A Tale of Two Brothers: The Impact of the *Khadr* Cases on Canadian Anti-Terrorism Law

- by -

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I. INTRODUCTION

After something of a slow start, Canada's post-9/11 terrorism laws have seen a fair amount of traffic over the last several years, and many of these prosecutions were high-profile in both the public and the legal senses. The case of the "Toronto 18" was well-chewed over by the press, coverage oscillating between grim amusement at the apparent incompetence of some of the accuseds and the sobering danger presented by others.[1] The Supreme Court of Canada recently granted leave to appeal in the cases of Momin Khawaja,[2] who was convicted for various terrorist activities carried out within and outside Canada, and of Suresh Sriskandarajah[3] and Piratheepan Nadarajah,[4] both of whom are facing extradition to the U.S. for allegedly providing support to the Liberation Tigers of the Tamil Eelam ("LTTE"). In all three of these cases, which will be heard together, the constitutionality of the definitional aspects of the *Criminal Code*'s terrorism offences will be dealt with by the top court. There is no doubt that anti-terrorism prosecutions are well on the national radar.

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[1] E.g. I. Teotonio, "Toronto 18 attack was to mimic 9/11," *Toronto Star* online: < http://www.thestar.com/News/GTA/article/655068 >
[2] *R. v. Khawaja*, 2010 ONCA 862, leave granted [2011] SCCA No. 80.
[3] *U.S.A. v. Sriskandarajah*, 2010 ONCA 857, leave granted [2011] SCCA No. 63.
[4] *U.S.A. v. Nadarajah*, 2010 ONCA 859, leave granted [2011] SCCA No. 64.

Arguably, however, the highest-profile Canadian terrorism cases have been two that did not involve prosecutions in Canada—those of brothers Abdullah and Omar Khadr. Both are Canadian nationals who have faced or are facing prosecution before U.S. courts for alleged terrorism-related activities, but regarding whom there have been Canadian legal proceedings. Omar Khadr's case has gone to the Supreme Court of Canada on two occasions,[5] while Abdullah Khadr's extradition case[6] seems bound in that direction.[7] There has also been a great deal of public notoriety for both of the cases, and indeed for the entire Khadr family who were famously dubbed "Canada's first family of terrorism" by Ontario Conservative MPP Bob Runciman.[8]

These proceedings tell us little, if anything, about substantive Canadian anti-terrorism law; indeed, at the time of writing there is no public indication that either of the Khadr brothers will face any charges in Canada. However, they have played a major part in generating a complex and interesting jurisprudence on various aspects of what might loosely be termed "cognate" areas: the administrative and procedural aspects of Canadian anti-terrorism law. The Omar Khadr case has been a major battleground for issues such as: the extraterritorial application of the *Charter*; obligations owed by the government to a citizen facing foreign prosecution; the implications of the Canadian government's complicity in foreign abuses; and the nature and scope of the courts' ability to judicially review Ministerial exercises of the federal foreign affairs authority. The Abdullah Khadr case, an extradition proceeding, has traversed such issues as: the distinction between

[5] *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 SCR 125 [*Khadr 2008*]; and *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 SCR 44 [*Khadr 2010*].
[6] *United States of America v. Khadr*, 2010 ONSC 4338 [*Khadr Extradition*], affirmed 2011 ONCA 358 [*Khadr Extradition Appeal*].
[7] See "Abdullah Khadr extradition request may go to top court," CBC online: < http://www.cbc.ca/news/politics/story/2011/07/29/pol-abdullah-khadr.html >
[8] As quoted on the website of the PBS television show "Frontline," online at: < http://www.pbs.org/wgbh/pages/frontline/shows/khadr/family/canada.html >

intelligence- and evidence-gathering; the government's duty to exercise diplomatic protection of its nationals abroad; and the implications of mistreatment by foreign states on Canada's international criminal cooperation obligations. In each case, there is a distinct intermingling of domestic and international law issues, which both courts and commentators have found difficult to disentangle.

While there is a great deal to be said about the Khadr cases, this paper will argue that they illustrate two legal and policy imperatives that must inform the future development of Canadian anti-terrorism law. The first is familiar: the end must continue to be worth what it costs. The terrorists who seek to harm us must be made accountable for the harm, and the governments who seek to protect us (including foreign governments) must remain accountable for the manner in which they pursue and prosecute. To be effective in the overall, democratic sense, an anti-terrorism regime must be both vigorous and fair; and while the balance between these two priorities is always a moving target, it is one we must vigilantly continue to strike.[9]

The second, and related, imperative is the recognition that Canadian anti-terrorism law does not exist in a domestically-based vacuum but engages significant and sometimes complex questions of international law and international relations. Canadian law in this area is underdeveloped in various important ways, due both to the novelty of the issues and the rocky interface between domestic law, international law and government policy that they involve. While a cogent picture is beginning to emerge, this state of continued underdevelopment threatens to undermine Canada's commitment to fundamental human rights and due process, a threat aggravated by state attempts to circumscribe the ability of

[9] See generally Roza Pati, *Due Process and International Terrorism: An International Legal Analysis* (Leiden: Martinus Nijhoff, 2009).

the courts to act as arbiters and protectors of *Charter* values. All players in the legal system—governments, Crown counsel, defence counsel and courts—must come to terms with these issues so that the system remains focused, effective and accountable. Specifically, this will require greater facility with international law generally and a more robust approach to its use in the protection of the fairness of Canadian legal process.

II. THE OMAR KHADR CASES

1. *Khadr 2008*[10]

As noted above, Omar Ahmed Khadr is a member of a family of Canadian nationals of Pakistani origin, who are notorious in Canada for their well-known links to and sympathies for Al-Qaeda. In July 2002, at the age of fifteen, Omar Khadr was actively involved in the military conflict in Afghanistan, apparently in aid of the Taliban and/or Al-Qaeda, and ended up in a firefight with U.S. soldiers. At the end of the battle he was taken prisoner by the American forces and transferred to the notorious Guantanamo Bay facility. He was charged with participating unlawfully in combat, murdering a U.S. soldier with a grenade during combat, and conspiring with Al-Qaeda to commit terrorist acts against U.S. and coalition forces in Afghanistan. The goal was for him to face trial before the Guantanamo system of secret special military commissions which had significantly circumscribed rules of procedure and evidence.

In 2003 and 2004, while Khadr was detained at Guantanamo but before charges had been laid, CSIS agents and DFAIT officials attended at the facility with the

[10] This summary is drawn, in part, from a longer discussion of the case in Robert J. Currie, *International & Transnational Criminal Law* (Toronto: Irwin, 2010) at 527-530. An excellent collection of documents relating to the Khadr matter can be found at the University of Toronto's law faculty website on the case: < http://www.law.utoronto.ca/faculty_content.asp?itemPath=1/3/4/0/0&contentId=1617 >

permission of American authorities and interrogated him about various topics, including conduct which would eventually be the subject of the charges. The 2004 interview with DFAIT officials took place when those officials knew that Khadr had been subjected to the "frequent flyer program," an interrogation technique involving sleep deprivation in order to make the subject more amenable to talking.[11] The Canadian officials passed summaries of this information on to US authorities. Through other proceedings Khadr's lawyers had received partial disclosure of these documents, but the copies were heavily redacted, and the Crown refused to disclose the unredacted documents. Khadr's counsel applied to the Federal Court for a *Charter* remedy, on the basis that Khadr's right to disclosure under section 7 of the *Charter* had been infringed by the refusal, which impaired his right to full answer and defence before the US court. The question was whether the *Charter* had such extraterritorial reach.

While the applications judge dismissed the motion, the Federal Court of Appeal reversed that ruling and allowed the application. It essentially held that the involvement of Canadian officials in the potential deprivation of Khadr's liberty engaged section 7 of the *Charter*, and applied the Supreme Court of Canada's test from *R. v. Cook*[12] in finding that there would be no "objectionable extraterritorial effect" in applying the *Charter* in this way. However, just after the Court of Appeal's ruling the Supreme Court released its decision in *R. v. Hape*,[13] wherein a majority of judges ruled that the *Charter* could not, in most circumstances, apply to the actions of Canadian officials in other states. This was because to do so would be an act of *enforcement jurisdiction* in another state, which was

[11] *Khadr 2010*, above note 5 at para. 5.
[12] [1998] 2 SCR 597.
[13] 2007 SCC 26.

illegal under customary international law and would breach the sovereignty of the foreign state.

Accordingly, it was clear that *Hape* would govern the Supreme Court's decision in *Khadr 2008*. In a brief but unanimous judgment (attributed to "The Court") the Supreme Court of Canada dismissed the appeal and, applying *Hape*, found that Khadr was entitled to disclosure. It emphasized that applying the *Charter* to the acts of Canadian officials abroad would normally amount to an impermissible extension of extraterritorial jurisdiction. This conclusion was, however, "based on international law principles against extraterritorial enforcement of domestic laws and the principle of comity which implies acceptance of foreign laws and procedures when Canadian officials are operating abroad."[14] The Court fastened on a "human rights exception" articulated by LeBel J. for the majority in *Hape*, noting that despite a three-way split on the law in *Hape* all judges had been united on the point that international law and comity would give way in any situation where Canadian officials were participating "in activities of a foreign state or its agents that are contrary to Canada's international obligations".[15] Both the conditions of Khadr's detention at Guantanamo and the trial which he faced there had already been ruled illegal by the U.S. Supreme Court,[16] in that they violated both U.S. law and the Geneva Conventions. Since Canada is a signatory to the Geneva Conventions, "[t]he *Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations."[17] The Court was careful to rule that it was simply participation in the illegal process that

[14] *Khadr 2008*, para. 17.
[15] Ibid., para. 18.
[16] In *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).
[17] *Khadr 2008*, para. 26.

entitled Khadr to a remedy under section 7, and it was not "necessary to conclude that handing over the fruits of the interviews in this case to U.S. officials constituted a breach of Mr. Khadr's s. 7 rights. It suffices to note that at the time Canada handed over the fruits of the interviews to U.S. officials, it was bound by the *Charter*, because at that point it became a participant in a process that violated Canada's international obligations."[18] Accordingly, since Khadr's right to liberty was engaged by Canada's participation in the foreign process, a remedy was necessary.

In terms of the nature of the remedy, the Court held that the principles of fundamental justice under s. 7 of the *Charter* were applicable "in an analogous way"[19] to the manner in which they would apply in a purely domestic case. Accordingly, "s. 7 imposes a duty on Canada to provide disclosure of materials in its possession arising from its participation in the foreign process that is contrary to international law and jeopardizes the liberty of a Canadian citizen."[20] However, because Canada was not playing the same role in this case as it would domestically (i.e. as prosecutor), the scope of the disclosure required would be shaped by the nature of Canada's participation in the unlawful process and, specifically, the nature of the information provided to the U.S. authorities.[21] It thus ordered the disclosure of all of the records of interviews between Khadr and Canadian officials, as well as records of whatever information had been given to the Americans. All of this would be subject to screening for privilege, including national security and public interest immunity privilege, by a motions judge of the Federal Court.

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[18] Ibid., para. 27.
[19] Ibid., para. 31.
[20] Ibid., para. 31.
[21] Ibid., para. 32.

2. *Khadr 2010*

By 2010 Omar Khadr had been imprisoned in Guantanamo Bay for over seven years, and while he had been charged his trial had not begun. Between 2005 and 2008 he had repeatedly made informal and formal requests that the government of Canada ask the U.S. government to repatriate him to Canada, as had been done by other states whose nationals were detained at Guantanamo. During a press conference in July 2008, Prime Minister Harper announced the government's decision not to ask for repatriation, noting that the government would continue to seek assurances of "good treatment" of Khadr.[22] Khadr then sought judicial review of this decision from the Federal Court, arguing that his section 7 *Charter* rights were being violated. Both the Federal Court and the Federal Court of Appeal found that there was a breach and ordered the government to request Khadr's repatriation, though the nature of the government's duty and how it was breached were defined differently by each court.

On the Crown's appeal to the Supreme Court of Canada, Khadr maintained that his section 7 rights had been violated and that the Court should uphold the order to request repatriation. The Court framed the issues as follows:

> A. Was There a Breach of Section 7 of the *Charter*?
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> 1. Does the *Charter* apply to the conduct of Canadian state officials alleged to have infringed Mr. Khadr's s. 7 *Charter* rights?
> 2. If so, does the conduct of the Canadian government deprive Mr. Khadr of the right to life, liberty or security of the person?
> 3. If so, does the deprivation accord with the principles of fundamental justice?

[22] *Khadr 2010*, above note 5 at para. 7.

B. Is the Remedy Sought Appropriate and Just in All the Circumstances?[23]

As to the first question, the Court ruled that as Khadr's claim was still based on the events in 2003-2004 that had been dealt with in *Khadr 2008*, the matter was essentially *res judicata* and the *Charter* applied under the *Hape* "human rights exception." On the second question, the Court concluded that there was ample evidence supporting a causal connection between the deprivation of Khadr's liberty under what had been an illegal process at the time (and under which he was still detained) and the actions of Canadian officials. The statements taken by CSIS agents had dealt with the substance of the events giving rise to the charges Khadr was facing and had been given to the U.S.; some of those statements had already been ruled admissible by the Guantanamo commission, "notwithstanding the oppressive circumstances under which they were obtained."[24] It was reasonable to infer from this uncontradicted evidence, the Court ruled, that these statements had contributed and were contributing to Khadr's deprivation of liberty.

As to the third question, the Court acknowledged that this case required a finding of a new principle of fundamental justice, under the criteria outlined in its earlier decision of *R. v. D.B.*[25] It concluded that the participation of Canadian officials in Khadr's detention violated principles of fundamental justice, which it summarized as follows:

> Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations

[23] *Ibid.*, para. 12.
[24] *Ibid*., at para. 20.
[25] 2008 SCC 25, cited at para. 23.

> would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.[26]

On the final question, the Court first turned to whether the requested remedy of a diplomatic repatriation request was sufficiently connected to the breach in order to ground the remedy at all. It concluded that the connection was sufficient, given that the effect of the breach continued to impact upon Khadr's liberty and security and the remedy could vindicate those rights. It then examined whether the remedy was precluded by the Crown's prerogative power over matters of foreign affairs, agreeing with O'Reilly J., the applications judge, that "the decision not to request Mr. Khadr's repatriation was made in the exercise of the prerogative over foreign relations" since it involved the making of representations to foreign governments.[27] However, the Court ruled that it had a "narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action,"[28] and that "in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution."[29] That said, the Court expressed concern about the uncertainty as to the impact on foreign relations that the requested order would have, and the general inadequacy of the record as to what the relevant considerations were and what negotiations might occur or have occurred. In general, the Court felt it was ill-equipped to specify the kind of order required, and opted to grant a declaration that Khadr's section 7

[26] *Khadr 2010*, at para. 25.
[27] Ibid., para. 35.
[28] Ibid., para. 38.
[29] Ibid., para. 37, citing *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283.

rights had been violated. This would respect the responsibilities of the executive and provide a framework in which the government could craft its future course of action.

For some time after *Khadr 2010*, the government continued to refuse to request the repatriation of Omar Khadr. However, ultimately Khadr's lawyers at Guantanamo negotiated a plea agreement for an eight-year sentence in exchange for a guilty plea, one year of which would be served in Guantanamo and the rest in Canada. The federal government agreed that it would look favourably on a request to repatriate him for this purpose.[30]

III. THE ABDULLAH KHADR EXTRADITION CASE

The involvement of Omar Khadr's older brother, Abdullah, in the Afghanistan conflict led to a series of events involving the diplomatic, security and law enforcement authorities of three states, culminating in the U.S. requesting Abdullah Khadr's extradition from Canada. In terms of a succinct summary of the facts, one cannot do better than that set out by Sharpe J.A. in the Ontario Court of Appeal's decision in the matter:

> The United States of America paid the Pakistani intelligence agency, the Inter-Services Intelligence Directorate (the "ISI"), half a million dollars to abduct Abdullah Khadr in Islamabad, Pakistan in 2004. Khadr, a Canadian citizen, was suspected of supplying weapons to Al Qaeda forces in Pakistan and Afghanistan. Following his abduction, Khadr was secretly held in detention for fourteen months. He was beaten until he cooperated with the ISI, who interrogated him for intelligence purposes. The ISI refused to deal with the Canadian government but did have contact with a CSIS official. The American authorities discouraged the CSIS official's request that Khadr be

[30] J. Taber, "Ottawa agrees to repatriate Omar Khadr," *Globe & Mail*, 1 November 2010, online: < http://www.theglobeandmail.com/news/politics/ottawa-notebook/ottawa-agrees-to-repatriate-omar-khadr/article1781106/ >

> granted consular access, and the ISI denied access for three months. The ISI refused to bring Khadr before the Pakistani courts. After the ISI had exhausted Khadr as a source of anti-terrorism intelligence, it was prepared to release him. The Americans insisted that the ISI hold Khadr for a further six months in secret detention, to permit the United States to conduct a criminal investigation and start the process for Khadr's possible rendition to the United States. When Khadr was finally repatriated to Canada, the United States sought to have him extradited on terrorism charges.[31]

Justice Christopher M. Speyer of the Ontario Superior Court of Justice sat as the extradition judge in a hearing[32] that blended a number of legal issues: the typical task of the extradition judge in determining whether "double criminality" was made out[33] and whether the individual in court was the person sought; a motion by Khadr to stay the extradition proceedings for abuse of process by the requesting state; and a determination of whether statements made by Khadr at various times should be excluded under any of section 24(2) of the *Charter*, the common law confessions rule, or because of "manifest unreliability" pursuant to s. 29 of the *Extradition Act*. Early in his reasons Justice Speyer indicated that because he had previously ruled that the abuse of process allegation had an "air of reality" the Crown had voluntarily provided voluminous, if heavily redacted, material. He had declined to order disclosure against the U.S. as this would, in his view, have amounted to extending the *Charter* extra-territorially.[34]

The factual picture that emerged in Speyer J.'s decision—largely undisputed at the hearing—was unflattering, to say the least, towards the U.S. and Pakistan. Detained in something like "investigative detention" by ISI, the powerful Pakistani security agency,

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[31] *Khadr Extradition Appeal*, above note 6, para. 1.
[32] Justice Speyer's decision is reported as *Khadr Extradition*, above note 6.
[33] I.e. whether the offences for which the individual is sought correspond to Canadian offences; see Currie, above note 10 at 463-66.
[34] *Khadr Extradition*, para. 5.

at the behest of the American government, Khadr was beaten and mistreated by ISI officials,[35] denied even the rudimentary procedural protections available under Pakistani law, and interrogated by both Pakistani and American officials for intelligence information. The Pakistani government refused to acknowledge for some time that it was even holding Khadr, even though the Canadian government had been informed by American contacts that this was so, and would not communicate with DFAIT officials. All contact was done between ISI officials and "John", a CSIS operative who was monitoring the situation. The ISI interfered with and denied requests for consular access for three months, and even once access had been granted in 2005 would not allow Canadian officials private access to Khadr. It refused requests to remove him from investigative detention or put him into the regular criminal system in Pakistan. When an RCMP officer sought to interview Khadr the ISI would not permit the conditions necessary for generating admissible evidence, such as the right to counsel and video-taping of the interview. It ignored Canada's request made at the outset of the situation that Pakistan respect international norms of human rights and due process. For its part the U.S. government had initiated the entire process in full knowledge that the deplorable detention conditions were a likelihood, and had itself interrogated Khadr under those conditions. When Pakistan chose to release Khadr to Canadian officials, American officials intervened and pressured Pakistan to cancel the repatriation, eventually generating a criminal case against him. It attempted to have Khadr sent directly to the U.S. and continued to threaten rendition. When Khadr was eventually released to Canada and agreed to speak to FBI officials, the interview was dominated by those officials

[35] Though Justice Speyer ultimately disbelieved Khadr's story that he had been tortured; see ibid., paras. 100-105.

cross-examining Khadr on a statement (found by Justice Speyer to have been coerced) he had given while under intense interrogation in Pakistan.

The contrast between the conduct of the foreign officials and Canadian personnel, on the other hand, was striking, Justice Speyer going to fairly significant lengths to emphasize that Canadian officials had at every turn acted fairly and with proper regard for both Khadr's rights and Canada's under international law. They had communicated both their desire to obtain consular access to Khadr and their desire to see him repatriated to Canada clearly and often, despite their frustration at being obstructed by Pakistani and U.S. officials in accomplishing either objective. When American officials sought Khadr's rendition from Pakistan to the U.S., Pakistan refused to comply because of pressure applied by "John" and other Canadian officials to repatriate him to Canada instead, which eventually occurred. When the RCMP could not question him under adequate conditions in Pakistan they simply did not do the interrogation, and when Khadr was questioned upon his return to Canada the detective who did the questioning conducted himself in an "exemplary" manner."[36]

At the heart of Speyer J.'s decision was the abuse of process claim. Applying the leading authority of *U.S.A. v. Cobb*, he ultimately ruled that the U.S. had abused the process of the court as it had been the "driving force" behind a series of human rights violations which were "both shocking and unjustifiable."[37] The case did not, he ruled, fall into the primary abuse of process category where the remedy was granted because the actions of the requesting state actually made the extradition proceeding itself unfair. Rather, it was within the residual category which required the court, in the "clearest of

[36] Ibid., para. 165.
[37] Ibid., para. 150.

cases," to "dissociate[e] itself from the conduct of the requesting state" by staying the proceeding—as "a specific deterrent; that is, a remedy aimed at preventing similar abuse in the future."[38]

Justice Speyer also excluded two statements given by Khadr. The first had been given while Khadr was under interrogation in Pakistan, and included in the U.S.'s record of the case for the extradition proceeding. This was excluded both under the *Extradition Act* because it was "manifestly unreliable" due to the "hostile and oppressive"[39] conditions in which it was taken,[40] and pursuant to s. 7 of the *Charter* because it had been gathered in an abusive manner so as to make the proceeding itself unfair.[41] The second statement had been given when Khadr voluntarily spoke to FBI agents at the Delta Hotel in Toronto following his return to Canada. Justice Speyer found that this statement was derived from the Pakistan statement, as the goal of the interrogators was clearly to have him confirm the details of the Pakistan statement, and offended the "derived confessions" rule.[42]

However, Speyer J. declined to exclude a statement taken by RCMP Detective Inspector Shourie at Pearson Airport in Toronto, prior to the Delta Hotel statement, because of Shourie's "impeccable" conduct during the questioning. Strikingly, Justice Speyer concluded the judgment by noting that if he was in error on the abuse of process finding, Khadr could be extradited to the U.S. on the basis of the Pearson Airport statement for all but one of the charges on which the request was based.

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[38] Ibid., para. 151.
[39] Ibid., para. 161.
[40] Citing *U.S.A. v. Ferras; U.S.A. v. Latty*, 2006 SCC 33.
[41] Paras. 162-63, citing *U.S.A. v. Shulman*, [2001] 1 SCR 616.
[42] Under *R. v. I.(L.R.)*, [1993] 4 SCR 504.

The case proceeded on a Crown appeal and, for a unanimous 3-member panel (Laskin and Cronk JJ.A. concurring), Justice Sharpe ruled that there was no basis to interfere with any of Justice Speyer's findings and roundly rejected all of the Crown's arguments in so doing. Acknowledging the pressing need for strong responses to terrorism and the significant Parliamentary mandate to that end, Sharpe J.A. spoke resoundingly to the dangers of unnecessary compromise or dilution of due process:

> the rule of law must prevail even in the face of the dreadful threat of terrorism. We must adhere to our democratic and legal values, even if that adherence serves in the short term to benefit those who oppose and seek to destroy those values. For if we do not, in the longer term, the enemies of democracy and the rule of law will have succeeded. They will have demonstrated that our faith in our legal order is unable to withstand their threats. In my view, the extradition judge did not err in law or in principle by giving primacy to adherence to the rule of law.[43]

In response to what Justice Sharpe characterized as the Crown's "emotive" argument that Justice Speyer's decision had essentially let "an admitted terrorist collaborator…walk free,"[44] the court noted that it was open to the Crown to prosecute Khadr for the charged offences itself under the appropriate provisions of the *Criminal Code*.

The Crown sought leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.[45] At the time of writing the Supreme Court had not rendered a decision on the leave application.

IV. ANALYSIS

[43] *Khadr Extradition Appeal*, above note 5, para. 76.
[44] Ibid, para. 77.
[45] SCC Bulletin, 26 August 2011, at 1164-1167.

1. The State and the (Non-)Citizen: Administrative and *Charter* Proceedings in Transnational Terrorism Matters

a) The Importance of Citizenship

One of the common threads running through the *Khadr* cases is that both of the individuals involved were Canadian citizens—in many quarters certainly not popular citizens, by any means, but citizens nonetheless. The fact of this citizenship had both emotive and legal consequences for all sides of the various debates. Canadians were and are divided on whether alleged terrorists detained by foreign states deserve or are entitled to support from the Canadian government, and on whether the fact that the alleged terrorists have Canadian citizenship should play any part in the mix. Should Omar Khadr, often described as a "child soldier," be left to rot in an American offshore gulag-style prison? Should Canada be "protecting" Abdullah Khadr in the face of evidence that he had been involved in terrorist crimes?

A quick nod to the international law background is necessary here. Under international law, states have two mechanisms by which they can protect the interests of their citizens who are abroad. The first is "diplomatic protection," which is the ability of the state to essentially "take up the case" of its citizen who claims to have been injured by another state.[46] It is akin to the insurance law doctrine of subrogation, but made necessary because under international law the individual is mostly just the "subject" of the law and not one of its "objects"; put another way, the citizen has no standing to sue the foreign state for a violation of international law. The second is "consular protection," where a state may assert certain rights vis-à-vis its nationals who are detained by foreign states,

[46] J. Currie, *Public International Law*, 2nd ed. (Toronto: Irwin, 2008) at 560-66.

the goal for the state of citizenship being to ensure its citizen's rights and interests are being protected.[47] Tying both of these together is the ability of states under general diplomatic law to make representations, a function reserved to the executive in most states (including Canada). Importantly, both diplomatic protection and consular protection are discretionary under international law; the state does not have an *international* legal obligation to pursue any such action on the part of its national, but may determine when and how it does so based on whatever criteria it chooses. Importantly, it may pass domestic laws or be subject to judicial decisions requiring these actions, but is not bound to take any action by international law.

Accordingly, citizenship is an important factual link in transnational terrorism cases. Certainly those actions which were taken by the government of Canada regarding the Khadrs were founded upon citizenship, as without this Canada would have had only a limited entitlement to make diplomatic representations on behalf of either individual. It also had important legal implications, in that the remedies imposed were a result of and involved the state-citizen relationship that existed.

What seems clear is that, as Canadians of every stripe and creed become mired in overseas entanglements, this engages debate and legal action over: whether citizens are entitled to expect assistance or even "protection" from their governments; and if so what the nature of that assistance should be or is legally required to be. As noted above, and as Justice O'Reilly found at the applications stage of *Khadr 2010*, states have no freestanding obligation under international law to exercise diplomatic or consular protection over their citizens. However, whether Canadian citizens have a right to diplomatic or consular protection from their government is quickly becoming a live and

[47] *Ibid*., 360-61.

constitutionalized question in our jurisprudence. While the *Khadr* cases demonstrate the vitality of the issue clearly (to differing extents), they are only part of an overall trend.

Consider the case of Ronald Allen Smith,[48] who was facing the death penalty for murder in Montana. In 2007 the Harper government announced that it would not follow the federal government's long-standing policy of making diplomatic representations on behalf of Canadians making death penalty clemency applications abroad and specifically refused to do so on Smith's behalf. Smith successfully sought judicial review of this decision, Barnes J. ruling that while the making of such diplomatic representations was within the federal foreign affairs prerogative, the manner in which the decision had been made deprived Smith of the procedural fairness to which he had been entitled. The government was ordered to follow the previous policy in Smith's case. Justice Barnes declined to evaluate the government's actions on *Charter* and international law grounds, but made two interesting remarks. First, while there was no new policy which required *Charter* scrutiny, Justice Barnes remarked that "if there is to be a case where a person's s. 7 Charter interests will attract a 'positive dimension' requiring the Government to take affirmative action where it has declined to do so, it will be a case like this one involving the pending execution of a Canadian citizen."[49] Second, he noted troubling instances of Canadian government officials making disparaging remarks about Smith's case, and held that while there was insufficient evidence that these remarks harmed Smith's clemency petition, there was a potential for a *Charter* remedy where such harm could be proven.[50]

[48] *Smith v. Canada (A.G.)*, 2009 FC 228.
[49] Ibid., para. 50.
[50] Ibid., para. 53.

More to the point for this paper, perhaps, is the case of Abousfian Abdelrazik,[51] a Canadian citizen of Sudanese origin who, through a complicated series of events, found himself marooned at the Canadian embassy in Sudan after being detained on suspicion of terrorist activities by Sudanese police, and barred from travel by virtue of having been listed on the United Nations' Security Council's 1267 Committee list of suspected terrorists. He repeatedly asked the Canadian government to issue him a passport and assist him in returning home, but despite promises to do so the government would not repatriate him and in fact denied him an emergency passport. On judicial review, Justice Zinn of the Federal Court found that the government had violated Abdelrazik's right under section 6 of the *Charter* to re-enter Canada, on essentially two bases: first, that CSIS directly or indirectly recommended to the Sudanese government that they detain Abdelrazik, which led to his torture and denial of procedural rights; and second that the government had made a deliberate decision to ensure that Abdelrazik would not return to Canada. The government was ordered to facilitate his return to Canada and to provide him with a government escort in so doing.

Citizenship was also an important at the application stage of *Khadr 2010*.[52] Justice O'Reilly noted that the Supreme Court had already decided, in *Khadr 2008*, that Khadr's *Charter* rights had been engaged, and that there was no international law obligation for Canada to exercise diplomatic or consular rights in his case. He framed the issue as "what duties Canada owes to citizens whose constitutional rights under the Charter are engaged" in circumstances such as Khadr's;[53] and specifically, whether the government had a *Charter*-based obligation to protect Khadr. He ultimately found that

[51] *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580.
[52] Reported at 2009 FC 45.
[53] Ibid., para. 47.

the "duty to protect persons in Mr. Khadr's circumstances" was a principle of fundamental justice under section 7 of the *Charter*. The principle was constructed by reference to Canada's obligations under the Torture Convention, the Convention on the Rights of the Child and the Optional Protocol on the Involvement of Children in Armed Conflict, as well as "additional factors:"

> [Khadr's] youth; his need for medical attention; his lack of education, access to consular assistance, and legal counsel; his inability to challenge his detention or conditions of confinement in a court of law; and his presence in an unfamiliar, remote and isolated prison, with no family contact.[54]

Since the duty to protect had been violated by the active participation of Canadian officials in the illegal process, the requested remedy of repatriation was the only one capable of remedying the breach. As discussed below, both the Federal Court of Appeal and the Supreme Court of Canada narrowed the principle of fundamental justice involved in a manner that diminished the legal effect of citizenship in the section 7 analysis. However, even the Supreme Court, which cast it most narrowly, still continued to emphasize that Khadr was a Canadian citizen.[55]

Citizenship also mattered, in an important sense, in the Abdullah Khadr extradition case. Factually, of course, it was Khadr's Canadian citizenship which caused Canada to be involved at all in the matter. In finding an abuse of process by the U.S., Justice Speyer put great weight on the fact that the U.S. (of its own accord and via Pakistan as proxy) had interfered with Canada's international law rights to exercise consular protection for, and make diplomatic representations regarding, its citizen. He

[54] Ibid., para. 70.
[55] For example, paragraph 1 of *Khadr 2010*, above note 5, begins: "Omar Khadr, a Canadian citizen, has been detained by the United States government at Guantanamo Bay, Cuba, for over seven years."

was at great pains to point out the exemplary conduct by Canadian officials involved in the case. It seems logical to conclude that the court would also have taken a dim view if Canada had mired itself in the human rights violations Khadr faced in Pakistan, either actively (as in the Omar Khadr case) or perhaps even passively by not making any or sufficient efforts on behalf of its citizen.[56]

Of course, lest there be too much focus on due process issues, it is worth noting that Canada also must not shirk its criminal justice responsibilities vis-à-vis its citizens who are involved in terrorism. These are responsibilities which it owes to the rest of the citizens of Canada, who are entitled to expect their government to pursue suspected terrorists in an effort to protect the citizenry from injury to person and property; and these responsibilities are also owed to the international community, to which Canada has committed vigourous pursuit and prosecution of terrorists in numerous treaties and in compliance with UN Security Council Resolutions.[57] In the Abdullah Khadr case, as a positive example, Canadian officials made efforts to have Khadr brought before the criminal courts of Pakistan, and gathered evidence to be put towards a criminal prosecution of Khadr on terrorism charges. That the state does not play only a protective role towards its citizen, but should and must actively prosecute some citizens according to legal standards of due process, is an important underlay.

In short, citizenship matters. Canadian citizens become involved or implicated in terrorist and other criminal activities in foreign states and these individuals seek the assistance and protection of the government of Canada. Naturally, the government of

[56] Though obviously the discretion to which the government is entitled in providing consular or diplomatic protection to citizens would be at play. Still, Canadian Crown misconduct has been implicated in at least one abuse of process extradition case before; see *U.S. v. Tollman* (2006), 271 D.L.R. (4th) 578 (Ont. SCJ).
[57] Canvassed in Currie, above note 10 at 343-370.

Canada wishes to be an effective participant in the fight against terrorism, but faces a certain tension due to its desire (in some cases, like Abdullah Khadr) and legal obligations (in other cases, like *Abdelrazik*) to provide some degree of protection to its citizens. Canada faced strong criticism at home, and some abroad, for the failure to request Omar Khadr's repatriation. Unflattering comparisons were made to the U.K. and Australia, which were perceived as having "gone to bat" for their citizens, while Canada's failure to do so engaged the powerful interest that citizens have in receiving assistance, where appropriate, from their governments. The legal and policy lesson for counsel, judges and government actors is that, in transnational terrorism cases, we must all keep on the radar the relationship between state and citizen. Failing to do so produces cases like that of Omar Khadr, while doing so produces much more salutary situations like that of Abdullah Khadr.

However, citizenship plays only one role in the constitutional due process matrix in transnational cases that is highlighted by the *Khadr* matters, to which I will now turn.

b) *Charter* Rights and Remedies in Transnational Terrorism Cases

Recall that what is being discussed in this section is administrative and *Charter* proceedings in transnational terrorism cases, in particular when and how courts will adjudicate upon the actions of the government in such cases—i.e., when are transnational state actions justiciable? As described in the previous sub-section, the fact that an individual is a Canadian citizen is often what brings the matter before the courts. However, what is most interesting about the *Khadr* cases is that citizenship can be seen as simply the factual hook or nexus that makes the government's actions justiciable. This

sub-section will argue that, despite the Supreme Court of Canada's caution on transnational matters, the *Khadr* cases are part of a line of case law that demonstrates a much broader basis for due process accountability. Specifically, the *legal* hook or nexus is the government's participation with foreign authorities and/or in foreign processes, and both the fact of that extraterritorial action and its nature will be important.

The *Khadr* cases are the latest in what the Supreme Court of Canada has called its "jurisprudence on matters involving Canada's international co-operation in criminal investigations and prosecutions."[58] The key issue in these cases has been whether and how the *Charter* applies in situations where another state is involved. International law, which is part of the law of Canada,[59] is important here—the issue boils down to whether a particular application of the *Charter* would be an exercise of *territorial* jurisdiction by Canada, which is not controversial under international law, or *extraterritorial* jurisdiction, which is more controversial and requires consideration of the applicable international law rules and how they apply in the Canadian context.[60]

There are three threads to this skein of cases. First, it is well-established that the *Charter* does not apply to the actions of foreign state officials on their own territories, because to do so would give the *Charter* unlawful extraterritorial effect.[61] This is so even if they are co-operating with Canadian authorities and even if, for example, they gather evidence that is used in a Canadian court proceeding.[62] Second, the *Charter* does apply to actions by Canadian state officials which occur in Canada but have extra-territorial

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[58] *Schreiber v. Canada (Attorney General)*, [1998] 1 SCR 841 at para. 34.
[59] *Hape*, above note 13.
[60] See generally S. Coughlan et al., "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization" (2007) 6 CJLT 29; and R.J. Currie & S. Coughlan, "Extraterritorial Criminal Jurisdiction: Bigger Picture or Smaller Frame?" (2007) 11 Can. Crim. L.Rev. 141.
[61] *R. v. Harrer*, [1995] 3 SCR 562; *R. v. Terry*, [1996] 2 SCR 207.
[62] *Ibid*. Evidence can be excluded pursuant to sections 7 and 11(d) of the *Charter* if its admission would make the trial unfair. See ibid., and also: *R. v. Mathur*, 2010 ONCA 311; Currie, above note 10 at 509-515.

effects which impact upon an individual's treatment by foreign states. So, for example, the *Charter* provides protection against human rights violations that might be faced by individuals subject to extradition[63] or deportation[64] from Canada. There is no unlawful exercise of extraterritorial jurisdiction because the Canadian state activities or processes covered take place in Canada, even though they have extraterritorial effects.

Abdelrazik was this second kind of case. To be sure, the case does show that citizenship can be, simultaneously, both the factual and legal nexus that brings a case before the courts. *Abdelrazik* was such a case, at least in part, because the government's actions engaged his mobility rights under section 6(1) of the *Charter*, which the section explicitly states is owed to "every citizen of Canada." Also, while the actions of Canadian state officials had some extraterritorial effect (given that decisions made in Canada affected what happened to Abdelrazik in Sudan), there was no exercise of extraterritorial jurisdiction involved. A slightly more expansive approach can be seen in the 2004 decision of the British Columbia Court of Appeal in *Purdy v. Canada (Attorney General)*,[65] wherein the applicant had been investigated by the RCMP in British Columbia, who were cooperating with U.S. authorities. Purdy ended up facing trial in Florida and applied to the B.C. courts for *Stinchcombe*-type disclosure under section 7 of the *Charter*—even though the right to full answer and defence he was facing could only be engaged before the U.S. court. Nonetheless, the Court of Appeal held that Purdy's right to full answer and defence was engaged in Canada even though it would only be suffered abroad, because of the actions of Canadian officials. This was under section 7 of the *Charter*, which does not require citizenship to be engaged. The issue was again the

[63] *U.S.A. v. Burns*, 2001 SCC 7.
[64] *Suresh v. Canada* (M.C.I.), 2002 SCC 1.
[65] *Purdy v. Canada (Attorney General)* (2004), 15 C.R. (6th) 211 (B.C.C.A.).

extraterritorial effects of the Canadian state actions, though without citizenship to link them: "the deprivation of the right to make full answer and defence is here in Canada by the RCMP's refusal to make disclosure, although the effect of the deprivation will be felt in Florida."[66]

The third thread, and the one to which the *Omar Khadr* case belongs, involves whether the *Charter* can apply to the actions of Canadian officials when they are acting abroad. The manner in which this jurisprudence is developing seems to indicate that the *extraterritorial* acts of Canadian state officials may be liable to face scrutiny before the courts even if the claimant is not a Canadian citizen. This is in no small part because the courts have treated these cases as falling under section 7 of the *Charter*, which provides that "*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" (emphasis added). The Supreme Court's starting point in *Hape* was that "everyone" could not include individuals interacting with Canadian officials outside Canada, since section 32 tilted territorially and applying the *Charter* would amount to an illegal assertion of extraterritorial jurisdiction. However, the "human rights exception" suggested by the Court in *Hape* was truly given legs in *Khadr 2008*, the Court ruling that the *Charter* does apply where Canadian officials are involved "in activities of a foreign state or its agents that are contrary to Canada's international obligations".[67] While citizenship was the factual link, it was the acts of participation in the illegal Guantanamo regime that triggered the *Charter*'s application, since some *Charter* rights, like section 7, can be owed to non-Canadians. So it appears that "everyone" for section 7 purposes could mean

[66] Ibid.
[67] *Hape* at para. 18.

not "everyone who had *Charter* rights to start out with and ran into trouble with Canadian officials abroad," but "everyone who interacts with Canadian officials abroad."

Could the result be this robust? Could it be that any interaction between Canadian officials and individuals outside Canada will potentially gain the individuals a *Charter* remedy? Certainly one lower court post-*Khadr 2008* decision, which dealt with non-Canadians at Guantanamo who were interviewed by Canadian officials, suggested that non-nationals could only benefit from this section 7 protection if they were present in Canada or were facing criminal proceedings in Canada.[68] The Supreme Court itself has treaded cautiously, bearing in mind the international law implications of extraterritorial application of Canadian domestic human rights laws.[69] It has been careful to link its *Charter* findings regarding Omar Khadr to what it repeatedly emphasizes are the unique facts of the case, to the point where while we know that the *Charter* can apply extraterritorially, the only person whom it protects is Omar Khadr. However, in *Khadr 2* the Court is firm on there being two scenarios which will attract *Charter* application: where Canadian officials participate in a foreign process that violates international law (i.e. the Guantanamo Bay military trial structure) and where a Canadian official violates basic human rights in an interrogation (here, the interrogation of Khadr after he had been subjected to the "frequent flyer" program), though it appears that the latter must be tied to the former. This is a broader finding than that made by Justice O'Reilly, who had framed the application of the *Charter* as a function, in part, of Omar Khadr's Canadian citizenship. The Supreme Court's findings, however, were shaped by the unique fact that

[68] *Slahi v. Canada (Minister of Justice)*, 2009 FC 160, affirmed 2009 FCA 259, leave to appeal dismissed [2009] SCCA No. 444.
[69] Though arguably the Court has been too cautious on this point; see the discussion of international law methodology, below.

the U.S. Supreme Court had already declared the Guantanamo process to be violative of international human rights law and the *Geneva Conventions*.[70] While it does seem that *any* foreign process in which Canada cooperates is open to evaluation against international human rights law and the *Charter*, this does not give either the Crown or targeted individuals much certainty as to when the *Charter* will apply. We await more cases to flesh this out.

It is worth returning to citizenship for a moment. After *Khadr 2010*, as argued above, it is possible that citizenship is not a requirement for extraterritorial *Charter* application but is simply the link that typically gets these matters before the courts because of the internationalized circumstances. That said, could the *Khadr* cases have happened if either Khadr brother was not a Canadian citizen? There is a slightly different answer for each case. With Omar Khadr, the cases factually were hinged on the fact that he was a Canadian citizen facing an extraordinary foreign anti-terrorism process in which Canadian officials participated. The Court repeatedly emphasizes the uniqueness of the case. Will Canadian officials often be participating "in activities of a foreign state or its agents that are contrary to Canada's international obligations," such as to engage extraterritorial *Charter* application? It is certainly becoming more common for Canada to participate in anti-terrorism and other anti-crime initiatives, and this will often involve Canadian officials traveling overseas (or across the border) and co-operating with their foreign counterparts. It is logically to be expected that they will interact with foreign nationals, who may seek redress for alleged human rights violations before our courts.

[70] See below for further discussion of this.

Indeed, this has already taken place. In *Amnesty International Canada v. Canada (Canadian Forces)*,[71] the applicants had applied for an order that the *Charter* applied to Canadian forces personnel who, as part of the Canadian mission in Afghanistan, were detaining individuals (mostly, if not all, foreign nationals) and handing them over to Afghan authorities. In a decision released after *Hape* but before *Khadr 2008*, Justice MacTavish of the Federal Court made a herculean effort to make sense of *Hape* and other domestic and international case law argued before her, ultimately applying *Hape* and dismissing the application. The Federal Court of Appeal's decision upholding the lower court finding[72] was released after, and cited, *Khadr 2008*, but the Court of Appeal did not engage with the "human rights exception" discussed therein and provided no significant analysis on the point. Even more unfortunately the Supreme Court denied leave to appeal,[73] consigning *Afghan Detainees* to the dustbin of "historical interest."

Further, in the *Slahi* case mentioned above, the Federal Court of Appeal upheld the applications judge's finding that the *Khadr 2008* "human rights exception" did not apply extraterritorially to non-Canadian citizens who interacted with Canadian state officials in Guantanamo. This decision was rendered not on the basis that *Hape* forbade application of the *Charter* in any circumstance where the foreign state had not given its permission, as in *Afghan Detainees*, but rather the court's reading of *Khadr 2008* as applying only to Canadian nationals. Justice Blanchard, the applications judges, had relied in particular on the following passage from *Khadr 2008*:

> Thus, s. 7 imposes a duty on Canada to provide disclosure of materials in its possession arising from its participation in the foreign process

[71] 2008 FC 336.
[72] 2008 FCA 401.
[73] [2009] SCCA No. 63.

> that is contrary to international law and jeopardizes the liberty of a Canadian citizen.[74]

This is a sensible and properly conservative reading of the Supreme Court's dictum. Indeed, in *Khadr 2010* the Supreme Court began its analysis regarding the extraterritorial applicability of section 7 as follows: "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*."[75] However, on a total reading of both decisions I suggest, with respect, that *Slahi* reads in citizenship as a requirement when the Supreme Court did not frame it as such. At the very least, it is just as accurate to read *Khadr 2008* and *2010* as saying that the *Charter* definitely applies to the extraterritorial acts of Canadian government officials interacting with Canadian citizens and leaving open the question as to whether foreign nationals are covered. The latter question was not before the court and, as *Afghan Detainees* demonstrated, would require a great deal more international law analysis than the court needed to use to dispense with the Omar Khadr matter. The Federal Court of Appeal agreed with Justice Blanchard's decision in *Slahi* and the Supreme Court denied leave to appeal, but it is still a live question as to whether a nationality-based exclusion is, indeed, mandated by the law or is desirable on policy grounds. The point remains that the Supreme Court's *Khadr 2008* and *2010* analyses may apply to non-nationals who encounter Canadian state officials abroad, and the issue will likely see continued traffic before the courts.

With the Abdullah Khadr case, the answer regarding citizenship is clearer. This was not a case involving extraterritorial application of the *Charter* at all, but rather the

[74] *Khadr 2008*, para. 13, as cited in *Slahi* (FC), above note 68 at para. 45.
[75] *Khadr 2010*, at para. 14.

court's ability to control its own process. There was no exercise of extraterritorial jurisdiction, but in the context of the abuse of process remedy the court clearly maintains the ability to scrutinize the conduct of both Canadian and foreign officials outside Canada. Factually, as noted above, it was important that Abdullah Khadr was Canadian, because it was this that engaged the Canadian government in the first place and made Canada the logical recipient of the extradition request when Khadr was repatriated. However, it seems clear that even if Abdullah Khadr was a foreign national, the abuse of process remedy would equally have been available since the jurisprudence[76] indicates that the citizenship of the person sought is not necessarily a major consideration—and in any event, abuses such as were found in this case would likely overwhelm the analysis even were foreign citizenship given significant weight.

The crux of the foregoing, then, is this: any action by Canadian government officials in cooperation with foreign states, either outside Canada or with an extra-territorial effect is, to use the colloquial phrase, a game-changer. It establishes a nexus that allows for review of, and ultimate legal accountability for, the government's actions—*in spite of* the extra-territorial element.[77] Canada continues to participate in international anti-terrorism activities, as it is committed to and as it should. However, what the *Khadr* cases teach us is that as this kind of activity increases in amount, scope and complexity, further scrutiny is required by both the state and the courts regarding

[76] See e.g. *Tollman*, above note 56, where the person sought was a U.S. citizen and permanent resident of the U.K.; *U.S.A. v. Licht*, 2002 BCSC 1151, where the nationality of the person sought was not considered by the court.

[77] It is worth mentioning in passing that the extraterritorial nature of the state infringement of the *Charter* also has an impact on the remedy. The SCC ruled in *Khadr 2008* and reiterated in *Khadr 2010* that the remedy to be awarded in such cases was not necessarily the same one as would be awarded in domestic circumstances; rather, the remedy was to be tailored to the nature and scope of the involvement of Canadian officials in the unlawful foreign process. Accordingly, in *Khadr 2008* the court designed a case-specific disclosure remedy regarding the information taken from Khadr and shared with the U.S. authorities.

what the applicable standards of due process are and how they should be met. This will be compounded and further complicated, as the court noted in *Khadr 2010*,[78] by the increased activity in intelligence-gathering, which differs from the traditional criminal investigation paradigm. Other questions loom for which the answers are only starting to develop: for example, what procedural standards should attach to informal information-sharing among police officers of different countries, and are there circumstances under which such practices will give rise to *Charter* violations or other procedural problems?[79] Different considerations will apply, different standards will underpin the "fundamental principles of justice," and the interplay of domestic and international law will continue to render everything more complex. It is to this latter point that I now turn.

2. The International-Domestic Law Interface

This section will explore, briefly, a proposition which I submit is reasonably evident from the case law canvassed above: in transnational terrorism cases, international law is important and becoming more so. The *Khadr* cases tell us three specific things about this proposition. First, it can be quite difficult for the government to ascertain and operate within its legal obligations in this context, in no small part because it must serve the three masters of international security cooperation, protecting Canadian sovereignty interests while respecting those of foreign states, and international human rights law. Second, both the government of Canada and our courts and counsel are in dire need of a solid international law methodology to underpin anti-terrorism but, and with respect, one has not been forthcoming from the Supreme Court of Canada. Third, an increased facility

[78] Above note 5 at para. 24.
[79] See, e.g., *U.S.A. v. Wakeling*, 2011 BCSC 165.

with international law methodology is an imperative, as it is increasingly part of the everyday docket and a primary concern in anti-terrorism cases.

International law is part of the law of Canada.[80] When Canada enters into treaties with other states or international organizations, those treaties become part of our law by way of "implementation," meaning that domestic statutes have to be passed or be in place in order to make Canada's international legal obligations operative in domestic Canadian law.[81] The situation is different for customary international law, which is a system of norms and practices that are accepted by states as binding without being set down in treaties. Custom is deemed to be incorporated directly into the common law automatically and generally does not require implementation by statute.[82] Additionally, courts must read legislation as being in conformity with custom unless there is a conflict that is either express or necessarily implied.[83] There is often nothing particularly dramatic about international law, as its application can occur in many wide and varied contexts, such as wrongful dismissal litigation.[84] Obviously, transnational terrorism cases will normally require some consideration of international law, though which law and how much will vary.

The Omar Khadr cases were decided essentially on matters of international law and how that law impacted upon the application of the *Charter*. The legal framework had originated in *Hape*, where in order to determine whether the *Charter* could apply

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[80] See generally Gibran van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin, 2008).
[81] Even un-implemented treaties have an impact, since domestic law is meant to be interpreted in conformity with these obligations unless a contrary intention on Parliament's part is obvious. See generally H. Kindred and P. Saunders, eds., *International Law: Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery, 2006) at 221-44.
[82] *Hape* at paras. 35-39.
[83] *Hape* at para. 39.
[84] E.g. *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2010 NSSC 346.

extraterritorially the Court resorted to the customary international law regarding jurisdiction—i.e. which state is permitted to apply and/or enforce its law, in what circumstances and in what locations. As noted above, the Court held that the *Charter* generally could not be applied to the actions of Canadian officials outside Canada, as such extraterritorial application of procedural law[85] was prohibited under international law because it would violate the sovereignty of other states. However, in situations where Canadian officials were involved in extraterritorial actions that potentially violated Canada's obligations under international human rights law, then the sovereignty/jurisdiction obligations should give way and the *Charter* could apply. It was this latter "human rights exception" that was applied in both *Khadr 2008* and *Khadr 2010*, the Court declining to lay out a generally applicable framework for such situations but simply confining their ruling to how *Charter* application worked in Khadr's specific circumstances.

The criticism of the *Hape/Khadr* framework has been wide and fierce, and I do not intend to canvass it here in any detail.[86] It might be best to acknowledge off the top that international law itself is complex, even arcane, and cases such as these further require engaging the metaphrastic complexity of how international law norms are to be applied in the domestic law framework. One of the strengths of the common law system is that judges are mostly generalists, and it requires both sustained effort by courts and effective assistance by counsel to manage such intricate areas of law. Moreover, cases

[85] Specifically, the court referred to the international law norm prohibiting extraterritorial exercise of *enforcement jurisdiction* (the ability of the state to enforce its laws), particularly through the sub-category of *investigative jurisdiction* (state officials investigating offences).

[86] Some of the best work has been done by Professor John Currie; see "Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law" (2007) 45 CYBIL 55 and "International Human Rights Law in the Supreme Court's Charter Jurisprudence: Commitment, Retrenchment *and* Retreat—In No Particular Order" (2010) 50 SCLR (2d) 423.

must be resolved in a timely way, based on the evidence led before the court, and nicety and perfection, while desirable, must give way to some amount of efficiency.

That said, the *Khadr* cases demonstrate a certain amount of disarray in an important area of anti-terrorism law, precisely because of the domestic-international law interface. The post-*Hape* cases generally have manifested confusion and doctrinal uncertainty, which the Supreme Court could only manage in both *Khadr* decisions by confining the scope of the matter so narrowly. However, the *Hape/Khadr* framework contains such profound methodology problems that there is little to go on for counsel and courts in determining how to apply the framework to different facts. At the center is the idea that applying the *Charter* to Canadian officials in a Canadian proceeding somehow violates the sovereignty of the state in which the Canadian officials acted, which is the starting presumption in *Hape*. It is difficult to see where the sovereignty violation happens. To be sure, and as the Court pointed out in *Hape*, Canadian officials cannot necessarily adhere to every letter of *Charter* standards when they go abroad because they are bound to follow the procedural law of the foreign state. However, there is nothing to stop Canadian courts from scrutinizing the extraterritorial actions of those officials under the *Charter*, though obviously the analytical framework must take account of the fact that they are operating in a foreign country.

If there is no international law imperative here, then the next obvious question is whether the law should contain the *Hape* presumption as a starting point. As Professor John Currie (no relation) commented:

> The profound asymmetry between the fact of extensive extraterritorial government activity and *Hape*'s principle of non-applicability of the *Charter* to such activity is both confounding and troubling. That Canadian officials should in fact be competent to act abroad and yet not

> be subject to any *Charter* constraints in doing so seems at best counter-intuitive and at worst unwise.[87]

Similarly, in *Afghan Detainees*, Justice MacTavish applied *Hape* but queried the wisdom of its central principle:

> It is also troubling that while Canada can prosecute members of its military after the fact for mistreating detainees under their control, a constitutional instrument whose primary purpose is, according to the Supreme Court, to limit the exercise of the authority of state actors so that breaches of the Charter are prevented, will not apply to prevent that mistreatment in the first place.[88]

To be perfectly fair to the Supreme Court, the "human rights exception" applied in the Omar Khadr decisions responds, at least implicitly, to these concerns. Yet here, too, there is doctrinal confusion which leads to uncertainty. Applying the *Charter* extraterritorially will violate the sovereignty of other states, so cannot be done; except where the actions of Canadian officials might violate international human rights law, at which point the *Charter* can be applied extraterritorially. The problem here is that the Supreme Court has set up a state of opposition between the law of jurisdiction and state sovereignty, on the one hand, and international human rights law, on the other, without justifying its ultimate exercise in line-drawing. It is not clear why Canada's participation in a process that violates some international law obligations, and thus mandates extraterritorial application of the *Charter*, trumps other international law obligations that prevent extraterritorial application of the *Charter*. As Professor John Currie points out, the Court simply did not engage with this question, "deepen[ing] the legal and logical

[87] John Currie, "*Khadr*'s Twist on *Hape*: Tortured Determinations of the Extraterritorial Reach of the Canadian *Charter*" (2008) 46 CYBIL 307 at 316.
[88] Above note 71, para. 340.

morass currently governing, in the name of respect for Canada's international legal obligations, the extraterritorial applicability of the *Charter*."[89]

It is not as if there is no international law relating to these questions upon which the Court could draw, framing it either as the law of Canada (which it is, as explained above) or at least as giving guidance on how the domestic analytical framework should play out. This is another feature of Canadian law generally and anti-terrorism law specifically which is brought into sharp relief by the *Khadr* cases: lost opportunities to utilize and apply international law, and in such a way as to give much-needed direction to the state and to parties which may contest its activities. For example, the Court holds in both Omar Khadr decisions that it is the fact of Canadian participation in the illegal Guantanamo regime that triggers *Charter* application, the interrogation and the sharing of information with American authorities providing the factual hooks. Yet since this is being analyzed under the "human rights exception," this must be an act of a state official that violates international human rights law—but what is the legal basis for saying that it is this kind or degree of cooperation that constitutes participation in the unlawful activity, and thus a violation? What threshold was crossed? How can Crown officials avoid crossing it again? The international law of state responsibility is the most obvious route to try to delineate the government's responsibilities here,[90] and since the bulk of that law is customary it is automatically part of Canadian law and can be applied or used by Canadian judges.

Slahi is another instructive example. The Federal Court and Court of Appeal would not apply the *Charter* to individuals in circumstances nearly identical to those of

[89] Currie, "Khadr's Twist on Hape," above note 87, at 332.
[90] Accord, J. Currie, *ibid*.

Omar Khadr, on the basis that they were non-Canadian nationals, based on the court's interpretation of *Khadr 2008*. I argued above that the Supreme Court in fact did not deal with this question in *Khadr 2008* or *2010*. If it is indeed a live issue, what is the answer? What is the legal basis for denying extraterritorial *Charter* application where it is non-Canadian citizens whose human rights are alleged to have been breached? Canadian law provides no answer, since section 7 applies to "everyone" and the Omar Khadr cases demonstrate that the *Charter* is not territorially limited in such situations. The international case law on this very question is vast and divided,[91] but it is at least clear that states are not prohibited under international law from applying their human rights laws extraterritorially, though it is doubtful whether they have an obligation to do so.

In a milder way, the *Khadr Extradition* case also demonstrates lost opportunities to use international law to render or buttress the court's findings—though it is important to note that the reported decision seems to indicate that little in the way of international law analysis was put before the court by counsel.[92] To be sure, the bulk of the case was concerned with Canadian extradition law and the inherent jurisdiction of superior courts to control their processes, and the analysis appears to be rock solid in those areas. However, the impugned actions are those of the governments of Pakistan and the U.S., and it is reasonably clear that that it was the international law effects of their actions that

[91] The question being, are states permitted to exercise extraterritorial jurisdiction over the acts of their officials, and do they have an obligation to do so? For some accounts, see Robert J. Currie & Hugh Kindred, "Flux and Fragmentation in the International Law of State Jurisdiction: The Synecdochal Example of Canada's Domestic Court Conflicts over Accountability for International Human Rights Violations" in Fauchauld & Nollkaemper, eds., *Unity or Fragmentation of International Law: the Role of International and National Tribunals* (Hart Publications: forthcoming, 2012); Guy S. Goodwin-Gill, "The Extra-Territorial Reach of Human Rights Obligations: A Brief Perspective on the Link to Jurisdiction" in Kohen et al., eds., *International Law and the Quest for its Implementation* (Leiden: Brill, 2010) at 293; Ralph Wilde, "Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties" (2007) 40 Isr. L.R. 503. See also the recent decision of the European Court of Human Rights in *Al-Skeini and others v. United Kingdom*, App. No. 55721/07, 7 July 2011.

[92] A version of this analysis appeared originally as my annotation to *Khadr Extradition*, at (2010) 78 C.R. (6^{th}) 1.

drove the result. For example, Justice Speyer implicitly found that Pakistan and the U.S. breached the *Vienna Convention on Consular Relations*; elsewhere, he found it relevant that Canada asked Pakistan to observe international human rights standards and makes it clear that Pakistan did not do so. Both of these were important elements of the ultimate finding that the U.S. was abusing the court's process by requesting extradition, but there was little legal analysis of either.

In fact, substantially more international law analysis than was used was available to (though seemingly not argued before) the court, and could have fleshed out the legal basis for the decision considerably. Speyer J. examined the conduct of Pakistan and the U.S., found it to have amounted to "gross" and "serious" misconduct respectively, and concluded that this amounted to abuse of process. However, this was more of a factual conclusion than a legal one. Why was this behaviour held to be "misconduct"? Because it was unlawful—and yet it is clearly not domestic Canadian law that was breached, but rather international law. A number of interesting international law questions arise: did Pakistan's actions breach international human rights law? Regarding which rights? Are Pakistan's actions attributable to the U.S. under the international law of state responsibility? What effect should that attribution have within the extradition process?

This is not to say that the result in the case would have been any different at either the hearing or appeal level if the international law analysis had been more complete. However, there would have been a firmer basis for how and why the unlawful actions of foreign states prevented this extradition. It could have given the Crown more guidance for their interaction and cooperation with foreign states and the possible legal implications of such interaction and cooperation. It would also give counsel on both sides

more specific focus for their arguments. And since, as both Justice Speyer and Justice Sharpe pointed out, the abuse of process remedy is meant to have a deterrent effect, all the better for all concerned if the deterrent is as specific as possible.

The goal here is not to excoriate the members of the Supreme Court and other worthy judges for insufficient attention to international law issues in their judgments. However, the rule of law demands a solid, knowable template of norms on which both the state and the individual can base their conduct and their assessment of future implications thereof. The *Khadr* cases tell us that Canadian anti-terrorism law, in turn, requires more in-depth knowledge and use of international law principles, particularly in figuring out how state sovereignty, the exercise of jurisdiction by states and international human rights law can and should interact in Canadian law. This will not only support basic standards of procedural fairness but provide an environment for more effective and accountable anti-terrorism work by states. With the Omar Khadr decisions, in particular, the Supreme Court is beginning to tease out a usable analytical framework, but its methodological foundations are weak. More work is required, particularly by counsel whose role in assisting the courts in ascertaining and envisioning the application of international law was never more important than it is now.

3. Courts, Discretion and Deference

The final set of lessons that might be drawn from the *Khadr* cases is that they reflect, or perhaps even expose, significant unresolved tensions in the relations between the courts and the executive branch of government. Again, some amount of this tension is created by virtue of the transnational character of anti-terrorism matters. The conflict on

the domestic side involves the role of the court in scrutinizing the state's foreign relations power, while the conflict on the international side reflects the growing tension between traditional deference for foreign sovereigns and the demands made by commitment to international human rights standards.

In the domestic context, there is little doubt that the *Charter* has made the courts more aggressive in constraining the activities of the state and holding the government to account—indeed, it was brought in as the supreme law of the land and this is exactly what it was designed to do. The pendulum has swung as the Supreme Court of Canada has struggled valiantly to strike the correct balance between accountability and deference, though this paper is not the setting in which to examine those trends. What is apparent from the case law being discussed here is that, in transnational terrorism cases, it is difficult to pinpoint the pendulum's position at any given moment.

International criminal co-operation always involves the federal Crown's exercise of its foreign affairs power in some respect. It is observable that over the last thirty years, the Crown has used the fact that foreign affairs matters are involved to push an aggressive law and order agenda, weighted towards Crown discretion in all criminal cooperation matters whether a particular feature of it involved any actual international activity or not, and attempting to restrict the scope of the *Charter*'s application. As the saying goes, this is not necessarily a bad thing. There is good policy behind the traditional circumspection of the common law courts regarding any fettering of the executive's discretion and freedom to act when it comes to international relations. Canada is involved in anti-terrorism cooperation (as well as general anti-crime efforts) with many other like-minded states and having an effective system may sometimes

require a certain tempering or calibration of the law as it would normally apply wholly within Canada. That said, the clear trend has been for the Crown to try to shrink the role of the courts as much as possible in the international criminal co-operation domain. What has been interesting to observe is how the Crown has been willing to "go to the wall" and take extreme positions, and the manner in which the courts have responded.

The extradition setting provides good background for this, as it is resplendent with strong Crown positions and textured court application. So, for example, the Crown brought in new extradition legislation in 1999 which was clearly designed to be more prosecution-friendly,[93] as well as to ease the terrible congestion that had built up within Canadian extradition process. The courts have generally been on board with this new set of tools designed to deal with 21st-century realities in crime-fighting, with the Supreme Court setting a deferential tone in various decisions.[94] However, limitations have been imposed. The Crown argued assiduously for its entitlement to extradite individuals to face the death penalty, only to have that position rebuffed in 2001.[95] The *Cobb* ruling on abuse of process referred to above was, needless to say, not the result of any agreement between the parties on the scope of the remedy or its application in that case, despite the nefarious features of the American prosecution. The attempt to shrink as much as possible the role of the extradition judge was brought to a halt in 2006, the Supreme

[93] Anne La Forest, "The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002) 28 Queen's L.J. 95. The mutual legal assistance setting provides another good illustration of the Crown's attitude here. The original version of the *Mutual Legal Assistance in Criminal Matters Act* based the prospect of cooperation upon the state that requested assistance having jurisdiction over the crime being dealt with. When it became clear that parties were sometimes contesting the jurisdiction of the requesting state over the crime, the Act was amended to remove the requirement that the requesting state have jurisdiction—removing this inquiry from the superior court judge charged with evaluating whether evidence gathered under the request should actually be sent.
[94] E.g. *Lake v. Canada (Minister of Justice)*, 2008 SCC 23; *U.S.A. v. Anekwu*, 2009 SCC 41
[95] *Burns*, supra.

Court re-imposing that judge's ability to refuse to order committal for extradition requests based on manifestly unreliable evidence.[96]

This push and pull itself is not unusual, perhaps, but what is noteworthy is the Crown's consistent insistence on arguing extreme positions and the way the courts have used the *Charter* to reject some of these positions. *Abdullah Khadr Extradition* is informative. While the Crown was bound by treaty to bring the American extradition request before the courts, one wonders why, based on Justice Speyer's findings of fact, the matter has continued to be appealed all the way to the Supreme Court.

However, there is an interesting balance of accountability and deference in the Omar Khadr proceedings. The Crown argued against both the scope of the "human rights exception" and its application to Khadr. The Court ultimately ruled that the *Charter* demanded remedies for Khadr, but was restrained in their formulation. The disclosure remedy in *Khadr 2008* was carefully tailored to address the nature of the breach (rather than its seriousness) and made subject to national security screening. In *Khadr 2010* the Court took an even more deferential stance, rendering only a declaration of breach and leaving the government the discretion to formulate its own remedy, though remaining seized of the matter.

Yet while the Supreme Court itself is cautious, the tone is not consistent through the courts. Both *Smith* and *Abdelrazik* display aggressive remedial approaches, the court in the latter case reflecting that the transnational nature of the facts demanded an affirmative remedy, something otherwise unusual under s. 7 of the *Charter*.[97] In *Khadr 2010* itself, the Supreme Court based its refusal to render an affirmative remedy on the

[96] Ferras, supra. See G. Botting, "The Supreme Court 'Decodes' the *Extradition Act*: Reading Down the Law in *Ferras* and *Ortega*" (2006-2007) 32 Queen's L.J. 446.
[97] *Abdelrazik*, supra, at paras. 147-152.

basis of the paucity of evidence of the impact on the foreign relations power; the Federal Court of Appeal, by contrast, had noted the detailed evidentiary record, and rather than reward the Crown for leaving the court in the dark as to the foreign relations impacts, held (as the Supreme Court had in *Burns*) that as a function of the adversarial system, the absence of such evidence meant that an affirmative remedy was justified.[98] While there is no sense of lower court revolt, there is a noteworthy contrast between the tone the Supreme Court is trying to strike and that of the trial and appellate courts.

The *Khadr* cases also display interesting developments in how Canadian law deals with both the acts of foreign sovereigns and their laws. The historical attitude of Canadian courts was extreme circumspection when it came to adjudicating upon the actions and laws of other states, both for lack of in-depth knowledge and the perceived wisdom of ensuring that domestic court action did not make trouble for the government on the international scene or impair international comity. Witness Justice La Forest's dictum in the still-influential case of *Canada v. Schmidt*:

> The judicial process in a foreign country must not be subjected to finicky evaluations against the rules governing the legal process in this country. A judicial system is not, for example, fundamentally unjust--indeed it may in its practical workings be as just as ours--because it functions on the basis of an investigatory system without a presumption of innocence or, generally, because its procedural or evidentiary safeguards have none of the rigours of our system.[99]

In this light, the Supreme Court's finding in both Omar Khadr cases that the Guantanamo regime was illegal under international law was something of a symbolic leap. However, the Court openly acknowledged that, given the findings to this effect by the United States Supreme Court, this was something of an easy call to make: "Issues

[98] David Schneiderman, Spring 2010 *Rights Review* 3:1.
[99] *Canada v. Schmidt*, [1987] 1 SCR 500 at para. 48.

may arise about whether it is appropriate for a Canadian court to pronounce on the legality of the process at Guantanamo Bay under which Mr. Khadr was held at the time that Canadian officials participated in that process. We need not resolve those issues in this case."[100]

Both *Khadr Extradition* decisions are remarkable in this regard. Here, both Justice Speyer and the Court of Appeal were driven by the facts of the case to scrutinize not just the activities of lower-level state officials like police officers and prosecutors, as in other "abuse of process" cases, but to the actions of secret service personnel and high state apparatuses—actions that both under international law and Canadian extradition law were attributable to the states themselves.

These are stark and new developments, driven by the increasing and necessary engagement of the courts with the transnational aspects of anti-terrorism cases. While the Supreme Court is cautious, and appropriately so, in my view the *Khadr* cases are the beginning of a significant development. The courts, as guardians of their own processes and of the human rights owed by governments to individuals, are taking the stance that traditional circumspection must give way, in such increasingly frequent appropriate circumstances, to vigorous protection of individuals and the due process to which they are entitled. The age of deference is over, and neither the federal executive's foreign affairs power nor the attitude of Canadian courts towards foreign states and their laws is likely to look the same in the future.

[100] *Khadr 2008*, para. 21.

V. Conclusion

Lest I be misunderstood, I will re-emphasize that this paper is not meant to be a platform for glib and unproductive academic criticism of the difficult and important work done by our courts in transnational terrorism cases, nor to generate wet tissue-wringing for either of the Khadr brothers. Rather, the point has been threefold: to reflect on the degree to which Canadian anti-terrorism law since 9/11 has raised novel and complex issues for individuals, the state and the courts; to explore the manner in which the case law has dealt with these issues; and to distil some directions for future development. The *Khadr* cases provide some illumination on all three points. They are instructive both as cautionary tales and as harbingers of future difficulties, and can be thought of as compasses pointing us toward the most salutary ways of developing the administrative and procedural aspects of this area of law.

9/11 and other terrorist attacks have taught us many things, but most prominent is the danger posed by internationalized terrorism and the importance of zealous law enforcement and security work. Zeal, however, must be tempered by accountability and adherence to the rule of law, else we give the terrorists the victories they seek. That said, our systems of accountability must be calibrated to deal with the challenges posed by the transnational aspect itself, and it is particularly important for the state both to have due process limitations placed upon it, and to know the parameters of those limitations as best as can be ascertained. The *Khadr* cases show that our courts have made strong efforts to uphold the rule of law while not suffocating the government's pursuit of its aim to combat terrorism and protect Canadians. Remarkably, the courts have stretched beyond the traditional deference with which foreign law and governments were treated, ensuring

as fully as they can that Canada, at least, will not be ensnared in irremediable illegal conduct. These efforts can be made stronger by greater attention to and engagement with international law norms, principles and methodology by the court and by officers of the court. This will have the double effect of providing more predictability and coherence to the law itself and in turn giving much-needed guidance for the important work to come.