the SCC narrowed the appeal to two distinct issues: (1) whether the actions of Canadian officials, in conducting interrogations and turning over information despite knowing of the sleep deprivation techniques employed against Khadr, constituted a

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<sup>51</sup> Justice O'Reilly of the Federal Court concluded in *Khadr v. Prime Minister of Canada*, [2010] 1 F.C.R. 34, 2009 F.C. 405 (Can.), that Canadian officials had breached Khadr's rights under international law and Section 7 of the Charter by not requesting repatriation and ordered the Canadian government to make this request "as soon as practicable." *Id.* at ¶ 92. The Canadian government appealed, and on August 14, 2009 a split panel of the Federal Court of Appeal affirmed, but narrowed the violation to conducting an interrogation and sharing information while knowing that Khadr had been subjected to "frequent flyer" sleep deprivation techniques (with Justices Evans and Sharlow making up the majority). See *Prime Minister of Canada v. Khadr*, (2010) 2009 FCA 246, [2010] 1 F.C.R. 73, ¶ 49 (Can.). Justice Nadon dissented from the panel's decision, arguing that "knowledge does not constitute participation in Mr. Khadr's mistreatment" and that the remedy granted "exceeds the role of the Federal Court and is not within the power of the Court to grant." *Id.* at ¶ 105, 106 (Nadon, J. dissenting).

<sup>52</sup> Press Conference, United States Attorney General Eric Holder, (Nov. 13, 2009), *available at* <http://blogs.usdoj.gov/blog/archives/348>. This was the same statement in which Holder announced, to significant media attention, that detainees actually implicated in the 9/11 attacks (such as Khalid Sheikh Mohammed) were to be tried in federal court in New York City. Former chief prosecutor for the military commissions Morris Davis has argued—based upon the recommendations of the Obama administration's Detention Policy Task Force—that the choice of forum depends upon the strength of the evidence against an accused detainee, with trial by military commission reserved for those against whom the government's case is weakest. See Morris Davis, Op-Ed., Justice and Guantanamo Bay, WALL ST. J., Nov. 10, 2009, at A21. If Davis is correct, the government's choice of a military commission for the trial of Omar Khadr may signal the weakness of its evidence against him.

<sup>53</sup> Khadr's attorney, Nathan Whitling, told the Court that he had received unconfirmed reports that his client was to be tried by military commission. Dahlia Lithwick, Supreme Court Dispatch, Eh, SLATE, Nov. 13, 2009, <http://www.slate.com/toolbar.aspx?action=print&id=2235467>.

violation of Section 7 of the Charter of Rights and Freedoms;<sup>54</sup> and (2) if so, whether a repatriation request would be a just and appropriate remedy.<sup>55</sup>

To answer the first question the SCC first had to decide whether the Charter applied to actions by the government taken in another country. Under Canadian law, the usual answer is no.<sup>56</sup> This case, however, constituted an exception because “[t]he jurisprudence leaves the door 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 norms.”<sup>57</sup> Therefore, to answer the extra-territoriality question, the Court first had to answer an international law question.

Despite noting a change in the American legal regime governing Khadr's detention,<sup>58</sup> the Court concluded that a violation effectively followed *a fortiori* from its earlier holding in *Khadr II* in which the SCC (relying in part upon *Hamdan* and *Rasul*) concluded, on the same underlying fact, that Canadian officials had participated in activities in violation of their obligations under international law.<sup>59</sup> As a result, the case called for the extra-territorial application of the

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<sup>54</sup> Khadr’s original challenge alleged violations of international law, Charter Section 6 (establishing a “right to enter, remain in and leave Canada”), and Charter Section 12 (prohibiting “cruel and unusual treatment or punishment”). Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, ch. 11 (U.K.). §§6(1), §12 [hereinafter Charter]. The lower court decisions were restricted to the Section 7 issue, so the SCC thus limited its review.

<sup>55</sup> Prime Minister of Canada v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44, ¶ 12 (Can.).

<sup>56</sup> “[I]t is a well-established principle that a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under international law.” R. v. Hape, 2007 SCC 26, [2007] 2 S.C.R. 292, ¶ 65 (Can.).

<sup>57</sup> Prime Minister of Canada v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44, ¶ 14 (Can.) (citation omitted).

<sup>58</sup> *Id.* at ¶ 17. The Court distinguished between the pre-*Hamdan* regime that the Supreme Court had held in violation of the UCMJ and Geneva Conventions, and the post-*Hamdan* regime, citing passage of the Military Commissions Act and the Detainee Treatment Act. Although the Court did not cite it, a recent Executive Order by President Obama requires that the standards of confinement and operation of military commissions meet international law standards. See Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 27, 2009).

<sup>59</sup> Prime Minister of Canada v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44, ¶¶ 16-18 (Can.). For a detailed discussion of the earlier *Khadr* decision and the establishment of this “human rights exception” for the extra-territorial application of the charter see Maria L. Banda, *On the Water’s Edge? A Comparative*

Canadian Charter.

The Court next had to determine whether there had actually been a Charter violation in Khadr's case. Section 7 states: "Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."<sup>60</sup> The Court noted that the United States, not Canada, had been "the primary source of the deprivation of Mr. Khadr's liberty and security of person."<sup>61</sup> However, citing *Suresh v. Minister of Citizenship and Immigration of Canada*,<sup>62</sup> the SCC stated that Canada's secondary role in violating Khadr's rights could still violate Section 7 if there existed "a sufficient causal connection between [the Canadian] government's participation and the deprivation [of liberty and security of the person] ultimately effected."<sup>63</sup> Here, the statements taken by Canadian officials and turned over to American authorities were inculpatory, and potentially admissible under the lower evidentiary bar of a military commission. They therefore contributed to Khadr's continued detention, and their disclosure by Canadian agents violated Section 7.<sup>64</sup>

Before finding a Section 7 violation, however, a Court must also determine that the deprivation in question is not otherwise in accordance with "principles of fundamental justice."<sup>65</sup>

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*Study of the Influence of International Law and the Extraterritorial Reach of Domestic Laws in the War on Terror Jurisprudence*, 41 GEO. J. INT'L L. 525, 540-43 (2010).

<sup>60</sup> Charter, *supra* note 53, at § 7.

<sup>61</sup> Prime Minister of Canada v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44, ¶ 19 (Can.).

<sup>62</sup> 2002 SCC 1, [2002] 1 S.C.R. 3, ¶ 54 (Can.). One of the leading recent cases to come out of the SCC, *Suresh* involved a Section 7 challenge to the Canadian government's deportation of an individual to a country where he is at risk of being tortured. The Court ruled that such a deportation may be unlawful under the Charter.

<sup>63</sup> Prime Minister of Canada v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44, ¶ 19 (Can.) (alterations in original).

<sup>64</sup> *Id.* at ¶¶ 20-21.

<sup>65</sup> Charter, *supra* note 53, at § 7. Under Section 7 of the Charter, any of the rights protected therein (life, liberty, and security of person) may be violated when such an infringement is in accordance with principles of fundamental justice. A "principle of fundamental justice" is "a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person." R. v. Malmo-Levine, 2003 SCC

In concluding that Khadr's deprivation violated principles of fundamental justice, the Court again cited *Khadr II*, noting: that Khadr was being indefinitely detained; that he was alone (without counsel) during the interrogations; that he was "young"; that his statements to Canadian officials related to a serious criminal charge; and that the Canadian agents knew that he had been subjected to sleep deprivation and that their evidence would be shared with U.S. prosecutors.<sup>66</sup> The Court cited no instrument of international human rights law in establishing the principles of fundamental justice relevant to the case,<sup>67</sup> seemingly taking the violation thereof as readily apparent based upon the recitation of the facts of the case.

The Court then turned to the second issue—whether the remedy of ordering the Executive to seek Khadr's repatriation was just and appropriate. This issue did not follow from *Khadr II* since the only remedy sought in that case was disclosure of interrogation information.<sup>68</sup> The SCC divided the "just and appropriate" question into two sub-issues: (a) whether the repatriation remedy was sufficiently connected to the Charter breach, and (b) if so, whether the remedy was precluded because it touched upon the Executive's "prerogative power over foreign

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74, [2003] 3 S.C.R. 571, ¶ 113 (Can.).

<sup>66</sup> Prime Minister of Canada v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44, ¶¶ 24-25 (Can.). Despite agreeing with the lower court that Khadr's detention violated principles of fundamental justice, the SCC's discussion differs notably from that of the Appeals Court. The Appeals Court engaged in a lengthy discussion of torture and Canada's responsibility under international law as a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concluding that "[q]uestioning 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." Prime Minister of Canada v. Khadr, (2010) 2009 FCA 246, [2010] 1 F.C. 73, ¶ 50 (Can.). The Appeals Court also noted that Khadr's juvenile status "exacerbated" Canada's Section 7 breach because Canadian officials knew Khadr was a child as defined in the Convention on the Rights of the Child and because his treatment constituted a violation of that Convention, to which Canada is a party. *Id.* at ¶ 53. The SCC never uses the words "torture" or "cruel, inhuman, or degrading" to describe Khadr's treatment, and it also merely mentions his youth three times in the opinion. Prime Minister of Canada v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44, ¶¶ 25, 30 (Can.). Despite these references to his youth and Canadian standards for treatment of youth, the Court does not discuss how his juvenile status requires additional protection under international law.

<sup>67</sup> See *id.* at ¶¶ 22-26.

<sup>68</sup> *Id.* at ¶ 27.

affairs.”<sup>69</sup>

Section 24(1) of the Charter states: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”<sup>70</sup> An appropriate and just remedy “meaningfully vindicates the rights and freedoms of the claimants.”<sup>71</sup> The SCC held that the requested remedy was appropriate given the ongoing effects of the Charter violation, namely that American prosecutors could still use the information gained from the Canadian interrogations against Khadr before a military commission.<sup>72</sup> The Court added an important statement that it would subsequently ignore: “When past acts violate present liberties, a present remedy may be required.”<sup>73</sup>

The Court then reached the final, and ultimately decisive, issue in this case—whether the desired remedy would encroach on the Executive’s prerogative power over foreign affairs. The SCC described the prerogative power as the “residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown . . . .”<sup>74</sup> The Court stated that representations to foreign governments fall within the scope of prerogative power—citing *Black v. Prime Minister of Canada*<sup>75</sup>—and therefore concluded that the Executive’s decision not to request Khadr’s repatriation constituted the exercise of that power.<sup>76</sup>

*Black* involved a dispute between businessman Conrad Black and Canadian Prime Minister Jean Chrétien. Black hoped to be named a peer in the U.K., which would allow him to

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<sup>69</sup> *Id.*

<sup>70</sup> Charter, *supra* note 53 at § 21(1).

<sup>71</sup> Doucet-Boudreau v. Attorney General of Nova Scotia, 2003 SCC 62, [2003] 3 S.C.R. 3, ¶ 55 (Can.).

<sup>72</sup> Prime Minister of Canada v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44, ¶ 30 (Can.).

<sup>73</sup> *Id.* at ¶ 31.

<sup>74</sup> *Id.* at ¶ 34 (internal citations and quotations marks omitted).

<sup>75</sup> [2001] 199 D.L.R. 4TH 228 (Can. Ont. C.A.).

<sup>76</sup> Prime Minister of Canada v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44, ¶ 35 (Can.).

sit in the House of Lords.<sup>77</sup> According to his allegations, the Prime Minister of Canada intervened with the Queen to oppose his appointment.<sup>78</sup> The Ontario Federal Court of Appeals held that advising the Queen on the conferral of this status on a Canadian citizen fell within the prerogative power of the Crown and beyond judicial review.<sup>79</sup> The SCC cited *Black* for the broad proposition that representations to foreign governments fall within the prerogative power.<sup>80</sup>

However, the SCC acknowledged that it still had the power to review the Executive's exercise of the prerogative power, albeit under a very deferential standard of review. The Court described such scrutiny as a "narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action . . . ."<sup>81</sup> According to the Court, the Executive is generally "better placed to make such decisions within a range of constitutional options," and the courts' role is only "to determine the legal and constitutional limits within which such decisions are to be taken."<sup>82</sup> Finally, relying on Khadr's "complex and ever-changing circumstances," the SCC stated that ordering the Executive to request Khadr's repatriation would give too little deference to executive responsibility over matters of foreign affairs.<sup>83</sup>

Still, the SCC acknowledged that there are other circumstances in which a Canadian court may give the Executive specific directions in the area of foreign policy, under its holding in *United States v. Burns*.<sup>84</sup> In *Burns*, two Canadian citizens who admitted to murder and were subsequently detained in Canada challenged their possible extradition to the United States as

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<sup>77</sup> *Black*, 199 D.L.R. 4TH 228 at ¶ 1.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at ¶¶ 41, 64.

<sup>80</sup> *Prime Minister of Canada v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, ¶ 35 (Can.).

<sup>81</sup> *Id.* at ¶ 38.

<sup>82</sup> *Id.* at ¶ 37.

<sup>83</sup> *Id.* at ¶ 39.

<sup>84</sup> 2001 SCC 7, [2001] 1 S.C.R. 283 (Can.).

improper without assurances that the U.S. would not impose the death penalty.<sup>85</sup> The SCC, holding that such assurances are required “in all but exceptional cases,” ordered the Canadian executive to seek assurances before allowing extradition of the prisoners.<sup>86</sup> The Court restricted *Burns* to its facts, and distinguished Khadr’s case on several grounds. In *Burns*: (1) it was clear that the required assurances would be effective to protect against prospective Charter breaches; (2) the fugitives were within Canada’s control; (3) “it was entirely within Canada’s power to protect” them; (4) “no public purpose would be served by extradition without assurance[.]” versus extradition with assurance; and (5) seeking assurance would not “undermine Canada’s relationship with other states.”<sup>87</sup> According to the Court, Khadr’s case did not involve these factual predicates,<sup>88</sup> and therefore his detention did not present a circumstance where the Court could give the Executive specific foreign policy orders.<sup>89</sup>

In addition to these foreign affairs considerations, the SCC also voiced concern about the inadequacy of the record.<sup>90</sup> Given that negotiations between the U.S. and Canadian governments regarding Khadr were ongoing, the Court voiced concern about uninformed judicial intervention.<sup>91</sup> Such restraint was particularly necessary because Khadr’s “legal predicament continues to evolve.”<sup>92</sup> The Court specifically noted Attorney General Holder’s announcement that the United States would try Khadr by military commission as evidence of this evolution.<sup>93</sup>

Thus, despite deciding most issues in Khadr’s favor, the SCC ultimately offered its lone citizen in Guantanamo mere declaratory relief, which it described as “an effective and flexible

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<sup>85</sup> *Id.* at ¶ 6.

<sup>86</sup> *Id.* at ¶ 8.

<sup>87</sup> Prime Minister of Canada v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44, ¶ 42 (Can.).

<sup>88</sup> *Id.* at ¶ 43.

<sup>89</sup> *Id.* at ¶ 39.

<sup>90</sup> *Id.* at ¶ 44.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at ¶ 45.

<sup>93</sup> *Id.* at ¶ 45.

remedy for the settlement of real disputes.”<sup>94</sup> The SCC’s declaration stated:

[T]hrough the conduct of Canadian officials in the course of interrogations in 2003-2004, as established on the evidence before us, Canada actively participated in a process contrary to Canada’s international human rights obligations and contributed to Mr. Khadr’s ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by s. 7 of the *Charter*, contrary to the principles of fundamental justice.<sup>95</sup>

Yet this declaration changed little. Notwithstanding the SCC’s rebuke, days later, on February 3, 2010, Canadian officials announced that they had reached “exactly the same decision that [they] have taken since the outset of this incident”—the government would not request Khadr’s repatriation.<sup>96</sup> Instead, the Canadian Embassy sent a diplomatic note to the United States requesting that American prosecutors not use any of the information obtained from the 2003 interrogations that formed the basis of the Charter violation.<sup>97</sup> The U.S. State Department’s response simply reiterated the (loose) evidentiary standards for military commissions set out in the Military Commissions Act of 2009 and made no specific reference to the information obtained in the 2003 interrogations.<sup>98</sup> Canada has taken no other action since the SCC’s declaration.

#### IV. ANALYSIS

In the aftermath of the decision, commentators recognized the SCC’s obvious desire to

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<sup>94</sup> *Id.* at ¶ 46 (quoting *R. v. Gamble*, 1988 SCC 15, [1988] 2 S.C.R. 595, ¶ 81 (Can.)). *Gamble* involved the declaration that the appellant was parole eligible, rather than a mere declaration that the individual’s rights had been violated—a significantly more “effective and flexible” declaratory order than that offered to Khadr.

<sup>95</sup> *Id.* at ¶ 48.

<sup>96</sup> Gloria Galloway, *Tories Stand Pat on Omar Khadr*, THE GLOBE & MAIL, Feb. 3, 2010.

<sup>97</sup> *Khadr v. The Prime Minister of Canada*, 2010 F.C. 715, ¶ 27, Annex A (Can.). This response to the declaration has a clear rationale. If the U.S. government acceded to the Canadian request, it would remedy the Canadians’ ongoing breach of Khadr’s Charter rights because it would remove the connection between the 2003 interrogations and his future trial—the causal link that formed the basis of the Charter violation found by the SCC.

<sup>98</sup> *Id.* at Annex B.



avoid a constitutional crisis in which the Executive ignored a direct order from the Court.<sup>99</sup>

However, this caution led the Court to adopt an overly-restrained view of its judicial role.

The Court's analysis displays dueling notions of the separation of powers. On the one hand, the Court recognized that *Burns* creates a role for the judicial branch in ensuring the constitutionality of the Executive's exercise of the prerogative power, and that it empowers the Court to give specific orders on matters of foreign policy.<sup>100</sup> On the other hand, the Court emphasized—and eventually yielded to—its concern that the prerogative power articulated in *Black* requires this role to be minimal.<sup>101</sup> But the Court's attempt to respect the separation of powers between the two branches struck this balance incorrectly, particularly given the troubling facts of this case in which a juvenile has been detained contrary to fundamental principles of international law in violation of his Charter rights.

The logic of the opinion and of Canadian law seemingly require actual—not merely declaratory—relief. The Court relied unquestioningly upon *Black*—a case quite factually distinct from Khadr's. Meanwhile, it painstakingly, and unpersuasively distinguished *Burns*—a closely analogous case. The Court stated that in *Burns*, unlike here, “[i]t was clear that [diplomatic] assurances would provide effective protection against the prospective *Charter* breaches . . . .”<sup>102</sup> But this ignores the simple observation of the opinion that was under review. The trial court had observed that “[m]any other countries have requested the return of their citizens or residents from Guantanamo Bay and the United States has granted those requests.”<sup>103</sup> Although this is no guarantee of the effectiveness of a repatriation request in this case, there can

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<sup>99</sup> See, e.g., Ken Dickerson, *Omar Khadr's Rights, Prerogative Powers and Canadian Diplomacy after the Supreme Court Decision*, CENTRE FOR CONSTITUTIONAL STUDIES, Feb. 8, 2010, [http://www.law.ualberta.ca/centres/ccs/issues/Khadr\\_Supreme\\_Court\\_Decision.php](http://www.law.ualberta.ca/centres/ccs/issues/Khadr_Supreme_Court_Decision.php)

<sup>100</sup> Prime Minister of Canada v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44, ¶¶ 36, 41 (Can.).

<sup>101</sup> *Id.* at ¶ 39.

<sup>102</sup> *Id.* at ¶ 42.

<sup>103</sup> Khadr v. Prime Minister of Canada, (2010) 2009 FC 405, [2010] 1 F.C.R. 34, ¶ 86 (Can.).

never be a guarantee that an international request will be effective—including the one at issue in *Burns*.<sup>104</sup> However, the history suggests that a request would likely result in repatriation.

The Court further distinguished Khadr's case from *Burns* by arguing that "the impact on Canadian foreign relations . . . cannot be properly assessed by the Court."<sup>105</sup> For the Court to invoke foreign relations as a reason for withholding a remedy, however, the Canadian government should first be required to demonstrate how the proposed remedy would have a "particular harm" to foreign relations and this showing should have to be "supported by evidence."<sup>106</sup> Yet the Court describes no such harm and cites no such evidence. Essentially the Court flipped the burden of proof, readily accepting the government's argument that extradition could undermine Canada-U.S. relations despite evidence to the contrary. Khadr is the last remaining citizen of a Western country in Guantanamo<sup>107</sup> precisely because every other Western country with citizens imprisoned there has already sought their repatriation.<sup>108</sup> These countries have not reported any deleterious effect on foreign relations as a result of these other

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<sup>104</sup> In addition, there is specific evidence in this case that the American government wants to send Khadr back to Canada, but will only do so after a repatriation request to ensure political cover from possible domestic backlash against his release. Steven Edwards, *U.S. Trying to Repatriate Khadr: Sources*, THE NATIONAL POST, March 6, 2010, available at <http://www.nationalpost.com/trying+repatriate+Khadr+sources/2652507/story.html>. If true, this all but guarantees that a request would be effective.

<sup>105</sup> *Prime Minister of Canada v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, ¶ 43 (Can). It is also a stretch, I think, for the Court to assert that the impact of the request in *Burns*—that the United States promise not to impose the death penalty on murderers prior to their extradition from Canada—could be assessed by the Court.

<sup>106</sup> *Khadr v. Prime Minister of Canada*, (2010) 2009 F.C. 405, [2010] 1 F.C.R. 34, ¶ 84 (Can.) (citing *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, (Can.) and noting that the Court in *Burns* discussed the more specific issue of whether extradition would "undermine in any significant way the achievement of Canada's mutual assistance objectives" rather than just cause harm to general Canada-U.S. relations).

<sup>107</sup> CBC NEWS, *supra* note 7.

<sup>108</sup> See, e.g., *Last Guantanamo Frenchmen Go Home*, BBC NEWS, March 8, 2005, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4327841.stm> (detailing release of French inmates); Tania Branigan & Vikram Dodd, *Afghanistan to Guantanamo Bay – The Story of Three British Detainees*, THE GUARDIAN, Aug. 4, 2004, at 5 (detailing release of British detainees).

repatriations.<sup>109</sup> Furthermore, according to recent reports the United States would apparently prefer to repatriate Khadr.<sup>110</sup> Thus, a repatriation request could actually *improve* Canadian foreign relations.<sup>111</sup>

The American government continues to hold Khadr contrary to the requirements of international human rights law on juvenile detention,<sup>112</sup> but the Court downplayed this aspect of the case throughout its decision. Unlike the SCC, the Canadian Court of Appeal referred to the international human rights instruments to which Canada is a party throughout its opinion.<sup>113</sup> The Court of Appeal described Canada's international law obligations and joined the lower court in detailing the abuses Khadr suffered during his detention, referring to them using terms of art in international human rights law: "torture" and "cruel, inhuman, or degrading treatment."<sup>114</sup> By contrast, the SCC's opinion did not explicitly focus upon the fact that Khadr's treatment had violated human rights norms. Instead, the SCC merely referred to its 2008 decision that had so

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<sup>109</sup> For example, the British government requested the release of five British residents from Guantanamo Bay in 2007. *See UK seeks Guantanamo men release*, BBC NEWS, (Aug. 7, 2007), <http://news.bbc.co.uk/2/hi/6934669.stm>. The request signaled a change in U.K. policy under Prime Minister Gordon Brown and came despite a Court of Appeals ruling that it would not order the government to seek repatriation in light of American intransigence on the issue. *Id.* Despite this shift in policy, the U.K. remains one of America's closest allies.

<sup>110</sup> Edwards, *supra* note 97.

<sup>111</sup> The Court similarly distorted its precedent when citing *Gamble* for the proposition that declaratory relief can be effective. *See supra* note 87. The SCC did not examine crucial factual distinctions between the two cases. The appellant in *Gamble* received a declaration of parole eligibility, not a general declaration of a rights violation. *R. v. Gamble*, 1988 SCC 152, [1988] 2 S.C.R. 595, ¶ 81 (Can.). Unlike in *Gamble*, the declaration in Khadr's case provides no relief itself.

<sup>112</sup> For a detailed discussion of the requirements of the relevant human rights law instruments and their violation in Khadr's case, see HUMAN RIGHTS WATCH, THE OMAR KHADR CASE: A TEENAGER IMPRISONED AT GUANTANAMO, (2007), available at <http://www.hrw.org/en/reports/2007/06/01/omar-khadr-case>.

<sup>113</sup> *See Prime Minister of Canada v. Khadr*, 2009 F.C.A. 246, ¶ 19 (quoting Minister of Justice of Canada v. Khadr, 2008 SCC 28, [2008] 2 S.C.R. 125 (discussing Common Article 3 of the Geneva Conventions)), ¶ 52 (citing to the Convention Against Torture), ¶ 53 (citing to the Convention on the Rights of the Child).

<sup>114</sup> *See Prime Minister of Canada v. Khadr*, (2010) 2009 FCA 246, [2010] 1 F.C.R. 73 (Can.).

held.<sup>115</sup> Perhaps most glaringly, the SCC's decision scarcely mentioned Khadr's juvenile status at the time of his initial detention at Bagram. In short, the Court largely ignored the most troubling aspects of Khadr's detention, which allowed it to strike an inappropriate balance in favor of judicial restraint rather than action.

This failure to discuss the most troubling issues associated with Khadr's detention is significant because the Court, in distinguishing *Burns*, failed to recognize a key part of the necessary inquiry. When deciding whether or not to compel the Executive to take actions that might influence foreign affairs, the Court should balance the severity of the violation with the difficulty of the remedy. None of the five factors that the Court used in distinguishing *Burns* addressed the severity of the human rights violation at issue. When government agents participate in gross violations of human rights treaties, especially those concerning children, greater intrusion by the judiciary is justified.

Finally, it is unclear that the SCC even avoided its separation of powers concerns by its chosen course of action. The Court announced that Canada had violated Khadr's Charter rights, thereby issuing an important rebuke to the Canadian Executive. The Executive, however, essentially ignored the declaratory order by not aggressively pursuing repatriation or other effective relief. Within a week of the decision, the Executive Branch had already announced that it had come to "exactly the same decision" on the question of whether to request Khadr's repatriation.<sup>116</sup> Though the Canadian government has since asked the United States not to use the evidence procured by the offending interrogations, the United States ignored this request. The Canadian Executive has not yet provided an effective remedy. Though the SCC's strategy avoided the explicit conflict of the Executive defying a more specific court order, the

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<sup>115</sup> See *Prime Minister of Canada v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, ¶ 24 (Can.).

<sup>116</sup> Galloway, *supra* note 95.

Executive's failure to provide relief in the face of an announced violation of the Canadian charter still places great strain on the Court's perceived power within the Canadian system of government.

## V. CONCLUSION

The Canadian courts have already issued their next decision. On July 5, 2010, the Federal Court clarified the Canadian government's obligations to Khadr. It held that the American rejection of the request concerning the use of information in Khadr's trial meant that "Canada has not cured its breach of Mr. Khadr's *Charter* rights."<sup>117</sup> According to the decision, if the only effective remedy left is that the court order the Executive to request Khadr's repatriation, "then this Court is not only empowered to order it, this Court is required to order that it be done."<sup>118</sup>

This appeal would have likely reached the Supreme Court of Canada again, but it may not have arrived on time. Khadr's trial by military commission had already begun in the United States, where he was the first individual to be captured as a juvenile and prosecuted for war crimes since World War II.<sup>119</sup> UN Secretary-General Ban Ki-moon's Special Representative for Children and Armed Conflict warned that Khadr's trial could "jeopardiz[e] the status of child soldiers around the world."<sup>120</sup> A military judge had already ruled that all of Khadr's allegedly coerced confessions would have been admissible in his trial.<sup>121</sup>

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<sup>117</sup> Khadr v. Prime Minister of Canada, 2010 F.C. 715, [2010] 1 S.C.R. 44, ¶ 89 (Can.).

<sup>118</sup> *Id.* at ¶ 91.

<sup>119</sup> *UN envoy warns of implications of trial of last child soldier held in Guantanamo*, UN NEWS CENTRE, Aug. 10, 2010, available at <http://www.un.org/apps/news/story.asp?NewsID=35574&Cr=child+soldier&Cr1=&Kw1=UN+Envoy+Wans+of+Implications&Kw2=&Kw3=>.

<sup>120</sup> *Id.*

<sup>121</sup> Anna Mehler Paperny, *Khadr's Confessions Admissible, Military Judge Rules*, THE GLOBE & MAIL, Aug. 9, 2010, available at <http://www.theglobeandmail.com/news/world/khadrs-confessions-admissible-military-judge-rules/article1666620/>.

In late October 2010, however, Khadr pled guilty.<sup>122</sup> Although he had asserted that he would never do so, Khadr pled guilty in exchange for what is believed to be a cap of eight additional years on his sentence and the possibility of a transfer to Canada after one year.<sup>123</sup> Khadr's guilty plea does not absolve the Supreme Court of Canada. Instead, it merely confirms what many already knew—the United States did not want to prosecute a juvenile for war crimes violations in a military commission. Not only because of the unprecedented nature of the case (and its highlighting of the Obama administration's unfulfilled pledge to shut down Guantanamo), but also because the charges against Khadr seemingly required the United States to implicitly concede that the Central Intelligence Agency unmanned drone attacks were war crimes.<sup>124</sup> The U.S. willingness to settle the case on these terms makes it that much more likely that it would have acceded to a repatriation request had the SCC ordered the executive to make one.

Although the transfer request places the Canadian Prime Minister Stephen Harper in “an exquisite political dilemma” because of his Conservative government's aversion to allowing repatriation,<sup>125</sup> recent reports suggest that the Canadian government will accept Khadr when he requests transfer in a year.<sup>126</sup> The conviction of Omar Khadr for a war crime he committed when he was legally a child would have been an unprecedented shift in the treatment of child soldiers, made possible only by the SCC's overly-restrained view of its power to review executive action.

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<sup>122</sup> Savage, *supra* note 9.

<sup>123</sup> *Id.*

<sup>124</sup> The United States charged Khadr with the war crime of killing an enemy soldier in combat—a charge that the U.S. could only bring because he wore no uniform. C.I.A. drone operators, however, also kill while not wearing any uniforms. Before striking Khadr's plea deal, the U.S. amended rules and downgraded the offense level of “murder in violation of the laws of war” from war crime status to a domestic level offense to avoid this implication. *See id.*

<sup>125</sup> John Ibbitson, *A U.S. Request Harper Would Dread*, THE GLOBE & MAIL, Oct. 14, 2010, at A10.

<sup>126</sup> Adam Levine, *Canada Says It Will Accept Guantanamo Detainee Khadr in a Year*, CNN.COM, Nov. 1, 2010 (citing spokeswoman for the Canadian Ministry of Foreign Affairs).

Ironically, the U.S. government—which had tortured, detained, and nearly prosecuted Khadr—did what the SCC had refused to do, and pressured the Canadian government into repatriating Omar Khadr. Though the United States may have avoided the unpalatable trial of its only juvenile detainee, the Supreme Court of Canada missed an opportunity to send a powerful statement to the world about the proper scope of a judiciary’s constitutional role.