Federal Court  Cour fédérale

Date: 20090423

Docket: T-1228-08

Citation: 2009 FC 405

Vancouver, British Columbia, April 23, 2009

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

OMAR AHMED KHADR

Applicant

and

THE PRIME MINISTER OF CANADA,
THE MINISTER OF FOREIGN AFFAIRS,
THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE, AND
THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Omar Khadr, a Canadian citizen, was arrested in Afghanistan in July 2002 when he was 15 years old. He is alleged to have thrown a grenade that caused the death of a U.S. soldier. He has been imprisoned at Guantánamo Bay since October 2002 awaiting trial on serious charges: murder, conspiracy and support of terrorism.

[2] Mr. Khadr challenges the refusal of the Canadian Government to seek his repatriation to Canada. He claims that his rights under the *Canadian Charter of Rights and Freedoms* (sections 6, 7 and 12) have been infringed and seeks a remedy under s. 24(1) of the *Charter*. More particularly, Mr. Khadr asks me to quash the decision of the respondents not to seek his return to Canada and order the respondents to request the United States Government to repatriate him. Mr. Khadr also asks me to overturn the respondents' decision on the grounds that it was unreasonable and taken in bad faith. Finally, Mr. Khadr seeks further disclosure of documents in the respondents' possession.

[3] I am satisfied, in the special circumstances of this case, that Mr. Khadr's rights under s. 7 of the *Charter* have been infringed. I will grant his request for an order requiring the respondents to seek his repatriation from the United States. Given my conclusion regarding s. 7, it is unnecessary for me to deal with the other grounds Mr. Khadr raised before me. The issue of disclosure has already been conclusively decided by the Supreme Court of Canada and, therefore, cannot be re-litigated before me.

[4] These are the questions that arise in this case:

1. Have the issues already been decided in other judicial proceedings; that is, is this case governed by the doctrine of *res judicata*?

2. Is there any "decision" that can be judicially reviewed?

3. Does the Canadian Government have a legal duty to protect Mr. Khadr?

4. What is the appropriate remedy if that duty is breached?

(Provisions of the *Canadian Charter of Rights and Freedoms* and the international instruments cited below are set out in Annex "A".)

I. Factual Background

(a) Events Leading to Mr. Khadr's Arrest and Detention

[5] Mr. Khadr was born in Canada in 1986. He moved with his family to Pakistan in 1990. In 1995, his father, Mr. Ahmad Khadr (Ahmad), was arrested for alleged involvement in a bombing of the Egyptian embassy in Islamabad. The rest of the family returned to Canada. They moved back to Pakistan in 1996 after Ahmad was released. They came back to Canada again in 2001 for a number of months while Ahmad recuperated from an injury caused by a landmine. The family moved to Afghanistan in July 2001. After the events of September 11, 2001, Mr. Khadr and his brothers attended training camps associated with Al-Qaeda.

[6] The events surrounding Mr. Khadr's arrest in July 2002 are disputed. Clearly, he was present at a gun-battle near Khost, Afghanistan, during which a United States soldier was killed by a grenade. Mr. Khadr is alleged to have thrown that grenade. He maintains that he did not.

[7] Mr. Khadr was himself seriously injured during the gun-battle by both bullets and shrapnel. He received medical treatment and was held in custody at Bagram Airbase for several weeks thereafter, and then transferred to Guantánamo Bay on October 28, 2002.

(b) Conditions at Bagram and Guantánamo Bay

[8] In his affidavit, Mr. Khadr describes various forms of mistreatment both at Bagram and Guantánamo Bay. For purposes of these proceedings, it is unnecessary for me to make any definitive factual findings about the conditions of Mr. Khadr's imprisonment. However, there are three significant facts that are relevant to this application and on which there is agreement between the parties.

[9] First, on detention, Mr. Khadr was "given no special status as a minor" even though he was only 15 when he was arrested and 16 at the time he was transferred to Guantánamo Bay.

[10] Second, Mr. Khadr had virtually no communication with anyone outside of Guantánamo Bay until November 2004, when he met with legal counsel for the first time.

[11] Third, at Guantánamo Bay, Mr. Khadr was subjected to the so-called "frequent flyer program", which involved depriving him of rest and sleep by moving him to a new location every three hours over a period of weeks. Canadian officials became aware of this treatment in the spring of 2004 when Mr. Khadr was 17, and proceeded to interrogate him.

(c) Actions of the Canadian Government

[12] After Mr. Khadr's arrest, Canadian authorities asked United States officials for consular access to him while he was being held at Bagram. It was denied. Canada also made clear that it believed that Guantánamo Bay was not an appropriate place for a child to be kept in custody. A diplomatic note dated September 13, 2002 stated:

> The Embassy of Canada would further urge the American authorities to consider the fact that Mr. Omar Khadr, at the time the events in question took place, was less than sixteen years of age. Under various laws of Canada and the United States, such an age provides for special treatment of such persons with respect to legal or judicial processes. As such, the Government of Canada believes that it would be inappropriate for Mr. Omar Khadr to be transferred to the detention facilities at the American naval base at Guantanamo Bay, Cuba. From the information that is available to the Government of Canada, such a facility would not be an appropriate place for Mr. Omar Khadr to be detained.

[13] While Mr. Khadr was at Guantánamo Bay, Canadian consular officials made inquiries about him beginning in November 2003. They also sought assurances that the death penalty would not be imposed on Mr. Khadr and that detainees generally would be treated in accordance with international law. Canada also expressed its concern about allegations that Mr. Khadr and other detainees were being mistreated. Beginning in 2005, Canadian officials visited Mr. Khadr a number of times to check on his welfare. In general, they found that he appeared to be healthy and well-fed. When he complained that his gunshot wounds were bothering him and still bleeding, Canadian officials requested medical treatment for him, and it was provided.

[14] In addition, Canadian officials, including agents of the Canadian Security and Intelligence Service (CSIS), visited Mr. Khadr a number of times and questioned him. In particular, in February 2003, CSIS agents and an officer from the Department of Foreign Affairs and International Trade (DFAIT) interviewed Mr. Khadr over the course of four days. Additional interrogations followed in September 2003 and March 2004. These visits were for purposes of law enforcement and intelligence gathering, not consular assistance to Mr. Khadr. Indeed, Canadian officials told Mr. Khadr in 2003 that they could not do anything to help him.

[15] A report on the March 2004 visit by a DFAIT official states (referring to Mr. Khadr as "Umar"):

> In an effort to make him more amenable and willing to talk, [blank] has placed Umar on the "frequent flyer program." [F]or the three weeks before [the] visit, Umar has not been permitted more than three hours in any one location. At three hours intervals he is moved to another cell block, thus denying him uninterrupted sleep and a continued change of neighbours. He will soon be placed in isolation for up to three weeks and then he will be interviewed again.
> . . .
> Certainly Umar did not appear to have been affected by three weeks on the "frequent flyer" program. He did not yawn or indicate in any way that he was tired throughout the two hour interview. It seems likely that the natural resilience of a well-fed and healthy seventeen-year old are keeping him going.

[16] Even before it came to light that Mr. Khadr had been subjected to sleep deprivation, Justice Konrad von Finckenstein had issued an interim injunction preventing further interviews with Mr. Khadr in order "to prevent a potential grave injustice" (*Khadr* v. *Canada*, 2005 FC 1076, at para. 46).

[17] By the spring of 2004, then, Canadian officials were knowingly implicated in the imposition of sleep deprivation techniques on Mr. Khadr as a means of making him more willing to provide intelligence. Mr. Khadr was then a 17-year-old minor, who was being detained without legal representation, with no access to his family, and with no Canadian consular assistance.

[18] It cannot fairly be said, however, that Canada abandoned Mr. Khadr entirely. Clearly, officials were concerned about his treatment and welfare and, beginning in 2005, checked on him regularly.

II. Legal Framework

[19] According to orders issued by then President George W. Bush, detainees at Guantánamo Bay were considered unlawful combatants, with no standing to seek remedies in any court and no protection under the Geneva Conventions. In June 2004, the United States Supreme Court ruled that Guantánamo Bay detainees were entitled to bring *habeas corpus* applications in United States federal courts (*Rasul* v. *Bush*, 542 U.S. 466 (2004)). The Court found the Presidential Order to the contrary to be unlawful.

[20] In September 2004, the Combatant Status Review Tribunal (CSRT) concluded that Mr. Khadr was an enemy combatant. In January 2005, the United States District Court for the District of Columbia, after receiving *habeas corpus* applications from a number of detainees, including Mr. Khadr, concluded that the CSRT had denied them due process. In particular, the Court found that the detainees had not been given access to the evidence against them, had been denied the assistance of counsel, and had evidence obtained by torture used against them (*In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443).

[21] In 2006, the United States Supreme Court held that the legal regime in Guantánamo Bay violated the Geneva Conventions because detainees had been denied the right to be tried by regular courts with the usual procedural protections (*Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006)). Subsequently, Congress enacted the *Military Commissions Act of 2006* (MCA) which removed the U.S. federal courts' jurisdiction to receive *habeas corpus* applications from detainees.

[22] Mr. Khadr faces five charges under the MCA: (1) Murder in Violation of the Law of War; (2) Attempted Murder in Violation of the Law of War; (3) Conspiracy; (4) Providing Material Support for Terrorism; and (5) Spying.

III. Earlier Proceedings Involving Mr. Khadr

[23] Mr. Khadr has launched a number of other proceedings in Federal Court. In 2004, he commenced an action for damages and a declaration that his *Charter* rights had been infringed. Justice Konrad von Finckenstein granted him an injunction against further interrogations by Canadian officials, but no further action was taken in the proceedings (*Khadr* v. *The Attorney General of Canada and the Minister of Foreign Affairs*, 2005 FC 1076, T-536-04).

[24] Also in 2004, Mr. Khadr applied for judicial review of a decision of the Minister of Foreign Affairs not to seek further consular access to him. Again, there has been no recent action taken on this file (*Khadr* v. *The Minister of Foreign Affairs*, 2004 FC 1145, T-686-04).

[25] In 2006, Mr. Khadr sought judicial review of a decision of the Minister of Justice not to comply with a request for disclosure of documents that would assist Mr. Khadr in defending the charges against him. The application was dismissed (*Khadr* v. *Canada (Minister of Justice)*, 2006 FC 509), but Mr. Khadr appealed successfully (*Khadr* v. *Canada (Minister of Justice)*, 2007 FCA 182). The Federal Court of Appeal found that Mr. Khadr's *Charter* rights were engaged by virtue of the involvement of Canadian officials in gathering evidence against him through their interrogations. The Court ordered the Minister of Justice to disclose all relevant documents to Mr.

Khadr.

[26] The Supreme Court of Canada dismissed the Minister's appeal but varied the disclosure order. The Minister was ordered to disclose "(i) records of the interviews conducted by Canadian officials with Mr. Khadr or (ii) records of information given to U.S. authorities as a direct consequence of Canada's having interviewed Mr. Khadr" (*Canada (Justice)* v. *Khadr*, 2008 SCC 28, at para. 40).

[27] The Supreme Court also ordered that a Federal Court judge review the disclosed documents in order to determine whether national security interests or other considerations apply to them and to make the final determination about what documents should be disclosed. Justice Richard Mosley performed that review and issued his order in June 2008: *Khadr* v. *Canada (Attorney General)*, 2008 FC 807.

[28] In 2007, Mr. Khadr commenced another application for judicial review, but it was discontinued in February 2008 (*Khadr* v. *Minister of Justice, Minister of Foreign Affairs, and Attorney General of Canada*, T-1319-07).

IV. Issues

1. *Have the issues in this case already been decided in other judicial proceedings; that is, is this case governed by the doctrine of* res judicata*?*

[29] The respondents point to the earlier proceedings instituted by Mr. Khadr, particularly those leading to the decision of the Supreme Court of Canada, and submit that the issues raised in this application have already been heard and decided; that is, that this application falls under the doctrine of *res judicata*.

[30] The Supreme Court of Canada addressed the question whether the respondents were required to disclose documents in their possession that were relevant to the charges Mr. Khadr was facing, including records of interviews and information turned over to U.S. officials. In the analysis of this question, the Court considered whether the *Charter* applied to the issue of disclosure, given that the materials sought related to interviews that had taken place outside of Canada. The Court referred to its prior decision in *R.* v. *Hape*, 2007 SCC 26 where it had concluded that the *Charter* generally does not apply to Canadian investigators operating outside of Canada. But *Hape* had also identified an exception to that general rule where the activities of Canadian agents violated Canada's international obligations, particularly its human rights commitments. The Court stated:

> If the Guantanamo Bay process under which Mr. Khadr was being held was in conformity with Canada's international obligations, the *Charter* has no application and Mr. Khadr's application for disclosure cannot succeed: *Hape*. However, if Canada was participating in a process that was violative of Canada's binding obligations under international law, the *Charter* applies to the extent of that participation. (At para. 19.)

[31] The Court relied on the U.S. Supreme Court's conclusion that the Guantánamo Bay detainees had been unlawfully denied access to the remedy of *habeas corpus* and were being held under terms that violated the Geneva Conventions: *Rasul* v. *Bush*, above. Further, the Court noted that the U.S. Supreme Court had also found that the process of trials before military commissions

violated Common Article 3 of the Geneva Conventions: *Hamdan* v. *Rumsfeld*, above. Based on these decisions, and given Canada's adherence to the Geneva Conventions, the Court concluded that "the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS interviews constituted a clear violation of fundamental human rights protected by international law" (at para. 24).

[32] However, the Court did not find it necessary to decide whether Canadian officials had actually violated the *Charter* by interviewing Mr. Khadr and turning over the fruits of those interviews to U.S. authorities. The Court simply noted that the Canadian officials were bound by the *Charter* at that point because they were participants in a process that violated international law. Accordingly, they were bound by the principles of fundamental justice that are protected by s. 7 of the *Charter* and nourished by international human rights obligations. Section 7 imposes on state agents an obligation to disclose relevant evidence to persons whose liberty interests are at stake. In the context of Mr. Khadr's case, this meant that Canadian officials had a duty to disclose all records of the interviews they had conducted and other information given to U.S. authorities as a consequence of those interviews.

[33] I do not agree with the respondents that the issues arising in this case were decided by the Supreme Court of Canada in the earlier litigation on disclosure. True, there is some overlap. For example, the question of the application of s. 7 of the *Charter* arises in both, and Mr. Khadr sought disclosure of information in both. However, the issues here are broader and different. In particular, the question whether the respondents have a duty to seek the repatriation of Mr. Khadr has not

previously been addressed.

[34] In further support of their position, the respondents also point to the judgment of Justice Mosley arising from his review of the documents the Supreme Court ordered to be disclosed. He justified disclosure to Mr. Khadr of certain information on the grounds that Canada had, by virtue of the DFAIT official's interrogation of Mr. Khadr at Guantánamo Bay in March 2004, become implicated in violations of the United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Can. T.S. 1987 No. 36 (CAT)), as well as the Geneva Conventions. As mentioned, that interrogation took place with knowledge that Mr. Khadr had been subjected to sleep deprivation in order to prepare him to be cooperative in the interview and, thereby, to reveal useful intelligence. Justice Mosley ordered the disclosure of the report of the March 2004 interrogation to Mr. Khadr, and its contents subsequently became public knowledge.

[35] Mr. Khadr raises similar arguments before me in support of his submission that Canadian officials have a duty to seek his repatriation. But that does not render the issues raised by Mr. Khadr here identical to the issues litigated previously. The contexts are quite different. This part of Mr. Khadr's application is not *res judicata*. However, it is clear that the issue of disclosure has been fully considered and decided in earlier proceedings and cannot be re-litigated before me.

2. *Is there any "decision" that can be judicially reviewed?*

(a) The Prime Minister's Statement and Government Policy

[36] On July 10, 2008, following the release of the decision of Justice Mosley discussed above, as well as the information about Canadian involvement in the imposition of sleep deprivation techniques on Mr. Khadr, a journalist asked Prime Minister Stephen Harper whether he would be requesting Mr. Khadr's repatriation to Canada. The Prime Minister said: "The answer is no, as I said the former Government, in our Government with the notification of the Minister of Justice had considered all these issues and the situation remains the same. … [W]e keep on looking for [assurances] of good treatment of Mr. Khadr."

[37] In addition to this specific statement, it is clear that the Government of Canada has an ongoing policy against requesting Mr. Khadr's repatriation that has been expressed publicly from time to time and can be the subject of judicial review at any given point: *Canadian Association of the Deaf* v. *Canada*, 2006 FC 971, at para. 72. This policy is reflected in the Government of Canada's dissent from a June 2008 report of the Standing Committee on Foreign Affairs and International Development on Mr. Khadr's case. The Standing Committee recommended that Canada demand Mr. Khadr's repatriation. The Government's dissent was based on a concern that Canada be seen to deal forcefully with terrorism. In the Government's view, Mr. Khadr's case reflects "Canada's commitment to impeding global terrorism and the results of our actions today could result in consequences that are not in the long-term interest of the country" (House of Commons, *Omar Khadr – Report of the Standing Committee on Foreign Affairs and International Development*, (Communications Canada – Publishing: Ottawa, 2008), at pp. 15-17).

[38] Accordingly, I find that there has clearly been a "decision" that may properly be the subject of an application for judicial review.

(b) Is the Decision Reviewable by the Court?

[39] Cases such as this require the Court to find the "legal edge between the executive and judicial functions" (as expressed by Lord Laws in *Al Rawi* v. *Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279, at para. 148).

[40] Generally speaking, decisions about foreign affairs fall naturally and properly to the executive. Still, Canadian courts have determined that the executive's prerogative in that area is subject to review under the *Charter*. As Justice Allen Linden has stated, "the exercise of Crown prerogative is beyond the scope of judicial review, except, of course, when a right guaranteed by the [*Charter*] is violated": *Copello* v. *Canada (Minister of Foreign Affairs)*, 2003 FCA 295, at para. 16, relying on *Black* v. *Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.).

[41] Justice Robert Barnes expressed the situation this way:

> Decisions involving pure policy or political choices in the nature of Crown prerogatives are generally not amenable to judicial review because their subject matter is not suitable to judicial assessment. But where the subject matter of a decision directly affects the rights or legitimate expectations of an individual, a Court is both competent and qualified to review it. (*Smith* v. *Canada (Attorney General)*, 2009 FC 228, at para. 26.)

[42] The courts of other countries have addressed the question whether decisions taken by Governments in respect of persons detained at Guantánamo Bay are reviewable. In *Abbasi* v. *Secretary of State for Foreign and Commonwealth Affairs*, [2002] E.W.J. No. 4947 (C.A.), Lord Phillips acknowledged that courts may review the exercise of the Government's prerogative power in relation to foreign affairs. However, he concluded that the Government does not have a general

enforceable duty to protect citizens abroad. The Government has the discretion to do so, but the courts should not intervene unless the Government's position is irrational or contrary to a legitimate expectation. Lord Phillips went on to say that, while a decision whether to make diplomatic representations on a citizen's behalf falls within the conduct of foreign policy, the Government has a duty at least to consider and respond to requests for diplomatic interventions. Whether the Government might be legally required to do more would depend on the particular facts.

[43] It should be noted that the *Abbasi* decision was made at a point in time when the legal status of detainees was unclear under U.S. law. Further, the U.K. Foreign Office was in active discussions with the U.S. about the status of detainees. The timing, therefore, was "delicate" in the Court's view. While the Court held a "deep concern that, in apparent contravention of fundamental principles of law, Mr. Abbasi may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention", it could not, for the reasons outlined above, rule in his favour (at para. 107).

[44] In *Al Rawi*, above, the Court considered the position of persons detained at Guantánamo Bay who were residents, not citizens, of the U.K. By 2006, the Secretary of State had made representations to the U.S. seeking the return of U.K. citizens, but had refused to do so on behalf of residents. The Court concluded that, to the extent that the *Abbasi* case recognized a basis for judicial review of Government decisions regarding citizens abroad, it should be confined to British nationals. And it made clear that the courts should be very careful not to intrude on the executive's responsibilities for foreign policy and national security.

[45] In *Mohamed* v. *Secretary of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2048 (Admin), the applicant, Binyan Mohamed, a Guantánamo Bay detainee, sought disclosure of information and documents held by the Foreign Secretary. Mr. Mohamed, a failed refugee claimant in, and resident of, the U.K., alleged that he had been arrested in Pakistan in 2002 and then kept in unlawful detention incommunicado until 2004 when he was transferred to Guantánamo Bay, where he faced serious charges. The Foreign Secretary refused disclosure on grounds of national security. Mr. Mohamed had been questioned by U.K. agents in Pakistan as part of an intelligence-gathering exercise. He was also questioned by U.S. authorities. Lord Thomas found that U.K. officials facilitated the U.S. interrogations, knowing that Mr. Mohamed's treatment and detention was unlawful. The Court specifically stated that it was not faced with the question whether the U.K. Government was under a duty, in these circumstances, to protest or make representations to the U.S. Government regarding Mr. Mohamed's treatment. However, in light of the involvement of U.K. officials, the Court held that Mr. Mohamed was entitled to disclosure at common law, subject to a claim of public interest immunity.

[46] The Federal Court of Australia considered whether there was any chance of success in an application brought by a Guantánamo Bay detainee, Mr. David Hicks, for an order requiring the Government of Australia to seek his repatriation to Australia. Justice Tamberlin denied the Government's motion to dismiss the proceedings summarily, finding that there was at least some basis in law for Mr. Hick's application. Justice Tamberlin noted that "the extent to which the court will examine executive action in the area of foreign relations and Acts of State is far from settled, black-letter law" (*Hicks* v. *Ruddock*, [2007] FCA 299 at para. 93). The case was never decided on its merits because Mr. Hicks was, in fact, returned to Australia.

[47] These cases support the respondents' contention that there is no clear duty to protect citizens recognized under international law, or under the common law. However, they do not help decide what duties Canada owes to citizens whose constitutional rights under the *Charter* are engaged. Further, they do not address the special circumstances that present themselves in this case – in particular, Mr. Khadr's youth and the direct involvement of Canadian authorities in his mistreatment at Guantánamo Bay.

[48] The Constitutional Court of South Africa considered whether there exists a legal duty to come to the aid of citizens who are at risk in other countries in *Kaunda* v. *President of South Africa*, CCT 23/04. There, the Court considered whether the Government of South Africa had an obligation to assist 69 South African citizens who had been arrested in Zimbabwe for purposes of extradition to Equatorial Guinea in connection with an alleged coup attempt. The question arose whether the Government of South Africa was obliged to intervene diplomatically on behalf of the detainees, given that their conditions of detention were deplorable and that they might face the death penalty in Equatorial Guinea if extradited. Chief Justice Chaskalson concluded that there is no right to diplomatic protection under international law. States have "the right to protect their nationals beyond their borders but are under no obligation to do so" (at para. 23). However, citizens have the right to request the Government "to provide protection against acts which violate accepted norms of international law" (at para. 144(5)). The Government must consider those requests and respond to them appropriately. Further, the Government's response is subject to judicial review under the Constitution. Still, courts will "give particular weight to the Government's special responsibility for

and particular expertise in foreign affairs, and the wide discretion that it must have in determining how best to deal with such matters" (at para. 144(6)).

[49] In my view, the same general approach applies here. The Government's decision is amenable to judicial review under the *Charter* but, at the same time, its view as to how best to deal with matters that affect international relations and foreign affairs is entitled to "particular weight".

3. *Does the Canadian Government have a legal duty to protect Mr. Khadr?*

(a) Application of the *Charter*

[50] While the Supreme Court of Canada's decision in respect of Mr. Khadr dealt with a different question (*i.e.*, the duty to disclose the fruits of an interrogation), its approach is, nevertheless, helpful in addressing the question before me: Given Mr. Khadr's personal circumstances, as well as the conditions of his confinement and treatment at Guantánamo Bay, and in light of the involvement of Canadian authorities, does Canada have an obligation, based on the *Charter*, to protect Mr. Khadr?

[51] To start with, it is clear that the *Charter* applies to the Canadian agents who travelled to Guantánamo Bay and questioned Mr. Khadr. The Supreme Court held that the "violations of human rights identified by the United States Supreme Court are sufficient to permit us to conclude that the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS interviews constituted a clear violation of fundamental rights protected by international law" (at para. 24).

Accordingly, while principles of international comity would otherwise have precluded the application of the *Charter*, those principles do not apply in circumstances where Canada's international human rights obligations have been contravened (at para. 18). Mr. Khadr's detention in Guantánamo Bay is illegal under both U.S. and international law. As such, the "*Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations" (at para. 26).

[52] Obviously, if the mere questioning of Mr. Khadr involved Canada in a process that violates our international human rights obligations, knowing involvement in the mistreatment of Mr. Khadr is an even more compelling basis on which to find that the *Charter* applied to Canadian officials at Guantánamo Bay.

(b) The Principles of Fundamental Justice

[53] When a person's life, liberty or security is at stake, s. 7 of the *Charter* requires Canadian officials to respect principles of fundamental justice. The Supreme Court found that Mr. Khadr's liberty interest was engaged by virtue of the participation of Canadian officials in an unlawful process and that the principles of fundamental justice required Canada to disclose the materials it acquired. Canada had provided that information to U.S. authorities and, therefore, its disclosure obligation required that the materials also be provided to Mr. Khadr. Canada's refusal to grant disclosure violated principles of fundamental justice and, therefore, Mr. Khadr's s. 7 rights.

[54] Here, I must decide whether the applicable principles of fundamental justice require the Canadian Government to protect Mr. Khadr. To be recognized as a principle of fundamental justice, three criteria must be met. It must be (1) a legal principle, (2) for which there is a broad consensus about its fundamental character in respect of the fair operation of the legal system, and (3) which is capable of being defined with sufficient precision to be used as a manageable standard for the measurement of deprivations of life, liberty and security of the person (*R.* v. *D.B.*, 2008 SCC 25).

[55] In addition, the principles of fundamental justice are informed by Canada's international obligations. The Court must take into account "Canada's international obligations and values as expressed in '[t]he various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms'" (*Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at para. 46, citing *United States* v. *Burns*, [2001] 1 S.C.R. 283 at para. 80).

(c) Relevant International Instruments

(i) <u>The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT)</u>

[56] Torture is defined under the CAT as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession" (Art. 1). The Supreme Court of Israel has concluded that sleep deprivation "for the purpose of tiring [the suspect] out or 'breaking' him, … is not part of the

scope of a fair and reasonable investigation" and harms "the rights and dignity of the suspect" (*Public Committee Against Torture in Israel* v. *Israel*, 38 I.L.M. 1471 at para. 31). Based on that decision, Justice Mosley concluded that the subjection of Mr. Khadr to sleep deprivation techniques offended the CAT.

[57] In addition to its obligation to prevent torture within Canada and to prosecute offenders, Canada also has a duty to "ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings" (Art. 15). Canada turned over the fruits of its interrogation of Mr. Khadr to U.S. authorities for use against him, knowing that sleep deprivation techniques had been imposed on him.

(ii) Convention on the Rights of the Child (CRC)

[58] Canada has a duty under the CRC to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child" (Art. 19.1). A child is a person under the age of 18 (Art. 1).

[59] In addition, Canada must ensure that "[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment", that "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily" and that the "arrest, detention or imprisonment of a child shall be in

conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time" (Art. 37(*a*),(*b*)).

[60] Canada must also ensure that "every child deprived of liberty shall be separated from adults" and "have the right to maintain contact with his or her family through correspondence and visits", except in exceptional circumstances (Art. 37(*c*)). Further, every child in custody "shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action" (Art. 37(*d*)).

[61] Canada also has a duty to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts" (Art. 39).

[62] Finally, Canada has recognized "the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth" (Art. 40.1).

[63] The CRC imposes on Canada some specific duties in respect of Mr. Khadr. Canada was required to take steps to protect Mr. Khadr from all forms of physical and mental violence, injury, abuse or maltreatment. We know that Canada raised concerns about Mr. Khadr's treatment, but it

also implicitly condoned the imposition of sleep deprivation techniques on him, having carried out interviews knowing that he had been subjected to them.

[64] Canada had a duty to protect Mr. Khadr from being subjected to any torture or other cruel, inhuman or degrading treatment or punishment, from being unlawfully detained, and from being locked up for a duration exceeding the shortest appropriate period of time. In Mr. Khadr's case, while Canada did make representations regarding his possible mistreatment, it also participated directly in conduct that failed to respect Mr. Khadr's rights, and failed to take steps to remove him from an extended period of unlawful detention among adult prisoners, without contact with his family.

[65] Canada had a duty to take all appropriate measures to promote Mr. Khadr's physical, psychological and social recovery.

(iii) Optional Protocol on the Involvement of Children in Armed Conflict

[66] The Optional Protocol requires states to ensure that members of their armed forces who are under age 18 do not take a direct part in hostilities. Other armed groups "should not" recruit or use in hostilities persons under age 18. Thus, the Optional Protocol does not appear to contain a specific legal obligation on Canada in respect of someone in Mr. Khadr's circumstances.

[67] However, the Optional Protocol is based on broader principles that are set out in its Preamble. For example, the signatories recognize the special needs of children "who are particularly

vulnerable to recruitment or use in hostilities . . . owing to their economic or social status or gender". Further, they recognize the need to strengthen international cooperation in the implementation of the Optional Protocol, "as well as the physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict."

[68] Clearly, Canada was obliged to recognize that Mr. Khadr, being a child, was vulnerable to being caught up in armed conflict as a result of his personal and social circumstances in 2002 and before. It cannot resile from its recognition of the need to protect minors, like Mr. Khadr, who are drawn into hostilities before they can apply mature judgment to the choices they face.

(d) Additional Factors

[69] In determining the scope of the principles of fundamental justice, the Supreme Court has made clear that the particular circumstances in which the claim for s. 7 rights is made must be considered. Some factors may be particular to the claimant and others may be more general (*Burns*, above, at para. 65). For example, in deciding whether a parent is entitled to be represented by counsel at a child custody hearing, the Court considered the seriousness of the interests at stake, the complexity of the proceedings, and the capacity of the parent to participate meaningfully in the hearing if not represented (*New Brunswick (Minister of Health and Community Services)* v. *G.(J.)*, [1999] 3 S.C.R. 46, at para. 74).

[70] In Mr. Khadr's case, relevant factors to consider are his 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.

(e) The Duty to Protect is a Principle of Fundamental Justice

[71] I find that the three criteria from *D.B.*, above, support the recognition of a duty to protect persons in Mr. Khadr's circumstances as a principle of fundamental justice.

[72] First, it is a legal principle, expressed in clear and forceful language in the international instruments discussed above.

[73] Second, given the broad international support for those instruments, I conclude that they represent a consensus that the duties contained in them have a fundamental character. I also note that the Supreme Court of Canada has already recognized that special treatment of young persons caught up in the legal system is a principle of fundamental justice given their diminished moral culpability. In doing so, it relied in part on the *Convention on the Rights of the Child* (*D.B.*, above, at para. 60). Further, the Court has also invoked the CRC in recognizing the "importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future" (*Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 71).

[74] Third, the scope of the duty to protect can be adequately identified and manageably applied to deprivations of life, liberty and security of the person. In this context, I rely on the special

circumstances that apply to Mr. Khadr's case and the multiplicity of departures from international norms that have taken place. Certainly, the scope of the duty to protect can be clearly articulated and applied to the facts before me.

[75] I find, therefore, that the principles of fundamental justice obliged Canada to protect Mr. Khadr by taking appropriate steps to ensure that his treatment accorded with international human rights norms.

4. *What is the appropriate remedy if that duty is breached?*

[76] In some cases, a violation of s. 7 will, in itself, define the appropriate remedy. That is because a failure to abide by a principle of fundamental justice can be remedied simply by imposing a duty on the Government to respect the applicable principle. In these circumstances, it may not be necessary to resort to s. 24(1) of the *Charter* to find a remedy (see, *e.g.*, *Burns*, above).

[77] Similarly, in its decision ordering disclosure of materials to Mr. Khadr, the Supreme Court of Canada stated that the remedy of disclosure "mitigated the effect" of Canada's involvement in the violation of Mr. Khadr's rights. The question to be asked here, then, is what remedy is appropriate to mitigate the effect of the involvement of Canadian officials in the mistreatment of Mr. Khadr at Guantánamo Bay?

[78] The principal remedy sought by Mr. Khadr is an order requiring Canada to request his repatriation. In the circumstances, no other remedy would appear to be capable of mitigating the

effect of the *Charter* violations in issue or accord with the Government's duty to promote Mr. Khadr's physical, psychological and social rehabilitation and reintegration. The respondents have not proposed any alternative remedy. In other cases, there may be alternative appropriate remedies but, given the facts and submissions before me, I will confine myself to the remedy requested by Mr. Khadr.

[79] The respondents argue that the Court should refrain from requiring them to request Mr. Khadr's repatriation because that would involve ordering Canada to take positive steps to protect Mr. Khadr, and would involve the Court in the exercise of prerogative powers relating to Canada's foreign relations with the United States. It is only in exceptional circumstances where an order to take positive steps can be made under s. 7 (*Gosselin* v. *Quebec (Attorney General)*, [2002] 4 S.C.R. 429) and, naturally, as discussed above, courts should generally leave matters of foreign relations to Government.

[80] In *Gosselin*, Chief Justice McLachlin noted that s. 7 protects the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. It does not create a positive obligation on the state to ensure that each person enjoys life, liberty and security – at least, the case law has not yet recognized such a duty. Chief Justice McLachlin acknowledged that, someday, s. 7 might be read to include positive obligations. She said: "I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances" (at para. 83).

[81] *Gosselin* involved a challenge to a social assistance scheme in the province of Quebec, primarily on grounds of inequality under s. 15 of the *Charter*. The argument under s. 7 related to the question whether a reduced amount of social assistance provided by the province infringed the appellant's right to security of the person in a manner contrary to the principles of fundamental justice. The appellant suggested that the province had a duty to provide her sufficient social assistance to realize a certain level of security.

[82] As I see it, this case does not involve a similar request for positive action on the part of Canada. Mr. Khadr has very clearly been deprived of his liberty and Canadian agents are involved in that deprivation. The question is whether the refusal of Canada to request his repatriation offends the principles of fundamental justice. If it does, the appropriate recourse is to order Canada to seek his repatriation. That is not a "positive" obligation in the same sense that the term was used in *Gosselin*. In fact, it is not uncommon for courts to order that certain affirmative steps be taken by Government officials in circumstances where there has been a violation of the principles of fundamental justice. The Supreme Court's disclosure order in the earlier *Khadr* proceeding is one example. Others would include requiring the Government to provide legal counsel (*G*, above) or to seek assurances that the death penalty would not be imposed or carried out (*Burns*, above). In these cases, positive action on the part of the state was required to mitigate the effect of a deprivation of rights protected under s. 7. In *Gosselin*, by contrast, Chief Justice McLachlin was discussing the possibility that s. 7 might require, in special circumstances, positive measures on the part of the Government to prevent a deprivation of those rights.

[83] The respondents emphasize the fact that the mistreatment of Mr. Khadr was carried out by non-Canadians. Under s. 7, "the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our Government, if there is a sufficient causal connection between our Government's participation and the deprivation ultimately effected" (*Suresh*, above, at para. 54). Here, the necessary degree of participation is found in Canada's interrogation of Mr. Khadr knowing that he had been subjected to treatment that offended international human rights norms to which Canada had specifically committed itself.

[84] The respondents also raised a general concern about potential harm to Canada-U.S. relations, but have not pointed to any particular harm that would result from requesting Mr. Khadr's repatriation. Similarly, the Supreme Court of Canada found that a requirement that Canada seek assurances that the death penalty would not be carried out on persons extradited to the United States did "not undermine in any significant way the achievement of Canada's mutual assistance objectives" (*Burns*, above, at para. 37). Further, the Court made clear that the Government's concern about a detrimental effect on foreign relations must be supported by evidence:

> With respect to the argument on comity, there is no doubt that it is important for Canada to maintain good relations with other states. However, the Minister has not shown that the means chosen to further that objective in this case – the refusal to ask for assurances that the death penalty will not be exacted – is necessary to further that objective. There is no suggestion in the evidence that asking for assurances would undermine Canada's international obligations or good relations with neighbouring states. (*Burns*, above, at para. 136.)

[85] The Court also noted that European states regularly sought and received assurances regarding the death penalty from the United States.

[86] Similarly, here, the respondents have not identified any particular harm that might flow from requesting Mr. Khadr's repatriation. Many other countries have requested the return of their citizens or residents from Guantánamo Bay and the United States has granted those requests. Further, the respondents have not identified how its firm position regarding the treatment of persons who have carried out terrorist acts would be compromised by requesting Mr. Khadr's repatriation to Canada for prosecution here. This, in fact, was one of the recommendations in the *Report of the Standing Committee on Foreign Affairs and International Development* (above, at p. 6). Accordingly, as discussed above, while I accept that the Court should give particular weight to Governmental decisions affecting foreign relations, there is little evidence before me to be weighed.

[87] The respondents argue that, if Mr. Khadr returns to Canada, the question will arise whether he can be prosecuted under Canadian law. The respondents' concern is whether the threshold criteria for launching a prosecution – that is, whether there is a reasonable prospect of conviction and the prosecution is in the public interest – would be met in Mr. Khadr's case. To my mind, any concern in this area merely reinforces the case for repatriation. If there is doubt about whether those criteria can be met, there should also be doubt about whether Mr. Khadr's ongoing detention at Guantánamo Bay is consistent with principles of fundamental justice.

[88] The respondents also suggest that there is no reason to believe that the United States would grant a request for Mr. Khadr's repatriation, given that Canada's request for consular access to Mr. Khadr was denied. In my view, the denial of consular access made the need for repatriation more acute; it does not provide a justification not to request Mr. Khadr's return. Further, the evidence of successful requests for repatriation on the part of other countries suggests that a request presented by

Canada would likely be granted by the United States. Indeed, given Canada's previous expressions of concern about Mr. Khadr's welfare and its view that Guantánamo Bay was not an appropriate place for his detention, a request from Canada for Mr. Khadr's repatriation would probably not be unexpected by U.S. authorities.

[89] The Constitutional Court of South Africa in *Kaunda*, above, noted that there is a broad range of conduct that falls within the scope of "diplomatic protection". It would include "consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, [and] economic pressures" (at para. 27). I would regard the presentation of a request for the return of a Canadian citizen as being at the lower end of this spectrum of diplomatic intervention and, therefore, minimally intrusive on the Crown's prerogative in relation to foreign affairs.

V. Admission of Evidence

[90] Mr. Khadr asked me to admit two items into evidence. The first is his affidavit outlining his treatment at Bagram and Guantánamo Bay. I have admitted this document, although I did not find it necessary to rely on it to any significant degree. The second item was a recording of a documentary about Mr. Khadr. I found that this recording was not relevant to this proceeding, so I did not admit it.

VI. Conclusion and Disposition

[91] I find that the Government of Canada is required by s. 7 of the *Charter* to request Mr. Khadr's repatriation to Canada in order to comply with a principle of fundamental justice, namely, the duty to protect persons in Mr. Khadr's circumstances by taking steps to ensure that their fundamental rights, recognized in widely-accepted international instruments such as the C*onvention on the Rights of the Child*, are respected. The respondents did not offer any basis for concluding that the violation of Mr. Khadr's rights was justified under s. 1 of the *Charter*.

[92] The ongoing refusal of Canada to request Mr. Khadr's repatriation to Canada offends a principle of fundamental justice and violates Mr. Khadr's rights under s. 7 of the *Charter*. To mitigate the effect of that violation, Canada must present a request to the United States for Mr. Khadr's repatriation to Canada as soon as practicable.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be allowed, with costs.

2. The respondents request that the United States return Mr. Khadr to Canada as soon as practicable.

"James W. O'Reilly"
Judge

Annex “A”

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act (U.K.), 1982, c. 11

Charte canadienne des droits et libertés, Partie I de la Loi constitutionnelle de 1982, Édictée comme l'annexe B de la Loi de 1982 sur le Canada, 1982, ch. 11 (R.-U.)

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada

Liberté de circulation

6. (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
(a) to move to and take up residence in any province; and
(b) to pursue the gaining of a livelihood in any province.

Liberté d’établissement

(2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit :

de se déplacer dans tout le pays et d'établir leur résidence dans toute province;
de gagner leur vie dans toute province.

Limitation
(3) The rights specified in subsection (2) are subject to
(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Restriction
(3) Les droits mentionnés au paragraphe (2) sont subordonnés :

a) aux lois et usages d'application générale en vigueur dans une province donnée, s'ils n'établissent entre les personnes aucune distinction fondée principalement sur la province de résidence antérieure ou actuelle;
b) aux lois prévoyant de justes conditions de résidence en vue de l'obtention des services sociaux publics.

Affirmative action programs
(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Programmes de promotion sociale
(4) Les paragraphes (2) et (3) n'ont pas pour objet d'interdire les lois, programmes ou activités destinés à améliorer, dans une province, la situation d'individus défavorisés socialement ou économiquement, si le taux d'emploi dans la province est inférieur à la moyenne nationale.

Legal Rights

Vie, liberté et sécurité

Life, liberty and security of person
7. 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.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Treatment or punishment
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Cruauté
12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Programmes de promotion sociale

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

Enforcement of guaranteed rights and freedoms
24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Recours en cas d'atteinte aux droits et libertés
24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry

Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, adoptée et ouverte à la signature, à la ratification et à l'adhésion par l'Assemblée générale dans sa résolution 39/46 du 10 décembre 1984, entrée en

into force 26 June 1987, in accordance with article 27 (1)

Article 15
Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49

Article 19
States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 37
States Parties shall ensure that:
(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of

vigueur: le 26 juin 1987, conformément aux dispositions de l'article 27 (1)
Article 15
Tout État partie veille à ce que toute déclaration dont il est établi qu'elle a été obtenue par la torture ne puisse être invoquée comme un élément de preuve dans une procédure, si ce n'est contre la personne accusée de torture pour établir qu'une déclaration a été faite.

Convention relative aux droits de l'enfant, adoptée et ouverte à la signature, ratification et adhésion par l'Assemblée générale dans sa résolution 44/25 du 20 novembre 1989, entrée en vigueur le 2 septembre 1990, conformément à l'article 49
Article 19

Les États parties prennent toutes les mesures législatives, administratives, sociales et éducatives appropriées pour protéger l'enfant contre toute forme de violence, d'atteinte ou de brutalités physiques ou mentales, d'abandon ou de négligence, de mauvais traitements ou d'exploitation, y compris la violence sexuelle, pendant qu'il est sous la garde de ses parents ou de l'un d'eux, de son ou ses représentants légaux ou de toute autre personne à qui il est confié.
Article 37
Les États parties veillent à ce que :
a) Nul enfant ne soit soumis à la torture ni à des peines ou traitements cruels, inhumains ou dégradants. Ni la peine capitale ni l'emprisonnement à vie sans possibilité de libération ne doivent être prononcés pour les infractions commises par des personnes âgées de moins de dix-huit ans;
b) Nul enfant ne soit privé de liberté de façon illégale ou arbitraire. L'arrestation, la détention ou l'emprisonnement d'un enfant doit être en conformité avec la loi, n'être qu'une mesure de dernier ressort, et être d'une durée aussi brève que possible;
c) Tout enfant privé de liberté soit traité avec humanité et avec le respect dû à la dignité de la personne humaine, et d'une manière tenant

persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 39
States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40
1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
(a) No child shall be alleged as, be accused of, or

compte des besoins des personnes de son âge. En particulier, tout enfant privé de liberté sera séparé des adultes, à moins que l'on estime préférable de ne pas le faire dans l'intérêt supérieur de l'enfant, et il a le droit de rester en contact avec sa famille par la correspondance et par les visites, sauf circonstances exceptionnelles;
d) Les enfants privés de liberté aient le droit d'avoir rapidement accès à l'assistance juridique ou à toute autre assistance appropriée, ainsi que le droit de contester la légalité de leur privation de liberté devant un tribunal ou une autre autorité compétente, indépendante et impartiale, et à ce qu'une décision rapide soit prise en la matière.
Article 39
Les États parties prennent toutes les mesures appropriées pour faciliter la réadaptation physique et psychologique et la réinsertion sociale de tout enfant victime de toute forme de négligence, d'exploitation ou de sévices, de torture ou de toute autre forme de peines ou traitements cruels, inhumains ou dégradants, ou de conflit armé. Cette réadaptation et cette réinsertion se déroulent dans des conditions qui favorisent la santé, le respect de soi et la dignité de l'enfant.
Article 40
1. Les États parties reconnaissent à tout enfant suspecté, accusé ou convaincu d'infraction à la loi pénale le droit à un traitement qui soit de nature à favoriser son sens de la dignité et de la valeur personnelle, qui renforce son respect pour les droits de l'homme et les libertés fondamentales d'autrui, et qui tienne compte de son âge ainsi que de la nécessité de faciliter sa réintégration dans la société et de lui faire assumer un rôle constructif au sein de celle-ci.
2. À cette fin, et compte tenu des dispositions pertinentes des instruments internationaux, les États parties veillent en particulier :
a) À ce qu'aucun enfant ne soit suspecté, accusé ou convaincu d'infraction à la loi pénale en raison d'actions ou d'omissions qui n'étaient pas interdites par le droit national ou international au

recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
(i) To be presumed innocent until proven guilty according to law;
(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in

moment où elles ont été commises;
b) À ce que tout enfant suspecté ou accusé d'infraction à la loi pénale ait au moins le droit aux garanties suivantes :
i) Être présumé innocent jusqu'à ce que sa culpabilité ait été légalement établie;
ii) Être informé dans le plus court délai et directement des accusations portées contre lui, ou, le cas échéant, par l'intermédiaire de ses parents ou représentants légaux, et bénéficier d'une assistance juridique ou de toute autre assistance appropriée pour la préparation et la présentation de sa défense;
iii) Que sa cause soit entendue sans retard par une autorité ou une instance judiciaire compétentes, indépendantes et impartiales, selon une procédure équitable aux termes de la loi, en présence de son conseil juridique ou autre et, à moins que cela ne soit jugé contraire à l'intérêt supérieur de l'enfant en raison notamment de son âge ou de sa situation, en présence de ses parents ou représentants légaux;
iv) Ne pas être contraint de témoigner ou de s'avouer coupable; interroger ou faire interroger les témoins à charge, et obtenir la comparution et l'interrogatoire des témoins à décharge dans des conditions d'égalité;
v) S'il est reconnu avoir enfreint la loi pénale, faire appel de cette décision et de toute mesure arrêtée en conséquence devant une autorité ou une instance judiciaire supérieure compétentes, indépendantes et impartiales, conformément à la loi;
vi) Se faire assister gratuitement d'un interprète s'il ne comprend ou ne parle pas la langue utilisée;
vii) Que sa vie privée soit pleinement respectée à tous les stades de la procédure.
3. Les États parties s'efforcent de promouvoir l'adoption de lois, de procédures, la mise en place d'autorités et d'institutions spécialement conçues pour les enfants suspectés, accusés ou convaincus d'infraction à la loi pénale, et en particulier :
a) D'établir un âge minimum au-dessous duquel les enfants seront présumés n'avoir pas la

particular:
(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

capacité d'enfreindre la loi pénale;
b) De prendre des mesures, chaque fois que cela est possible et souhaitable, pour traiter ces enfants sans recourir à la procédure judiciaire, étant cependant entendu que les droits de l'homme et les garanties légales doivent être pleinement respectés.
4. Toute une gamme de dispositions, relatives notamment aux soins, à l'orientation et à la supervision, aux conseils, à la probation, au placement familial, aux programmes d'éducation générale et professionnelle et aux solutions autres qu'institutionnelles seront prévues en vue d'assurer aux enfants un traitement conforme à leur bien-être et proportionné à leur situation et à l'infraction.

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 12 February 2002

The States Parties to the present Protocol,

…
Recognizing the special needs of those children who are particularly vulnerable to recruitment or use in hostilities contrary to the present Protocol owing to their economic or social status or gender,
…
Convinced of the need to strengthen international cooperation in the implementation of the present Protocol, as well as the physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict,

Article 1
States Parties shall take all feasible measures to

Protocole facultatif à la Convention relative aux droits de l'enfant, concernant l'implication d'enfants dans les conflits armés. Les États Parties au présent Protocole

Les États Parties au présent Protocole

[…]
Conscients des besoins particuliers des enfants qui, en raison de leur situation économique et sociale ou de leur sexe, sont particulièrement vulnérables à l'enrôlement ou à l'utilisation dans des hostilités en violation du présent Protocole,

[…]
Convaincus de la nécessité de renforcer la coopération internationale pour assurer la réadaptation physique et psychologique et la réinsertion sociale des enfants qui sont victimes de conflits armés,

Article 1
Les États Parties prennent toutes les mesures possibles pour veiller à ce que les membres de leurs forces armées qui n'ont pas atteint l'âge de 18 ans ne participent pas directement aux hostilités.

ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

Article 4

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

3. The application of the present article shall not affect the legal status of any party to an armed conflict.

Article 4

1. Les groupes armés qui sont distincts des forces armées d'un État ne devraient en aucune circonstance enrôler ni utiliser dans les hostilités des personnes âgées de moins de 18 ans.

2. Les États Parties prennent toutes les mesures possibles pour empêcher l'enrôlement et l'utilisation de ces personnes, notamment les mesures d'ordre juridique nécessaires pour interdire et sanctionner pénalement ces pratiques.

3. L'application du présent article est sans effet sur le statut juridique de toute partie à un conflit armé.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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