The Khadr Situation and the Erosion of Canadian Values

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Omar Khadr was a 15-year-old Canadian child soldier fighting for Al-Qaeda in Afghanistan in 2002. He was nearly killed by U.S. forces in a fire fight, and then captured. He was accused of being an "enemy combatant" – a category that is an invention of the Bush government to avoid the Geneva conventions and U.S. Law -- and of killing a U.S. soldier. He was transferred to the U.S. detention centre in Guantanamo Bay. At Guantanamo Bay, he was tortured by U.S. authorities on a number of occasions so that they could try to obtain intelligence information. He was interviewed twice by Canadian officials in 2003 and 2004; they knew that the results of the interviews would be used as evidence against Khadr in a military tribunal hearing. At the first interview, Khadr was not given access to legal counsel. The second interview occurred after Khadr had been deprived of sleep for three weeks. Meanwhile, the legislation that set up the Bush military tribunals was declared unconstitutional by the U.S. Supreme Court, and the legislation underwent some adjustment. Barack Obama promised to replace the Bush tribunal at Guantanamo Bay with a process that complied with the rule of law. However, once elected, the Obama administration realized that compliance with the rule of law would require setting free nearly all of the Guantanamo Bay detainees because the evidence obtained through torture would not be admissible in any legitimate court.

In May of 2008, the Supreme Court of Canada ruled that Khadr's Charter rights had been violated even though the Canadian officials were outside of Canada. The Court decided that in rare instances in which Charter rights are clearly and grievously violated, Charter rights apply extraterritorially. The Court ordered that the transcripts of the interviews by Canadian officials with Khadr be provided to him. The government complied. In June of 2008, the opposition majority of the House of Commons Standing Committee on Foreign Affairs and International Relations recommended that pursuant to the Supreme Court's finding that the U.S. military tribunals were violating Khadr's Charter rights, the Canadian government should request the U.S. government to return Khadr to Canada to be dealt with under Canadian law. (Other foreign nationals incarcerated at Guantanamo had been repatriated to their home countries, and Khadr remains the only foreign national at Guantanamo.) The Conservative members of the committee wrote a minority report that reasoned that the end justifies the means, and that during the war against terror, extraordinary measures that violate basic human rights are justifiable. The government refused to comply with the majority recommendations.

In early 2010, the Supreme Court affirmed the violation of Khadr's Charter rights, but rejected Khadr's contention that the appropriate remedy was to request the U.S. government to return Khadr to Canada. The Court left it up to the Canadian government to decide on an appropriate remedy that would meet Charter standards. Prime Minister Harper announced that the Canadian Government would do nothing except to request that Khadr not be mistreated. Subsequently, Khadr's lawyers in Canada pursued further legal actions,[1] but these came to an end in October of 2010 when Khadr pleaded guilty to the

[1] Khadr's lawyers launched an application in the Federal Court to order the government to provide a list of possible remedies. Rather than complying with the order, the government appealed to the Federal Court of Appeal. In July, a Federal Court of Appeal judge granted a stay of enforcement of the previous decision, and in September

charges against him in return for a plea bargain that limited his incarceration to eight years, and opened the possibility of his return to Canada after one year. Evidence and analysis by some lawyers and academics indicates that Khadr is likely not guilty,[2] but the plea bargain was the only option to avoid a life sentence in the United States.

Since 9-11, we have witnessed a steady erosion of basic human right protections throughout the Western World, and in particular under the George W. Bush administration in the United States.[3] This erosion of human rights principles by anti-terrorism legislation in the US was flagged by Canada's federal Minister of Justice , Irwin Cotler, as early as 2002.[4] Clearly, the two Canadian officials who violated Khadr's Charter rights in 2003 and 2004 we either unaware of the Minister's warnings, or ignored them. The Harper government has not shared Cotler's viewpoint, and has accepted violations of fundamental human rights if they consider that the end justifies the means. In this atmosphere, the 2010 Supreme Court decision on Khadr, which declared that his Section 7 Charter right to life, liberty and security of the person had been violated by Canada, but which left the remedy up to the government, was likely as far as the Court could practically go without risking that the government would refuse to implement a prescribed remedy. As well, the Khadr decision may be a basis for expanding the extraterritorial reach of the Charter in future years. Based on my interviews with judges over my career, judges are aware of such environmental issues, rarely discuss them with their colleagues, but nevertheless sometimes allow

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another Federal Court of Appeal judge denied an application by Khadr to expedite the appeal, because of the Military Commission trial scheduled for October 18.

[2] For example, presentation by Rebecca Snyder, former Deputy Director, United States Navy Marine Corps, Appellate Defense Division, at 13th Annual Analysis of the Constitutional Decisions of the Supreme Court of Canada, April 16, 2010, Osgoode Professional Development Centre, Toronto; Keith Jones, "Child Soldier Omar Khadr Coerced into Plea-Bargain," Global Research, October 28, 2010, accessed on May 6, 2010 at http://www.globalresearch.ca/index.php?context=viewArticle&code=JON20101028&articleId=21670; Canadian Civil Liberties Association, "Omar Khadr, Canadian, Pleads Guilty To Alleged War Crimes Committed As A Child," October 25, 2010, accessed on May 6, 2010 at http://ccla.org/2010/10/25/omar-khadr-canadian-pleads-guilty-to-alleged-war-crimes-committed-as-a-child/; and testimony of Lieutenant-Commander William Kuebler (Defense Counsel, Office of Military Commissions, United States Department of Defense) before House of Parliament of Canada, Minutes of Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, Evidence, Tuesday, April 29, 2008, 39th PARLIAMENT, 2nd SESSION, retrieved on May 6, 2011 at http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3449878&Language=E&Mode=1&Parl=39&Ses=2. Kuebler stated that Khadr was "[C]onveniently blamed for the unfortunate death of Sergeant Christopher Speer, official records were retroactively altered so that Omar could be held responsible."

[3] A.C. Grayling, *Towards the Light: The Story of the Struggles for Liberty and Rights That Made the Modern West* (London: Bloomsbury, 2007).

[4] Irwin Cotler, "Terrorism, Security and Rihgts: The Dilemma of Democracies," in 14 National Journal of Constitutional Law (2002), 13, 55 ff. Cotler points out that as a result of the U.S. attempting to exempt itself from domestic and international law and citing the necessity to fight terrorism as the reason, nations such as China, Zimbabwe, and Russia have declared that their repression of anti-government groups is justified as part of the international war on terror, and that they are simply following the U.S. example.

them to impact their judgments.[5] Rather than being critical of the Supreme Court for being too soft, we need to be critical of the Harper government for willfully ignoring more than three hundred years of progress toward respect for human rights and the rule of law, and for overlooking the grave consequences of condoning violations of human rights.

The paper will begin with a brief analysis of the background to the Khadr situation. It will then consider the Supreme Court decision on Khadr in 2008, the Parliamentary Committee Report on Khadr of 2008, the Supreme Court's decision on Khadr in 2010, and the government's response to these decisions. I will suggest that the Supreme Court of Canada's timid approach to providing Khadr with an appropriate remedy in the Khadr 2010 decision may have been generated by concern over the government's likely response to such a decision.

Background

Omar Khadr, born in 1986, is the son of Ahmed Khadr, and Egyptian-Canadian and ardent supporter of Osama Bin Laden until he was killed in 2003 in an attack by the Pakistani military on an Al Qaeda compound in Pakistan. In January of 2001, Omar Khadr was sent to an Al Qaeda weapons training camp by his father, most likely against his will.[6] On July 27, 2002, when Omar Khadr was 15, the Al Qaeda compound in which he was staying was attacked by U.S. forces. Omar was severely injured, and pleaded with the U.S. forces to kill him. Instead he was given medical attention at the Bagram Airbase in Afghanistan, and although he lost his sight in one eye, he recovered. He should have received treatment at this point as a child soldier under the Geneva Conventions. However, "Khadr states that [at Bagram] interrogators withheld pain medication, forced him into stress positions, threw cold water at him, made him stand with his hands tied above a door frame for hours, interrogated him with a bag over his head in a room with barking dogs, and interrogated him for so long that he urinated on himself."[7] In October of 2002, he was transferred to Guantanamo Bay.

The George W. Bush government established the category of "enemy combatant" (not a recognized term in international law), and set up the detention centre at Guantanamo Bay in order to try to circumvent both the Geneva Conventions[8] and U.S. law.[9] One of the U.S. Department of Justice Officials

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[5] In 1979 and 1980, as part of my doctoral research, I conducted interviews in Ontario with a representative sample of 40 judges at all levels. During the early 1980s, Prof. Peter McCormick and I, between us, interviewed 90 judges at all levels in Alberta. During the early 1990s, I interviewed more than fifty appeal court judges from across Canada, including eight judges of the Supreme Court of Canada, and colleagues of mine interviewed another fifty appellate court judges.

[6] Testimony of Lieutenant-Commander William Kuebler (Defense Counsel, Office of Military Commissions, United States Department of Defense), Parliament of Canada, Minutes of Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, Evidence, Tuesday, April 29, 2008, op. cit.

[7] The OMAR KHADR PROJECT pocket timeline, University of Toronto Faculty of Law, Omar Khadr Project, accessed on February 13, 2011 at http://www.law.utoronto.ca/documents/Mackin/Khadr_summary-timeline.pdf.

[8] Presidential "orders purported to remove protections of the Geneva Convantions of 1949 (75 U.N.T.S. 31, 135 and 287) and established procedural rules for the military commissions that departed from normal rules of criminal procedure as to the type of evidence that may be admitted, the right to counsel and the disclosure of the case to meet, and judicial independence." Canada (Justice) v. Khadr, 2 S.C.R. 125, 2008 SCC 28, para. 6.

[9] The Guantanamo Bay camp, set up by Presidential Military Order in 2001, was established "for the detention and prosecution of Non-UlS. Citizens believed to be members of Al Qaeda or otherwise involved in international

who gave the green light to these moves was lawyer John Yoo, who from 2001 to 2003 worked in the U.S. Department of Justice Office of the Legal Counsel. According to Yoo, in the post 9-11 period, torture was permissible in order to retrieve evidence that might help to capture Al Qaeda leaders.[10] Yoo is currently a professor in the School of Law at Berkeley University; some have suggested that he should be disciplined for providing seriously flawed legal advice to the Bush administration.[11]

In 2004, the U.S. Supreme Court held that the order under which the Guantanamo Bay detainees had been held was illegal, and that the detainees had the right to challenge their detention by way of *habeas corpus*.[12] Further, in 2006, the U.S. Supreme Court ruled that the Presidential Order that established the Military Commission was illegal.[13] The Court held that the Order contravened the United States Uniform Code of Military Justice,[14] as well as Common Article 3 of the *Geneva Conventions*.
In February and September of 2003, officials from the Canadian Security Intelligence Service and the Department of Foreign Affairs and International Trade (DFAIT) interviewed Khadr in order to collect security intelligence information. Khadr was not provided with access to a lawyer.[15] In March of 2004, an official from DFAIT attemted to interview Khadr, even though the official knew that Khadr had been subjected to the "frequent flyer" sleep deprivation program over several weeks.[16] This time, however, Khadr refused to talk. Khadr claims that in addition to these interrogations, he was questioned a number of times by U.S. officials while or after being tortured.[17] In November of 2004, thanks to the *Rasul v. Bush* decision of the U.S. Supreme Court, Khadr was provided with access to Canadian legal counsel for the first time.

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terrorism … and stipulated pursuant to 10 U.S.C. § 836 that applying normal rules of criminal procedure to such trials "is not practicable."" Ibid.

[10] Tim Golden, "A Junior Aide Had a Big Role in Terror Policy", New York Times, December 23, 2005, accessed on May 6, 2011 at http://www.nytimes.com/2005/12/23/politics/23yoo.html.

[11] Ashby Jones, "What to Do About John C. Yoo?," Wall Street Journal Law Blog , March 9, 2009, accessed on May 6, 2011 at http://blogs.wsj.com/law/2009/03/09/what-to-do-about-john-c-yoo/.

[12] *Rasul v. Bush*, 542 U.S. 466 (2004).

[13] *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

[14] 10 U.S.C. § 836.

[15] Canada (Justice) v. Khadr, 2 S.C.R. 125, 2008 SCC 28, para. 7.

[16] Gerald Chan, "Remedial Minimalism under Section 24(1) of the Charter: Bjelland, Khadr and Nasogaluak," (2010) 51 S.C.L.R. (2d), 349, at 361.

[17] Khadr claims that the torture included having his hands and feet bolted to the floor with his hands behind his knees for several hours; being forced into stress positions for hours at a time so that he is forced to urinate on himself; being kicked; and restricting his breathing. The OMAR KHADR PROJECT pocket timeline, op. cit., and Factum of Omar Khadr, Supreme Court of Canada, 9 October 2009, accessed from The Omar Khadr Project, University of Toronto Faculty of Law, on May 6, 2011 at http://www.law.utoronto.ca/faculty_content.asp?itemPath=1/3/4/0/0&contentId=1617.

In November of 2005, Khadr was officially charged with murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, conspiracy, and aiding the enemy. In February of 2006, Lieutenant-Commander William Kuebler was assigned by Military Tribunal officials to defend Khadr, which was the first U.S. legal support that he was provided with. Also in 2006, the *Military Commissions Act* was enacted by the U.S. Congress in response to the U.S. Supreme Court's *Hamdan* decision. [18] (Amongst other provisions, the Act prevented any court in the United States from having jurisdiction to hear applications for habeas corpus from any Guantanamo detainee; this Act was declared unconstitutional by the U.S. Supreme Court in 2008.[19])

The 2008 Khadr decision of the Supreme Court of Canada

After charges were laid against Khadr in 2005 at Guantanamo Bay, Khadr applied in Canada's Federal Court for disclosure of all of the evidence collected by Canadian officials in their interviews with him, transcripts of which were shared with U.S. prosecutors. Khadr invoked the decision of the Supreme Court of Canada in *Stinchcombe*.[20] The major issue was whether the Canadian Charter of Rights and Freedoms can be applied extraterritorially to situations involving Canadian citizens and Canadian governmental agents, that is, outside of Canada's borders.

The normal reach of the law of sovereign states, under international law, is to citizens and agents over which they have jurisdiction and control. When Canadian citizens or state agents are outside of Canada, in nearly all cases Canada does not have jurisdiction or control over them. Therefore, normally Canadians abroad must abide by the laws in the jurisdiction that they are residing or sojourning in and not Canadian law – the international law of "comity." In 2007, the Supreme Court of Canada affirmed the principle of comity in *Hape*, but stated that there could be rare exceptions if Canadian officials acted in disregard of Canada's "binding human rights oblibations."[21] Given that the United States Supreme Court on two occasions had declared that the regime under which Omar Khadr was subjected was illegal under U.S. domestic and international law, the Canadian Supreme Court declared that Canadian officials had run aground of one of the rare exceptions of international comity. Because Khadr's rights under international law had clearly been violated, Canadian courts could decide whether his Charter rights had been violated. The Court decided that Khadr's Charter S. 7 right to "life, liberty and security of the person" had indeed been violated, and not in accord with the principles of fundamental justice. The remedy that was ordered was the production to Khadr of the transcripts of the interviews conducted by Canadian government officials in 2003 and 2004. The Canadian government complied with the remedy that was ordered, and released the transcripts of the interviews to Khadr and his lawyers.

The 2008 Report of the Subcommittee on International Human Rights of the House of Commons Standing Committee on Foreign Affairs and International Relations on Omar Khadr

In the spring of 2008, while the Supreme Court of Canada was considering its 2008 decision on Khadr, the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development of the House of Commons was conducting hearings into the detention of

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[18] Pub. L. No. 109-366 Stat. 2600 (2006).

[19] *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

[20] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. In this decision, the Supreme Court decided that the Crown had a duty to provide to the defence all evidence that might be relevant to the decision-making process.

[21] Canada (Justice) v. Khadr, [2008] 2 S/C/R/ 125. 2—8 SCC 28, headnotes. R. *v.* Hape, [2007] 2 S.C.R. 292, 2007 SCC 26.

Omar Khadr. The Supreme Court's decision was released on May 23, and the Committee's decision was released in June. The Committee's majority report referred to the Supreme Court of Canada's decision on Khadr, and recommended that the government request Khadr's repatriation to Canada to be dealt with under Canadian law and according to Canada's international agreements. The Committee's final recommendation is as follows:

> 7. In particular, the Subcommittee calls on the relevant Canadian authorities to ensure that an appropriate rehabilitation and reintegration program is developed for Omar Khadr, which takes into account legitimate security concerns. To the extent necessary, such a program could place judicially enforceable conditions on Omar Khadr's conduct.[22]

It is notable that the majority on the committee included Irwin Cotler, and the minority included Jason Kenney. The Conservative members' minority report emphasized the importance of fighting terror and the risk associated with repatriating Khadr, stated that the usual standards in criminal law were impractical in a war situation and in particular when combating terrorism, and argued that the Geneva Convention on the treatment child soldiers did not apply in terror-related situations.[23]

The 2010 Khadr decision

After reviewing the transcripts of the interviews by Canadian officials in 2003 and 2004, Khadr's lawyers advised him to apply for a Canadian court order to compel the Canadian government to have him repatriated to Canada. The reasoning was first that the Obama Administration – which was opposed to the anti-rule of law Guantanamo regime – wanted foreign nationals repatriated to be dealt with under the domestic law of their home countries. Second, given the finding of the Canadian Supreme Court in the 2008 Khadr decision that the Canadian Charter of Rights and Freedoms applied extraterritorially given a clear violation of Canada's international human rights obligations, and given that that the United States was guilty of violating international human rights obligations and that Canadian officials were complicit, it seemed a good possibility that Canadian courts would order Khadr – a child soldier when apprehended by U.S. officials, and a person subjected to torture – to be repatriated.

The Federal Court of Appeal agreed with Khadr's argument. However, the Supreme Court of Canada agreed only in part. Given the 2008 Khadr decision, the Supreme Court confirmed that Khadr's Charter rights had been violated, and that they applied extraterritorially:

> 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 would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.[24]

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[22] Report of the Standing Committee on Foreign Affairs and International Development, Kevin Sorenson, M.P. Chair, Subcommittee on International Human Rights, Scott Reid, M.P. Chair, JUNE 2008, 39th PARLIAMENT, 2nd Session, accessed on April 2, 2011 at http://www.jlc.org/files/briefs/khadr/Parliament%20Report%2017%20Jun%2008.pdf

[23] Ibid.

[24] Canada (Prime Minister) *v*. Khadr, 2010 SCC 3, at para. 25.

The remedy ordered by the Court, however, was not a real remedy.[25] The Court simply declared that Khadr's Charter rights had been violated, and left it to the Canadian government to find an appropriate remedy. The reason given by the unanimous Court in not ordering the federal government to request the repatriation of Khadr was that foreign relations is a prerogative power of the federal cabinet, and the Court does not have the evidence or expertise to decide an appropriate remedy. As other commentators have pointed out, this reasoning is difficult to understand, given that the Obama administration clearly wanted Khadr to be repatriated to Canada.[26]

Shortly after the decision was announced, Prime Minister Harper said that the Canadian government would not request Khadr's repatriation, but would request the U.S. government to treat him fairly. As well, the Canadian government also requested that the Guantanamo Bay military tribunal not use the evidence collected by Canadian officials against Khadr. This request was refused by the military tribunal. According to Audrey Macklin, it was "predictable" that the U.S. government would reject this request. "After all, attempting to tamper with the trial process of another state … constitutes a significantly greater intrusion into the sovereignty of another state than a request from on executive branch to another to repatriate the accused before a trial commences."[27]

Aftermath of the 2010 Supreme Court decision on Khadr

Given that the Canadian government had refused to request the repatriation of Kadhr, and given that the military tribunal had refused to not consider the evidence collected by Canadian officials in violation of domestic and international law, Khadr launched an application in the Federal Court to force the Canadian government to list alternatives to complying with the Supreme Court's 2008 order. The application was granted by a Federal Court judge, but a subsequent application by the federal government for a stay in enforcement was granted.[28] Given that there was precious little time for appeal prior to Khadr's military tribunal trial at Guantanamo, Khadr's lawyers focused on negotiating a plea bargain. In return for pleading guilty to all charges, Khadr would receive an eight year sentence (not life imprisonment), and after one year the sentence could be served in Canada. (This was in recognition that on Canadian soil, the egregious violations of the rule of law in the U.S. military courts might result in a different result in Canada). Khadr pleaded guilty to all the charges, and received the plea bargained sentence (although his military jury had sentenced him to a non plea-bargained 40 year term).

On May 1, 2011, Osama bin Laden was killed in Pakistan by U.S. special forces. On May 2, 2011, the Harper Conservative government won a majority in the General Election. Both Jason Kenney and Irwin Cotler will return to the House of Commons.

After bin Laden's killing, lawyer John Yoo argued that it would have been better if bin Laden had been captured alive and tortured to provide more information that would lead to the capture of other Al Qaeda terrorists. He argued that it was evidence collected by U.S. intelligence officials through the use

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[25] Gerald Chan, "Remedial Minimalism under Section 24(1) of the Charter…" op. cit., 360 ff., and Audrey Macklin, "Comment on Canada (Prime Minister) v. Khadr (2010)," (2010) Supreme Court Law Review 51 (2d), 295, at 329.

[26] Gerald Chan, "Remedial Minimalism" at 366, op. cit., and Audrey Macklin, "Comment on Canad v. Khadr," at 237-331, op. cit.

[27] Audrey Macklin, "Comment on Canada (Prime Minister" v. Khadr (2010), op. cit., at pp. 326-27.

[28] Audrey Macklin, Ibid., "Postscript," 330-31.

of torture that had led to the discovery of bin Laden's hiding place in Pakistan. In an editorial in the Globe and Mail on May 6, the editorial board strongly disagreed with Yoo's assertions. First, the Globe and Mail argued that the evidence that led to bin Laden's capture likely did not depend on information obtained from torture. Second, the editorial pointed out the amount of false information gleaned by U.S. interrogators from torture. And finally, "Torturing Mr. bin Laden would have been deeply counterproductive, at a moment when a popular movement in Arab lands is forming against police states, in which abuse in detention is a common feature."[29]

There is no doubt that the debate about human rights and whether torture can be justified will continue in the 40th Parliament. The witness in the hearings by the Subcommittee on International Human Rights relied on by the Conservative minority, Howard Anglin, whose position is similar to John Yoo's, is an associate of the special assistant hired by Jason Kenney Kenney's office in 2007, Alykhan Velshi.[30] After Irwin Cotler left the cabinet with the defeat of the Liberal government in 2006, he worked with the team of U.S. and Canadian lawyers defending Omar Khadr. Khadr's plea bargain included a provision to return Khadr to Canada after a year of incarceration at Guantanamo Bay, which will be in October of 2010.[31] Given that Kenney and Cotler occupy radically opposite positions, there are bound to be intense debates over Khadr's future at that time.

Conclusion

Canada's constitution is based on the lessons learned from centuries of tumult about rights and freedoms, both in Britain and then in Canada. Basic human rights constitute one of the foundations of our constitution, including *habeas corpus*, the right to legal counsel, the right of an accused person to see the evidence him/her in order to answer, and the right not to be tortured. All of these rights were violated by the Bush era Guantanamo detention centre, and the Bush military tribunals.

How could the Bush administration have forsaken these icons of Western civilization? John Yoo and others persuaded key U.S. administrators, who may not have possessed the educational background to question his assertions, that torture of the Afghan detainees was justified, even though there is little or no evidence that torture is more effective in gaining credible evidence than standard interrogation techniques that comply with international and domestic law.[32] But even if torture might work in some situations, that's not the point. Much of the raison d'etre of Canada as a nation is to uphold and promote a value system based on mutual respect and basic human rights.

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[29] "Torture bin Laden: The moral of the story*," The Globe and Mail*, May 6, 2011, A24.

[30] Kady O'Malley, "The other side of the story: Liveblogging the Khadr committee," Macleans'.ca, May 27, 2008, accessed on May 6, 20100 at http://www2.macleans.ca/2008/05/27/the-other-side-of-the-story-liveblogging-the-khadr-committee/

[31] On October 24, 2010, Canadian and U.S. officials exchanged diplomatic notes that would facilitate the transfer of Omar Khadr to Canada in October of 2011. See Memoramdum for Michael L. Bruhn, Executive Secretary, United States Department of Defence, and attached diplomatic notes, accessed on May 6, 2011 at http://beta.images.theglobeandmail.com/archive/00978/Read_diplomatic_mem_978462a.pdf.

[32] For example, see Human Rights First, "Former FBI Interrogators Tell Obama Miranda Modifications May Do "More Harm Than Good," May 13, 2010, accessed on May 6, 2011 at http://www.humanrightsfirst.org/2010/05/13/former-fbi-interrogators-tell-obama-miranda-modifications-may-do-more-harm-than-good/

When the Khadr case was considered before a Canadian Parliamentary committee, the rule of law prevailed and the committee recommended the repatriation of Khadr. However, the Conservative party' minority report concluded that the end justifies the means. It implied that if Khadr might have provided valuable intelligence information through torture, so much the better.

In this environment, is it any wonder that the Supreme Court of Canada took a timid approach to applying a remedy to the egregious violations of Khadr's human rights?

> "No doubt the Prime Minister would have sharply criticized the Court had it actually [ordered the government to request Khadr's repatriation], and some segment of the Canadian population would have agreed with the Prime Minister. Perhaps the Prime Minister would have flouted a Court's order to request repatriation, and with it the executive's fidelity to the rule of law. Or may not. We will never know.[33]

As well, no doubt the Supreme Court was well aware of the criticisms of judges by the Prime Minister and his chief supporters over the years.[34]

As someone who has studied human rights issues for much of his career, I find it extraordinary that in 2011 Canadians are still debating whether basic protections of human rights can sometimes be sacrificed if there is some possibility that the end might justify the means. To quote from a recent Globe and Mail editorial:

> If torture is not like a magical elixir of truth, if it only sometimes – in common with less medieval interrogation techniques – produces actionable intelligence, it is really worth turning back the clock of civilization to the days when the monstrous in detention was deemed lawful? The moral of the bin Laden assassination is not that torture is good. Tough guys don't torture, as President Barack Obama has shown. And they still get their man.[35]

[33] Audrey Macklin, "Comment on Canada v. Khadr," op. cit., 329.

[34] These criticisms culminated in the speech by Jason Kenney to the University of Western Ontario Faculty of Law in early February, 2011, in which Kenney ridiculed particular judicial decisions. Clearly, this is a serious violation of judicial independence, but Kenney was never reprimanded by the Prime Minister. See Audrey Macklin and Lorne, Waldman, "When cabinet ministers attack judges, they attack democracy" The Globe and Mail, February 18, 20100, accessed on April 6, 2011 at http://www.theglobeandmail.com/news/opinions/opinion/when-cabinet-ministers-attack-judges-they-attack-democracy/article1912110/

[35] The Globe and Mail, "Torture Bin Laden: The moral of the story," op. cit.