KHADR AT THE SUPREME COURT:*
HOW TO REACH THE RIGHT RESULT WITH A SOUND REASONING

Many members of Omar Khadr's family have at one moment or another embraced a form of jihadist ideology and anti-Americanism. Mr. Khadr himself has fought against the Americans in Afghanistan. He was barely 16 years old when he was captured and sent to the Guantanamo Bay prison, where he has been incarcerated for more than 7 years. He is a Canadian citizen. His lawyers support that the Canadian Charter of Rights and Freedoms requires that the Canadian government requests from the American government his return to Canada. They affirm that his rights to security of the person have been violated by the Canadian government. The Federal Court and the Federal Court of Appeal (at 2 against 1) had ordered the government to demand his transfer. The government had nevertheless appealed these decisions and the case will be heard at the Supreme Court November 13, 2009.

Those around us with a minimal sense of morality had the tendency to think that leaving Mr. Khadr to perish at Guantanamo is cringe worthy from its disgracefulness, and that the Canadian government (under the Liberals and Conservatives) must have asked for his return long ago already. Meanwhile, the Supreme Court is not confronted with the question whether the actions of the government are morally acceptable or not. Rather, the question is whether on the basis of the Canadian Charter, the courts can impose on the government the obligation to demand the transfer of Mr. Khadr from the American government. Can the courts do so? Maybe. Nevertheless, if that is the case, while maximizing the clarity and coherence of their decision, it would be preferable that the Supreme Court judges arrive to this conclusion by relying on a stronger reasoning than the lower courts.

The Charter only applies to the actions of the Canadian government. It cannot apply to the actions of the American government. Mr. Khadr’s lawyers must show that it was the Canadian government that had violated his constitutional rights. And, what had the Canadian government done exactly? It had profited from Mr. Khadr’s incarceration by obtaining information from his interrogation. It had then transmitted this information to the American authorities. On the other hand, it was shown that before interrogating him, the Canadian government was informed that Mr. Khadr was subjected to mistreatment that likely included forms of torture.

With that being said, the crucial question is: does such behavior on the part of Canadian authorities constitute a violation of Mr. Khadr’s rights to personal freedom and security? Once again, maybe. It is undeniable that the American authorities have violated these rights, among others. But it is more difficult to conclude that the Canadian authorities had done so in interrogating Mr. Khadr and transmitting the information. If I benefit from the fact that a stranger had chained you to a post, beat you up, and then took your wallet, have I violated your personal freedom? It’s possible. What is clear is that the Canadian government has profited from the violations of rights by the American authorities, which in itself may be an issue. It could be a problem if the Canadian government eventually used the information acquired within domestic procedures, in setting out to undermine the rights of Mr. Khadr, for example, in criminal procedures. Courts could then prevent the government from using the information collected in a questionable manner. Whatever the case, even if these interrogations constituted violations of Mr. Khadr’s rights, the appropriate reparation would surely not be to order the government to ask for his repatriation, which was done by the lower courts. The appropriate reparation would be to forbid the Canadian government to act in such a way in the future and to prevent it from using the collected information.
This may be bad news for Mr. Khadr’s lawyers. But there may be some good news: they could still put forward an argument from the Charter that would allow the Supreme Court to force the government to demand Mr. Khadr’s repatriation. This argument implies that a majority of judges from the Supreme Court dare to venture where they have not before, in recognizing finally that the rights to personal freedom and security could be violated through the inaction of government and not only through its positive actions. The Court must then accept that in doing nothing – in not demanding the repatriation of Mr. Khadr, even though they know that his rights are in peril at Guantanamo – the government finds itself in violation of the Charter. And as the former judge of the Supreme Court Justice Louise Arbour had unequivocally shown in 2002 in a dissent, there is no obstacle (written, institutional or otherwise) to imposing a positive obligation on the government to protect the freedom and security of individuals. Once this argument is accepted, then appropriate reparation becomes the immediate prescription to the government to conform itself to its constitutional obligations by making a demand for a transfer. In conclusion, it seems to me that this is the argument that the Court would have to examine if it wants to arrive at this right result with sound reasoning. Let’s wait to see if these judges will have the audacity to adopt this.

- This opinion was written prior to the hearing at the Supreme Court and was initially published in French in Le Devoir on November 13th 2009.

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KHADR

Sitting quietly on the uncomfortable bench in the courtroom of the Supreme Court, I was listening carefully to the arguments. As usual, the arguments unfold quickly, occasionally interrupted by pointed or more open questions, leaving all observers guessing about the outcome of this sad story. The atmosphere is intense: would it be possible that there would finally be an end to such a tragic fate?

The story of Omar Khadr is well known: at 15 years old, he was taken prisoner in Afghanistan in 2002, suspected of throwing a bomb that killed a U.S. soldier. He has been held at Guantanamo Bay since 2002. Still being imprisoned without having had a trial, he symbolizes everything that has been going wrong since the attacks of September 11 2001: the suspension of habeas corpus, the category of "enemy combatants", the non-applicability of the Geneva Convention, the practices of depriving prisoners of sleep to ‘soften them up’, the images of Abu Ghraib – everything that seemed unthinkable before 2001.

Ottawa, 2009. The hearing continues and arguments overlap. Several stories are told, different legal scenarios that seem to overlap, in part because of the multiple intervenors, but especially because the story of Omar Khadr is riddled with so many irregularities that it is difficult to identify the one that will be the tipping point that will break the government’s constant refusal to consider all attempts to repatriate Omar Khadr.
First, is told the story of Omar Khadr and the *Convention on the Rights of the Child*. The United States has not ratified the *Convention on the Rights of the Child* but Canada is a party - and the staff of the CSIS knew that the conditions of detention and interrogation of Omar Khadr violated the Convention. Shouldn’t there be consequences for such flagrant violation of the rights of a child?

Follows a more ambitious narrative: Omar Khadr and the rights of Canadians detained in foreign countries. Khadr’s lawyers defend themselves from wanting to solve this thorny problem. Still, this is a thesis that could affect all Canadians: What are the rights of Canadians when they are imprisoned elsewhere, what should they expect from their government if they are incarcerated in violation of international law? Do they depend on the popularity of their family? Or does it depend on their capacity to generate positive media coverage? Are they completely at the mercy of the Prime Minister? Should there be safeguards to this discretion? What legal framework should be imposed?

More pragmatically, the tale that comes next is the one of Omar Khadr and judicial review of administrative decisions poorly motivated. The argument is this: the decision of the Prime Minister in July 2009 to refuse to seek the repatriation did not take into account all aspects of the problem - so it's a decision to be reviewed by the courts. Even giving the greatest deference to the Prime Minister, his decision had not taken into account all aspects of the problem and must be returned to the decision maker. There is nothing extraordinary: it is simply the judicial review of an administrative decision, nothing more, nothing less.

Another portrait slightly more dramatic emerges, Omar Khadr and the accountability of CSIS. The proposal put forward is that there must be a remedy to ensure the accountability of intelligence services: they are the ones who interviewed the young Khadr knowing he was not represented, the ones who forwarded the information to U.S. authorities who are now using it to keep Khadr in detention and possibly send it before a military commission. It is this link between the actions of the Canadian government and the Khadr situation which grounds the application of the *Charter* and thus the violation of Canadian constitutional law. So we need a Canadian remedy for this Canadian violation.

Government officials are trying to cool the atmosphere: Omar Khadr and the limits of judicial powers. Omar Khadr is in a foreign country and not on Canadian soil, they remind us. Historically, governments have had complete discretion on matters of international relations, they argue. This absolutely is not the place for the courts to interfere: courts have no expertise in this area nor do they know the ramifications of their decisions in terms of economic, political or diplomatic reprisals. Looms the spectre of angry US giant ... but everyone knows that other countries have repatriated their citizens from Guantanamo without any ill consequence. Nevertheless, the fear of overstepping its authority seems to hover above the court.

Quickly, a counter-argument is presented: there is no absolute immunity in diplomatic relations. In extradition cases, courts have insisted on guarantees of non-imposition of capital punishment. Are we not in a similar situation in which the Canadian constitutional law requires that certain measures are taken generally in the field of diplomatic relations? Requiring a country to abandon the recourse to the death penalty in a particular case where it would normally be available is a veiled criticism of that country’s legal regime and a foray into the realm of diplomatic relations. Isn’t it the same to ask for the repatriation of a citizen whose rights under international law have been violated in a context where the citizen could be tried in Canada? In sum, the thesis can be summarized as Omar Khadr and the respect for
international law. It argues that there will not be effective international law as long as
government authorities are not obliged to comply with it in the context of bilateral relations. The
argument suggests that diplomatic relations should be influenced and shaped by international
law. Is this not the best way to advance international law and facilitate the implementation of
universal values such as the elimination of torture and the rights to the most basic due process?

The arguments continued for a few minutes and soon it will be the end. There are too many
injustices in this case. And obviously at the heart of all these theories, nuanced arguments and
practical and theoretical controversies, lies the fate of a young man of 22 years imprisoned
without trial since the age of 15.

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