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Canada's Supreme Court : Torture as Foreign Policy: the Omar Khadr Decision

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The decision of the Supreme Court of Canada in the Omar Khadr [1] case, which implies that remedies to prevent torture and punish perpetrators are a privilege to be granted or withheld at the pleasure of the Prime Minister, is wrong.

The Supreme Court of Canada confirmed that the government of Canada violated Omar Khadr's *Charter* rights, that those violations continue and that those violations contribute to his ongoing detention. The court was referring to the fact that officials from Canada's Department of Foreign Affairs and International Trade (DFAIT) interrogated Omar Khadr at Guantanamo Bay and gave their interrogation records to Khadr's U.S. captors, after being told that U.S. officials had tortured Khadr (by severe sleep deprivation)[2] for three weeks to "make him more amenable and willing to talk" to the Canadians and that he would be placed in isolation after the interrogation.

Ignoring the imperative international duties triggered by these appalling facts, the Supreme Court of Canada went on to rule it appropriate to leave "it to the government to decide how best to respond…".[3] The court set aside the 23 April 2009 order of the Federal Court of Canada–confirmed by the Federal Court of Appeal on 14 August 2009–compelling the Prime Minister, the Minister of Foreign Affairs, the Commissioner of the RCMP and the Director of CSIS to "…request that the United States return Mr. Khadr to Canada as soon as practicable."

The Federal Court order was in keeping with the decision made by the Canadian government in March 2009. In June 2008 the Committee struck to study the Omar Khadr case recommended to Parliament "…that the Government of Canada demand Omar Khadr's release from U.S. custody at Guantanamo Bay to the custody of Canadian law enforcement officials as soon as practical."[4] On 23 March 2009, Parliament voted by a majority to accept that recommendation, thereby directing the Prime Minister to act to secure Khadr's release and repatriation.

In setting aside the lower court orders and overriding the will of Parliament, the court cited a need to respect the prerogative power of the executive to conduct foreign affairs, described as the "…arbitrary authority, which at any given time is legally left in the hand of the Crown…".

To arrive at this conclusion, the court relied on a text published in 1915, long before the prohibition of torture became a norm of *jus cogens*, a "peremptory norm of general international law" from which no derogation is permitted; long before the "…use of torture…by state authorities…had come to be regarded as an attack upon the international

order;"[5] long before the individual's right to freedom from torture took precedence over the right of states to conduct their affairs free from interference by other states. Under current international law, the duties of states to enact and enforce effective remedies to prevent and punish torture are not subservient to any other domestic or international purpose or circumstance including "comity" between states.

In taking the extraordinary step of denying Khadr the remedy ordered by the courts below—the only remedy available–based on the existence of an arbitrary power not supported by law, the Supreme Court of Canada was simply wrong. It was simply wrong for the court to conclude that characterizing a remedy for torture as a foreign affairs policy matter displaces the imperative legal duties under the Convention against Torture to take effective action. Prime Minister Harper cannot clothe himself with the power to do what is prohibited by international and Canadian law. By law, torture against a Canadian citizen must be remedied through investigation and prosecution of suspects. Obviously the victim—in this case Khadr–must be removed from the control of the perpetrators of crimes against him. Neither the Prime Minister nor "government" has any "residual" right to "speak freely with a foreign state"[6] on the suspension or relaxation of the absolute prohibition against torture.[7] Torture can never be considered a legitimate act of state; neither can suspending or refusing remedies be legitimated as foreign policy.

The language used by the court to describe key facts and principles creates the erroneous impression that U.S. accusations against Omar Khadr are more serious than, and therefore take precedence over, the crimes the U.S. is known to have been committed against him.

Here are examples of the misleading language used by the court in the Khadr judgment:

Ø "frequent flyer program" is used to refer to the torture of Khadr by subjecting him to prolonged and severe sleep deprivation to enhance extraction of information by Canadian officials.

Ø "trial" is used to refer to the military commissions process found by the U.S. Supreme Court to illegally violate the right to a fair trial by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Ø "war crimes" is used to describe charges against Khadr that have been challenged as illegitimate because they are: unknown to the laws of war; created after they are alleged to have been committed, for which reason prosecution is absolutely barred;[8] and inapplicable since as a child Khadr lacked the capacity to consent to involvement in war.

Ø "the trial is proceeding" refers to a delay of [9] almost eight years–a delay that violates the right to be tried within a reasonable time under Canadian and U.S. law.[10] Were Khadr before a regularly constituted court, the prosecution would be stayed on the basis of that delay.

Ø "government" is used to refer to Stephen Harper, the Commissioner of the RCMP, the Minister of Foreign Affairs and the Director of CSIS.[11]

Ø “Mr. Khadr’s rights under s. 7 of the Canadian Charter of Rights and Freedoms were violated” refers to the most grave violations of Khadr’s rights to liberty[12]; due process[13]; freedom from torture and other cruel, inhuman and degrading treatment or punishment[14]; freedom from arbitrary imprisonment[15]; freedom from prosecution for *ex post facto* crimes; a fair trial; timely and confidential legal representation; determination of criminal charges by an impartial and independent tribunal; *habeas corpus* for determination of the legality of imprisonment and treatment during imprisonment; equality before the law and equal access to the protection of the law;[16] and, under the *Convention on the Rights of the Child,* to rehabilitation, education and re-integration into free society.

Finally, the Supreme Court of Canada decision in the Khadr case ignored the legal reality that without remedies there are no rights.[17] The Chief Justice of the Supreme Court of Canada has in the past observed that had freedom from torture and other basic rights been enforced, the Holocaust could not have occurred.[18]

By allowing the Prime Minister to refuse to take the actions required by law and approved by Parliament to stop violations of Omar Khadr’s rights, and by dubbing Mr. Harper’s inaction “foreign affairs,” the Supreme Court of Canada has put the rights of us all at risk.

Notes

[1] *Prime Minister of Canada, Minister of Foreign Affairs, Director of the Canadian Security Intelligence Service and Commissioner of the Royal Canadian Mounted Police v. Omar Ahmed Khadr*, Supreme Court of Canada, January 29, 2010, http://scc.lexum.umontreal.ca/en/2010/2010scc3/2010scc3.html

[2] Sleep deprivation used to extract information from a prisoner is torture according to a variety of authorities. UN experts, reviewing international law, confirmed in a 2006 report on Guantanamo Bay that sleep deprivation, even for several consecutive days, is torture. The U.S. Army Field Manual on Interrogation in force in 2004 listed sleep deprivation as a form of torture. The Canadian government publication, *Torture & Abuse Awareness,* lists the U.S. as one of the ten countries worldwide known to engage in torture and lists sleep deprivation as a form of torture.

[3] “…in view of the constitutional responsibility of the executive to make decisions on matters of foreign affairs and the inconclusive state of the record. The appropriate remedy in this case is to declare that K’s *Charter* rights were violated, leaving it to the government to decide how best to respond in light of current information, its responsibility over foreign affairs, and the *Charter*.” *Supra* note 1 at para. 39.

[4] OMAR KHADR Report of the Standing Committee on Foreign Affairs and International Development:

Subcommittee on International Human Rights, June 2008, para. 3, page 6.

http://www.jlc.org/files/briefs/khadr/Parliament%20Report%2017%20Jun%2008.pdf

[5] *R v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, [1999] UKHL 17, House of Lords. Lord Millet.

[6] *Supra*, note 1 at para. 33.

[7] Instruments that impose a mandatory duty to provide effective remedies against torture include the: Geneva Conventions; *Rome Statute of the International Court*; *International Covenant on Civil and Criminal Rights*; *Convention against Torture and other Cruel, Inhuman or Degrading Punishment or Treatment*; *Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Violations of International Human Rights and Serious Violations of International Humanitarian* Law; The Vienna Declaration and Programme of Action, articles 56 and 60; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.*

[8] Freedom from *ex post facto* prosecutions is absolute and cannot be displaced by any authority under any circumstances.

[9] Factors contributing to the delay include: rulings by the U.S. Supreme Court that the military commissions are illegal; dismissal of the charges; non-disclosure by the prosecution; leaked documents indicating falsification of evidence by the U.S. military; the Pentagon sacking of the military "Presiding Officer" in charge of the Khadr case; investigation of professional misconduct complaints against Khadr's lead military attorney; a 120-day adjournment imposed by President Obama in January 2009 for a review the process; a four month suspension imposed by the president in May 2009 to alter the military commissions.

[10] The U.S. Constitution, art. VI, cl.2 guarantees a trial within a reasonable time as does the *Speedy Trial Act.* In Canada this right is guaranteed by the *Charter of Rights and Freedoms* s. 11(b). The Supreme Court of Canada recently ruled that a two year delay violated Charter rights and that the appropriate remedy was to stay the prosecution. (*R. v. Godin*, 2009 SCC 26)

[11] *Supra* note 4, a ptara. 3, page 6.

[12] The right to liberty and not to be deprived thereof except in accordance with the principles of fundamental justice is guaranteed by the *Charter of Rights and Freedoms;* the *International Covenant on Civil and Political Rights;* and the *Universal Declaration of Human Rights*.

[13] Due Process rights, including rights to a lawyer, notice of charges and evidence, a fair trial before a competent and independent tribunal, habeas corpus, an appeal, the presumption of innocence are guaranteed by a number of Canadian statutes and international instruments binding on Canada, e.g., the Canadian *Charter of Rights and Freedoms*; the *International Covenant on Civil and Political Rights;* Third Geneva Convention; *Crimes against Humanity and War Crimes Act; Convention on the Rights of the Child*; *Hague Conventions, Annex*, art. 23(h).

[14] Freedom from torture is a non-derogable right of all humankind that cannot be displaced by any circumstances, guaranteed by the *Convention against Torture and Other Cruel and Inhuman Treatment or Punishment;*, the *Criminal Code;* the *Crimes against Humanity and War Crimes Act;* the *Rome Statute of the International Court; th*e Geneva Conventions; the *Convention on the Rights of the Child;* and other laws binding on Canada and the U.S.

[15] Freedom from arbitrary imprisonment is guaranteed by the *Charter of Rights and Freedoms;* the *International Covenant on Civil and Political Rights;* the *Convention on the Rights of the Child;* the Third Geneva Convention; the *Universal Declaration of Human*

Rights; and the Magna Carta.

[16] Rights to equality before the law and equal access to protection by law and to legal remedies for the prevention and punishment of violations is guaranteed by the *Charter of Rights and Freedoms;* the *International Covenant on Civil and Political Rights;* and the *Convention on the Rights of the Child*.

[17] "Our High Commissioner has reminded us that "Rights which are violated or ignored are rights in name only." It is in this spirit that we must abolish the culture of **impunity**. States that fail to prosecute human rights abusers are failing in their "responsibility to protect"." Canada's International Human Rights Policy website,

http://www.dfait-maeci.gc.ca/foreign_policy/human-rights/statement_hr_item9-en.asp (accessed 2 August 2005)

[18] "The most basic human rights are those guaranteed by the criminal law – the right to life; to liberty; to freedom from arbitrary detention, abuse and torture…Rights, that had they been in place and in force, would have made impossible the atrocities of the holocaust." The Right Honourable Beverley McLachlin P.C. Chief Justice of Canada, *The Changing Face of International Criminal Law* p.14.

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