Court File No. 32147

**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

**THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA, THE MINISTER OF FOREIGN AFFAIRS, THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE, and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE**

Appellants

- and -

**OMAR AHMED KHADR**

Respondent

---

# JOINT FACTUM OF THE INTERVENERS, THE UNIVERSITY OF TORONTO, FACULTY OF LAW – INTERNATIONAL HUMAN RIGHTS CLINIC AND HUMAN RIGHTS WATCH

---


**GOODMANS LLP**
Barristers & Solicitors
250 Yonge Street, Suite 2400
Toronto, ON M5B 2M6

Tom Friedland (tfriedland@goodmans.ca)
Gerald Chan (gechan@goodmans.ca)

Tel: (416) 979-2211
Fax: (416) 979-1234

**UNIVERSITY OF TORONTO, FACULTY OF LAW**

Audrey Macklin (audrey.macklin@utoronto.ca)

Tel: (416) 946-7493
Fax: (416) 978-2648

Solicitors for the Interveners, The University of Toronto, Faculty of Law – International Human Rights Clinic and Human Rights Watch

**NELLIGAN O'BRIEN PAYNE**
Barristers & Solicitors
Suite 1900, 66 Slater St.
Ottawa, ON K1P 5H1

Dougald E. Brown

Tel: (613) 238-8080
Fax: (613) 238-2098

Ottawa Agent for the Solicitors for the Interveners, The University of Toronto, Faculty of Law – International Human Rights Clinic and Human Rights Watch

**TO:**

**THE REGISTRAR OF THIS COURT**

**AND TO:**


**Counsel for the Appellants**

Department of Justice
(Robert J. Frater)
(Sharlene Telles-Langdon)
(Doreene Mueller)
Bank of Canada Building
234 Wellington Street, Room 1161
Ottawa, Ontario K1A 0H8
Telephone: (613) 957-4763
Fax: (613) 954-1920
E-mail: robert.frater@justice.gc.ca

**Ottawa Agent for Counsel for the Appellants**

Deputy Attorney General of Canada
(John H. Sims, Q.C.)
Ottawa Agent
Department of Justice
Bank of Canada Building
234 Wellington Street, Room 1161
Ottawa, Ontario K1A 0H8
Telephone: (613) 957-4763
Fax: (613) 954-1920

**Counsel for the Respondent**

Parlee McLaws LLP
(Nathan J. Whitling)
1500, 10180 – 101 Street
Edmonton, AB T5J 4K1
Telephone: (780) 423-8658
Fax: (780) 423-2870
Email: nwhitling@parlee.com

Edney, Hattersley & Dolphin
(Dennis Edney)
1970, 10123 – 99th St.
Edmonton, AB T5J 3H1
Telephone: (780) 423-4081
Fax: (780) 425-5247
Email: dedney@shaw.ca

**Ottawa Agent for Counsel for the Respondent**

Lang Michener LLP
(Eugene Meehan, Q.C.)
300 – 50 O'Connor Street
Ottawa, ON K1P 6L2
Telephone: (613) 232-7171
Fax: (613) 231-3191
Email: emeehan@langmichener.ca

**Counsel for the British Columbia Civil Liberties Association**

Arvay Finlay
(Joseph J. Arvay, Q.C.)
1350-355 Burrard Street
Vancouver, BC V6C 2G8
Telephone: (604) 689-4421
Fax: (604) 687-1941
Email: jarvay@arvayfinlay.com

**Ottawa Agent for Counsel for the British Columbia Civil Liberties Association**

Raven, Cameron, Ballantyne & Yazbeck LLP
(Paul Champ)
1600-220 Laurier Avenue West
Ottawa, ON K1P 5Z9
Telephone: (613) 567-2441
Fax: (613) 567-2921
Email: pchamp@ravenlaw.com

**Counsel for the Criminal Lawyers' Association**

John Norris
Ruby & Edwardh
11 Prince Arthur Avenue
Toronto, ON M5R 1B2
Telephone: (416) 964-9664
Fax: (416) 964-8305
Email: john@ruby-edwardh.com

**Ottawa Agent for Counsel for the Criminal Lawyers' Association**

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600 – 160 Elgin Street
PO Box 466 Stn "D"
Ottawa, ON K1P 1C3
Telephone: (613) 233-1781
Fax: (613) 563-9869
Email: henry.brown@gowlings.com

## TABLE OF CONTENTS

PART I – OVERVIEW AND FACTS ........ 1

PART II – POSITION ON APPELLANTS' ISSUE ........ 1

PART III – ARGUMENT ........ 1

A. Canada's international human rights obligations are critical to *Charter* analysis in a case with extra-territorial dimensions ........ 1

B. Canadian officials violated international human rights during their interrogation of Omar in Guantánamo Bay and thus violated the *Charter*... 3

i. Omar was within Canadian jurisdiction for the purposes of the *CRC* and *ICCPR* during his interrogation at Guantánamo Bay...... 3

ii. During the interrogation, Canadian officials violated Omar's international human rights ........ 4

(a) Interrogation failed to consider Omar's best interests as a child ........ 4

(b) Interrogation failed to respect Omar's legal rights ........ 5

iii. International human rights violations during interrogation constitute *Charter* violations ........ 8

C. Sharing the fruits of the interrogation with U.S. officials constituted participation in U.S. violation of international human rights and violated Omar's *Charter* rights ........ 8

i. Military Commissions process violates international human rights.... 8

ii. Unconditional sharing of information obtained by interrogation constitutes participation in the violation of international human rights by another state and breaches the *Charter* ........ 11

D. Omar is entitled to the remedy of disclosure under section 24(1) of the *Charter* ........ 14

PART IV – COSTS ........ 15

PART V – ORDER REQUESTED ........ 15

PART VI – TABLE OF AUTHORITIES ........ 16

PART VII – STATUTES ........ 20

## PART I – OVERVIEW AND FACTS

1. This appeal concerns documents in the possession of the Appellants that include or relate to information obtained from the Respondent, and shared with the United States, in a manner that violates international human rights and the Canadian *Charter of Rights and Freedoms*. The question is whether the Respondent, Omar Khadr ("Omar"), a Canadian citizen whose rights were and are still being violated, is entitled to disclosure of that information under the *Charter*. The University of Toronto, Faculty of Law – International Human Rights Clinic (the "IHRC") and Human Rights Watch ("HRW") respectfully submit that the answer is yes. Therefore, this appeal ought to be dismissed.

2. The IHRC and HRW adopt the facts set out in Part I of the Respondent's factum.

## PART II – POSITION ON APPELLANTS' ISSUE

3. The IHRC and HRW take the following position on the issue stated by the Appellants:

   1) Canadian officials violated Omar's international human rights and Canadian *Charter* rights. Thus, Omar is entitled to the documents sought by his counsel, Mr. Nathan Whitling, in his letter to the Appellants dated November 21, 2005 (the "Disclosure Request") as an effective and responsive remedy under section 24(1) of the *Charter*.

## PART III – ARGUMENT

### A. Canada's international human rights obligations are critical to *Charter* analysis in a case with extra-territorial dimensions

4. This Court has repeatedly held that international human rights norms play a crucial role in informing the content of the principles of fundamental justice under section 7 of the *Charter*[1] and that "the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."[2]

[1] *Suresh v. Minister of Employment and Immigration*, [2002] 1 S.C.R. 3 at 37-38, Book of Authorities ("B of A"), Tab 52; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-1057, B of A, Tab 48; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 349-350, B of A, Tab 45; and *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 503 and 512, B of A, Tab 43.

[2] *Reference Re Public Service Employee Relations Act (Alta.)*, *supra* note 1 at 349-350, B of A, Tab 45; quoted in R *v. Hape*, [2007] 2 S.C.R. 292 at para. 55, B of A, Tab 41.

Thus, actions by Canadian officials that directly violate Canada's international human rights obligations will virtually always infringe the comparable rights and freedoms under the *Charter.*

5. While comity and the need to respect the sovereignty of foreign states generally require that the *Charter* not be given extra-territorial application, this Court held in R. *v. Hape*[3], released after the Federal Court of Appeal's decision in this matter, that deference to the sovereignty of foreign states "ends where clear violations of international law and fundamental human rights begin."[4] More specifically, the Court stated the following:

> ...the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights. In such circumstances, the permissive rule might no longer apply and Canadian officers might be prohibited from participating. I would leave open the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s. 24(1) of the *Charter* because of the impact of those activities on *Charter* rights in Canada. [5]

6. The IHRC and HRW will first argue that Canadian officials violated Omar's international human rights, and consequently his *Charter* rights, by interrogating him in Guantánamo Bay. Second, the IHRC and HRW will argue that Canadian officials also participated in violations of Omar's international human rights by unconditionally sharing the fruits of their interrogation with U.S. authorities, in circumstances where Omar's prosecution before the Military Commissions was reasonably foreseeable. By doing so, Canadian officials violated Omar's liberty and security of the person in a manner that does not accord with the principles of fundamental justice under section 7 of the *Charter.* The IHRC and HRW will argue that disclosure is the appropriate remedy under section 24(1) of the *Charter.*

7. The legality of the conduct of Canadian officials under international human rights law will be assessed based on the *International Covenant on Civil and Political Rights* ("*ICCPR*")[6] and the *Convention on the Rights of the Child* ("*CRC*")[7], both of which Canada has ratified.

---

[3] *Hape, supra* note 2, B of A, Tab 41.
[4] *Ibid.* at para. 52, B of A, Tab 41.
[5] *Ibid.* at para. 101, B of A, Tab 41.
[6] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368, (entered into force 23 March 1976, ratified by Canada 19 August 1976) [*ICCPR*], B of A, Tab 28.

## B. Canadian officials violated international human rights during their interrogation of Omar in Guantánamo Bay and thus violated the *Charter*

### i. Omar was within Canadian jurisdiction for the purposes of the *CRC* and *ICCPR* during his interrogation at Guantánamo Bay

8. In February and September 2003,[8] Canadian officials from the Canadian Security Intelligence Service ("CSIS") and the Department of Foreign Affairs and International Trade ("DFAIT") interrogated Omar in Guantánamo Bay with the consent of U.S. authorities. These visits were not welfare or covert consular visits but were purely information gathering visits with a focus on intelligence and law enforcement. Canadian officials took a primary role in these interviews, acted independently, and were not under the direction of U.S. authorities.[9]

9. During these interrogations, Canadian officials were at all times subject to their obligations under the *CRC* and *ICCPR*. Article 2(1) of the *CRC* obliges States Parties to "respect and ensure" the rights of each child "within their jurisdiction"; similarly, Article 2(1) of the *ICCPR* obliges States Parties to respect and ensure the rights of those "within its territory and subject to its jurisdiction".

10. In defining the scope of jurisdiction under the *CRC,* the International Court of Justice ("ICJ") has adopted the jurisprudence of the United Nations Human Rights Committee ("HRC")[10] with respect to jurisdiction under the *ICCPR*.[11] Under HRC jurisprudence, jurisdiction is "not delimited by the place where the violation occurred".[12] Instead, a person is within or subject to the jurisdiction of the state even if he or she is outside the state's *de jure* territory where: (a) the person is a national of that state; and (b) the state through its agents takes positive actions which directly violate the person's treaty-guaranteed rights.[13]

---

7 *Convention on the Rights of the Child,* 20 November 1989, 1577 U.N.T.S. 3, Can. T.S. 1992 No. 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991) [*CRC*], B of A, Tab 12.
8 Exhibit 'C' to Cross-examination of William Johnston, A.B. Vol. II, p. 309, para. 1; Reasons of the Federal Court of Appeal, at para. 8.
9 Reasons of the Federal Court of Appeal, at para. 8.
10 The HRC is the expert body established under the *ICCPR* to monitor treaty compliance and determine individual complaints.
11 *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory,* Advisory Opinion, [2004] I.C.J. Rep. 136 at paras. 109-113, B of A, Tab 31.
12 *Lopez Burgos v Uruguay,* No. 52/1979, para. 12.2, B of A, Tab 32; *Celiberti de Casariego v. Uruguay,* No. 56/1979, para. 10.2 [*de Casariego*], B of A, Tab 6.
13 *de Casariego, ibid.,* B of A, Tab 6; *Varela Nunez v Uruguay,* No. 108/1981, B of A, Tab 58; *Samuel Lichtensztejn v Uruguay,* No. 77/1980, B of A, Tab 46; *Pereira Montero v Uruguay,* No. 106/1981, B of A, Tab 40. In all of these cases, the victim

11. Aligning jurisdiction under human rights treaties with the exercise of state authority by its agents reduces the risk of "legal blackholes"[14] in which states seek to evade fundamental international human rights obligations by doing abroad what they cannot do at home.

12. Canada's obligations under both the *CRC* and *ICCPR* were triggered when it took the positive step of interrogating Omar, a Canadian citizen and a child, in Guantánamo Bay.

### ii. During the interrogation, Canadian officials violated Omar's international human rights

13. At the time of the first round of interrogation in February 2003, Omar was 16 years of age. He was 17 at the time of the second round in September 2003. Article 1 of the *CRC* defines the age of majority as "the age of eighteen years unless under the law applicable to the child, majority is attained earlier". Canadian law does not provide for an earlier age of majority and, therefore, Omar is entitled to the protections of the *CRC*. Given Omar's age, the IHRC and HRW will focus their submissions on the *CRC*.

#### (a) Interrogation failed to consider Omar's best interests as a child

14. Article 3 of the *CRC* obliges all branches of the government and all government officials to make the best interests of the child a primary consideration in every action that may directly or indirectly affect children. The duty to ensure a child's best interests is a strong obligation, encompassing both passive and active (including pro-active) obligations.[15] At a minimum, the principle requires the avoidance of actions that would aggravate the child's risk of exposure to serious human rights violations.

15. In the context of juvenile justice, the obligation to make the child's best interests a primary consideration requires that the state treat children in ways that promote their rehabilitation and reintegration into society. The Committee on the Rights of the Child[16] has emphasized that the specific developmental, emotional and psychological differences between children and adults

suffered the violation at the hands of Uruguayan state agents, but was not in the territory of Uruguay nor necessarily in the custody or control of Uruguayan agents.

[14] Steyn, J., "Guantanamo Bay: The Legal Black Hole" (2004) 53 I.C.L.Q. 1, B of A, Tab 51.

[15] Alston, P., "The Legal Framework of the Convention on the Rights of the Child" (1992) 91 Bulletin of Human Rights 2 at 9, B of A, Tab 1.

[16] The Committee on the rights of the Child is a body of independent experts that monitors implementation of the United Nations Convention on the Rights of the Child by governments that ratify the Convention.

demand a separate juvenile justice system, including a different approach to detention and incarceration, a lesser standard of culpability, and different consequences and treatment upon a finding of culpability.[17] The importance of the best interests of the child principle has also been recognized in numerous domestic judgments and statutes.[18]

16. In their interrogation, Canadian officials failed to make the best interests of Omar a primary consideration. As early as November 2002, Canadian officials were aware that Omar was not being afforded any special treatment or status as a child,[19] and that he was at a continuing risk of arbitrary detention and exposure to other human rights violations, including an unfair trial.[20]

17. Nevertheless, Canadian officials interrogated Omar with the specific objective of gathering information for intelligence and law enforcement purposes. No welfare or other protective purposes were served or intended to be served by the visits.[21] During one of the interviews with Omar, one Canadian official allegedly said "I'm not here to help you. I'm not here to do anything for you. I'm just here to get information."[22] Conducting such interviews with a child in a context where the state knows of a real risk of serious and continuing violations of the child's rights, and where the state's agents themselves may violate the child's rights, cannot by any measure be consistent with the child's best interests. Such conduct not only failed to make Omar's best interests a primary consideration, but it actively undermined his best interests.[23]

### (b) Interrogation failed to respect Omar's legal rights

18. In addition to the general duty to make the best interests of the child a primary consideration, Article 40(1) of the *CRC* imposes specific obligations on States Parties in relation to

---

[17] *CRC, supra* note 7, Article 40(1), B of A, Tab 12; Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice,* 44th Sess., UN Doc. CRC/C/GC/10 (2007) at paras. 10, 13 [Committee on Rights of the Child], B of A, Tab 9.

[18] *Canadian Foundation for Children Youth & the Law v. Canada (Attorney General),* [2004] 1 S.C.R. 76 at 92-93, B of A, Tab 5; *Baker v. Canada (Minister of Citizenship & Immigration,* [1999] 2 S.C.R. 817 at 863-864, B of A, Tab 2; *Youth Criminal Justice Act,* S.C. 2002, c. 1, Preamble, B of A, Tab 60.

[19] Exhibit 'A' to Cross-Examination of William Johnston, A.B. Vol. II, p. 305 para. 4.

[20] **Cross-examination of William Hooper, CSIS Official, RFER Vol. I, p. 95; Exhibit 'T' to Affidavit of Muneer Ahmad, RFER Vol. I, p. 265.**

[21] *Khadr v. Canada* (2005), 257 D.L.R. (4th) 577, 2005 FC 1076 para. 23(c) [*Khadr v. Canada*], B of A, Tab 30; **Affidavit of Muneer Ahmad, RFER Vol. I, p. 14, para. 28.**

[22] **Affidavit of Muneer Ahmad, RFER Vol. I, p. 14, para. 31; Exhibit 'F' to Affidavit of Muneer Ahmad, RFER Vol. I, p. 158.**

[23] Exhibit 'A' to Cross-Examination of William Johnston, A.B. Vol. II, p. 305 para. 4; *Khadr v. Canada, supra* note 20 at para. 23(f), B of A, Tab 30.

children who are "alleged as, accused of or recognized as having infringed the penal law".[24] Canadian officials failed to respect those obligations.

19. First, Canadian officials failed to respect Omar's right to legal assistance under Article 40(2)(b)(ii) of the *CRC*.[25] There is no evidence that they informed Omar of his right to counsel or attempted to ensure representation for him before interrogating him.[26] Article 14(3)(d) of the *ICCPR* also protects the right to counsel of a person suspected of a crime.[27]

20. Second, Canadian officials failed to respect Omar's right under Article 40(2)(b)(iv) of the *CRC* not to be compelled to give testimony or confess guilt. Article 14(3)(g) of the *ICCPR* also protects this right.[28] In the context of children, the term "compelled" should be given a broad reading, taking into account the impact of age, development, length of interrogation, fear and lack of understanding on the vulnerability of children.[29]

21. At the time they interrogated Omar in 2003, Canadian officials were aware that he was alleged by the U.S. to have murdered an American soldier in Afghanistan and to be a member of Al-Qaeda.[30] The possibility of a trial before the Military Commissions was real and foreseeable, as the Military Commissions had been expressly established in 2002 to prosecute members of Al-Qaeda.[31] Despite this possibility, Canadian officials sought to have Omar make admissions against interest during his interrogation. Omar stated that he had no knowledge of Islamic extremism or Al Qaeda and CSIS officials "repeatedly challenged him on those denials".[32]

22. In deciding whether this interrogation amounted to compulsion within the meaning of Article 40(2)(b)(iv) of the *CRC*, it is instructive to look to this Court's jurisprudence on the common

---

[24] As the wording of Article 40(1) indicates, a child need not be formally charged to benefit from these provisions.
[25] See also *CRC, supra* note 7, art. 37(d), B of A, Tab 12.
[26] *CRC, supra* note 7 arts. 37(d), 40.2(b)(ii), B of A, Tab 12; Committee on Rights of the Child, *supra* note 17 at paras. 57-58, B of A, Tab 9; *Khadr v. Canada, supra* note 21 at para. 23(g), B of A, Tab 30.
[27] *ICCPR, supra* note 6, Art. 14(3)(d), B of A, Tab 28, and see interpretation of the identical provision of the ECHR in *Ocalan v Turkey*, Application No. 46221/99, 12 May 2005, B of A, Tab 37; *Deweer v Belgium*, Application No. 6903/75, 27 February 1980, para. 44, B of A, Tab 13; *Imbrioscia v Switzerland*, Application No. 13972/88, 24 November 1993, para. 36, B of A, Tab 26.
[28] *ICCPR, supra* note 6, Art. 14(3)(g), B of A, Tab 28; *Saunders v United Kingdom*, 43/1994/490/572, paras. 67-76, B of A, Tab 47; Trechsel, S., *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005) at 349, B of A, Tab 53.
[29] Committee on Rights of the Child, *supra* note 17 at para. 57, B of A, Tab 9.
[30] Email of November 1, 2002, from Furtado, A.B., p. 258.
[31] See President's Military Order, 13 November 2001, ss. 2(a), 4(a), Exhibit 'F' to the Affidavit of Richard Wilson, A.B. Vol. II, pp. 158-162; United States of America, Secretary of Defense, *Military Commission Order No. 1,* March 21, 2002, B of A, Tab 56 [MCO 2002].
[32] **Cross-examination of William Hooper, RFER Vol. I, pp. 105-107.**

law confessions rule. This Court has held that the voluntariness of a confession will be vitiated where it is extracted in an "atmosphere of oppression" and has provided useful guidance on the indicia that would establish an atmosphere of oppression. These include "depriving the suspect of food, clothing, water, sleep, or medical attention; denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time."[33]

23. The IHRC and HRW submit that the circumstances in Guantánamo Bay created an "atmosphere of oppression" for Omar, regardless of the specific interrogation methods used by Canadian officials. At the time of the interrogation, Omar was being detained by the U.S. without regard to the requirements of international human rights law and international humanitarian law[34]. For approximately the first two years of his detention, Omar was held without charge, without independent review of the legality of his detention, without access to counsel of any kind, without contact with his family, and without regard to his status as a minor.[35] In addition, there are serious allegations of incommunicado detention,[36] solitary confinement and physical and psychological mistreatment.[37] These circumstances establish an intensely coercive environment, the effect of which could only be exacerbated by Omar's youth. Thus, the IHRC and HRW submit that Omar's testimony was compelled in violation of the *CRC* and the *ICCPR*.

24. It is important to note that Article 2(1) of the *CRC* requires that Canada both "respect and ensure" the rights set forth in the *CRC*. Even if there were some dispute as to Canada's ability to take effective steps to *ensure* the protection of Omar's legal rights under the *CRC*, it is clear that Canada failed to *respect* such rights. The choice to assert authority over a national by interrogating him in disregard of past, ongoing and potential violations of international human rights by another

---

[33] R. *v. Oickle*, [2000] 2 S.C.R. 3 at 39, B of A, Tab 42.

[34] After his battlefield capture, he had not been accorded a determination by a "competent tribunal" under the customary international laws of armed conflict: see Common Article 3 of the Geneva Conventions (*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31, Can. T.S. 1965 No. 20; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85, Can. T.S. 1965 No. 20; *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, Can. T.S. 1965 No. 20 [*GCIII*]; *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287, Can. T.S. 1965 No. 20 [*GCIV*] (each of which entered into force 21 October 1950, ratified by Canada 14 May 1965)); Article 5 of *GCIII*; and Art. 78 of *GCIV*.

[35] Affidavit of Richard Wilson, A.B. Vol. II, p. 55 paras. 12-17.

[36] Khadr was only permitted to send postcards to his family such as those attached as Exhibit 'E' to the Affidavit of Richard Wilson, A.R. Vol. II, pp. 152-157.

[37] **Exhibit 'F' to Affidavit of Muneer Ahmad, RFER Vol. I, pp. 158-160.**

state itself constitutes a failure to respect such rights.[38] Canadian officials should not be allowed to piggyback on rights violations by another state.

### iii. International human rights violations during interrogation constitute *Charter* violations

25. The IHRC and HRW submit that because the conduct of Canadian officials in interrogating Omar in Guantánamo Bay directly violates international human rights, it also violates section 7 of the *Charter* and warrants a *Charter* remedy under section 24(1). While such violations occurred outside of Canada, this Court made it clear in *Hape* that, when Canadian officials engage in activities in another country that violate Canada's international human rights obligations, the Court may grant a remedy under section 24(1) of the *Charter* despite the extra-territoriality of the impugned conduct.

## C. Sharing the fruits of the interrogation with U.S. officials constituted participation in a violation of international human rights and violated Omar's *Charter* rights

26. The IHRC and HRW submit that by unconditionally sharing the information they obtained with U.S. authorities at a time when it was reasonably foreseeable that the information would be used against Omar in a prosecution before the Military Commissions, Canadian officials condoned and acquiesced in the Military Commissions process and thus participated in the violations of international human rights inherent in that process. By doing so, they violated Omar's *Charter* rights.

### i. Military Commissions process violates international human rights

27. On March 21, 2002, the U.S. Secretary of Defense issued Military Commission Order No. 1[39] (the "MCO") establishing the initial Military Commissions regime. This regime was struck down by the U.S. Supreme Court in *Hamdan v. Rumsfeld*[40], and then revived in a modified form by the U.S. Congress' enactment of the *Military Commissions Act of 2006*[41] (the "*MCA*"). Both versions of the Military Commissions regime fail to respect the standards mandated by international human rights.

---

[38] Committee on Rights of the Child, *supra* note 17 at para. 57, B of A, Tab 9; *Khadr v. Canada*, *supra* note 21 para. 23(h), B of A, Tab 30.
[39] MCO 2002, *supra* note 31; Affidavit of Richard Wilson, A.B. Vol. II, p. 54 para. 10.
[40] 126 S. Ct. 2749 (2006), B of A, Tab 21.
[41] U.S.C. tit. 10 § 948d [*MCA 2006*], B of A, Tab 33.

28. First, the Military Commissions under both the MCO and the *MCA* fail to provide any special protections to juvenile accused. All of the charges against Omar are grounded in conduct alleged to have been committed by him when he was only 15 years old or younger.[42] International law requires that procedure in cases involving juvenile accused take account of their age and the desirability of promoting their rehabilitation. Criminal trials against juveniles, or against those who had not attained the age of majority at the time of their alleged crime, must be conducted in a manner that pays due regard to their special vulnerability.[43] For example, and in contrast to the MCO and *MCA,* Article 7 of the Statute of the Special Court for Sierra Leone provides:

> The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.[44]

29. Second, both the MCO and *MCA* fail to protect an accused's right against compelled self-incrimination and fail to prohibit the use of incriminating evidence obtained through coercion, including through torture or cruel, inhuman or degrading treatment. This violates a fundamental fair trial guarantee in international human rights law.[45] The MCO permitted admission of any probative evidence and did not exclude the use of evidence obtained by torture or cruel, inhuman or degrading treatment.[46] The *MCA* continues to permit the admission of evidence obtained by cruel, inhuman or degrading treatment where such evidence was obtained before December 30, 2005 and is deemed "reliable" and "probative".[47] While the *MCA* excludes statements obtained by torture[48], the

---

[42] The allegations relate to events in July, 2002: Affidavit of Richard Wilson, A.B. Vol. II, p. 54 para. 9.

[43] Committee on Rights of the Child, *supra* note 17, B of A, Tab 9; *ICCPR*, *supra* note 6, Article 14(4), B of A, Tab 28; Human Rights Committee, *General Comment 32, Article 14* (CCPR/C/GC/32) 23 August 2007, para.42 [HRC General Comment 32], B of A, Tab 24; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed. (Kehl: NP Engel, 2005) at 347, B of A, Tab 36.

[44] *Statute of the Special Court for Sierra Leone*, annexed to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone*, 16 January 2002, 2178 U.N.T.S. 137, available at http://www.sc-sl.org/Documents/scsl-statute.html, B of A, Tab 50.

[45] *ICCPR*, *supra* note 6, Art 14(3)(g), B of A, Tab 28; HRC General Comment 32, *supra* note 43, para.41, B of A, Tab 24; *CRC*, Art 40(2)(b)(iv), B of A, Tab 12; International Committee of the Red Cross (Henckaerts and Doswald Beck, eds), *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), pp.367-8 [Henckaerts], B of A, Tab 44.

[46] MCO 2002, *supra* note 31, s. 6(D)(1), B of A, Tab56.

[47] *MCA* 2006, *supra* note 40, s. 3, § 948r(c), B of A, Tab 33.

[48] *Ibid.* s. 948r(b), B of A, Tab 33.

definition of "torture" found in Rule 304 of the Manual for Military Commissions established pursuant to the *MCA* is narrower than the accepted international definition of torture.[49] Moreover, statements obtained by forms of coercion other than torture and cruel, inhuman or degrading treatment remain admissible, regardless of when they were obtained. In this case, Omar has alleged very serious mistreatment at the hands of American interrogators, which, if proved, would be torture or cruel, inhuman or degrading treatment.[50]

30. Third, both the MCO and *MCA* fail to ensure that an accused is brought before an adjudicator without unreasonable delay. International human rights law requires that all persons charged with criminal offences be brought before a judge or authorized adjudicator promptly and tried without unreasonable delay.[51] The HRC has held that excessive pretrial detention affects "the right to be presumed innocent and therefore reveals a violation of" international law.[52] Children have a particular right to be detained for the "shortest appropriate period of time," in light of their special vulnerability.[53] Pretrial detention of months or years constitutes a grave violation of article 37(b) of *CRC*.[54]

31. This is exactly what happened to Omar. From the time of his capture to the date of submission of this factum, Omar will have been detained without trial for 2036 days (5 years, 6 months and 26 days, approximately one-quarter of his life). Under the *MCA*, he cannot challenge the legality of his detention before a court.[55]

---

[49] United States of America, Secretary of Defense, *The Manual for Military Commissions,* January 2007, Rule 304 defines torture in accordance with USC Title 2340. USC title 2340 restrictively defines the concept of "severe mental pain or suffering" contained in the international definition as limited to certain specific acts, such as "the threat of imminent death." This restrictive definition has been held by the Committee against Torture as inconsistent with Article 1 of the CAT: Conclusions and recommendations of the Committee against Torture, United States of America, U.N. Doc. A/55/44, (2000), para.179, B of A, Tab 10; Conclusions and recommendations of the Committee against Torture, United States of America, U.N. Doc. CAT/C/USA/C/2 (2006), para. 13, B of A, Tab 11.

[50] **Exhibit 'F' to Affidavit of Muneer Ahmad, RFER Vol. I, p. 158-160, paras. 10-18.**

[51] *ICCPR*, *supra* note 6, Arts. 9(3), 14(2), (3)(c), B of A, Tab 28; HRC General Comment 32, *supra* note 43 at paras. 27, 35, 61, B of A, Tab 24; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur. T.S. 1950 No. 5, Arts. 6(1) and (2), B of A, Tab 16; *Drescher Caldas v. Uruguay*, Communication No. 43/1979 at 12.1, 13.4 and 14, B of A, Tab 15; *Hill v. Spain*, Communication No. 526/1993 at 12.4, B of A, Tab 22; Human Rights Committee, *General Comment 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) at 15, B of A, Tab 23; Henckaerts, *supra* note 44 at 363-364, B of A, Tab 27.

[52] *Cagas et. al. v. The Philippines*, Communication No. 788/1997 at 7.3, B of A, Tab 4.

[53] *CRC*, *supra* note 6, Art. 37(b), B of A, Tab 12. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985), B of A, Tab 54; HRC General Comment 32, *supra* note 43 at para. 42, B of A, Tab 24.

[54] Committee on Rights of the Child, *supra* note 17 at para. 81, B of A, Tab 9.

[55] *MCA 2006*, *supra* note 40, s.7, B of A, Tab 23.

32. Fourth and finally, the MCO and *MCA* deny fair trial rights to an accused based on his or her nationality. Article 2 of the *ICCPR* and Article 2 of the *CRC* require States Parties to respect and ensure the treaty rights "without distinction" (*ICCPR*) and "without discrimination" (*CRC*) on enumerated grounds, including that of nationality. The HRC has held that rules of criminal procedure which inherently or in their application make distinctions on any of the grounds enumerated in Article 2 of the *ICCPR* violate the obligation to ensure equality before the courts contained in Article 14(1) of the *ICCPR*.[56]

33. Contrary to these requirements, the Military Commissions regime applies exclusively to "*alien* unlawful enemy combatants". U.S. citizens who would meet the definition of "unlawful enemy combatants" have been afforded the procedural and substantive protections of the U.S. criminal and constitutional law.[57] By denying non-citizens, such as Omar (a Canadian citizen), basic fair trial guarantees, the Military Commissions regime discriminates on the basis of nationality, in contravention of international human rights law.

34. In this regard, not only has every other member of NATO secured the release of its citizens (and even permanent residents) from Guantánamo Bay,[58] but the Parliamentary Assembly of the Council of Europe has adopted a resolution that specifically calls on Member States "not to permit their authorities to participate or assist in the interrogation of Guantánamo Bay detainees".[59] The conduct of Canadian officials stands in stark contrast to this resolution.

**ii. Unconditional sharing of information obtained by interrogation constitutes participation in the violation of international human rights by another state and breaches the *Charter***

---

[56] HRC General Comment 32, *supra* note 43 at para. 65, B of A, Tab 24.

[57] *United States of America v. John Walker Philip Lindh (a/k/a "Suleyman al-Faris," a/k/a "Abdul Hamid,")*, Criminal No. 02-37a, United States District Court for the Eastern District of Virginia, February 2002 Term, Grand Jury Indictment (charges include conspiracy to murder, providing material support and resources to foreign terrorist organizations), B of A, Tab 55; *Hamdi v. Rumsfeld*, (2004) 542 US 507.

[58] Forcese, C., ed., *Repatriation of Omar Khadr to be Tried under Canadian Law* (Ottawa: University of Ottawa Foreign Policy Practicum, January 2008) at 19-37 (available at http://aix1.uottawa.ca/~cforcese/other/khadrrepatriation.pdf), B of A, Tab 20.

[59] Parliamentary Assembly of the Council of Europe, Resolution 1433 (2005), "Lawfulness of detentions by the United States in Guantánamo Bay", adopted by the Assembly 26 April 2005 (10th Sitting), Article 10(iii), available at http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta05/ERES1433.htm#_ftn1, B of A, Tab 39.

35. Summaries of the information collected from the interrogation of Omar by CSIS and DFAIT officials in 2003 were passed on to the Royal Canadian Mounted Police ("RCMP") and to U.S. authorities.[60] There is no evidence that Canadian officials placed any conditions on the use to which the evidence could be put.[61]

36. Whether and to what extent the information shared by Canadian officials with U.S. authorities will actually be used against Omar in the Military Commissions process, including his forthcoming trial, is both irrelevant and impossible to know.[62] What matters is that: (1) at all material times, Canadian officials knew or ought to have known that the Military Commissions process violated international human rights, as the procedures to be used in the Military Commissions were publicly available; and (2) it was reasonably foreseeable that Omar would be subjected to the Military Commissions process, as it was the declared intention of the U.S. to try detainees held in Guantánamo Bay under those procedures, from early 2002.[63] Notwithstanding this knowledge, Canadian officials unconditionally shared the information they gathered from Omar's interrogation with U.S. authorities. In so doing, they communicated a clear message of acquiescence in, and condonation of, the Military Commissions process.

37. The IHRC and HRW submit that this participation in the violation of human rights by another state constitutes a sufficient nexus between the actions of Canadian officials and the violations of international human rights. The requisite nexus is established by the steps taken by Canadian officials that conveyed condonation, acquiescence and a willingness to contribute toward the Military Commissions process.[64]

38. This approach is consistent with the position of Mr. Justice O'Connor in his Report of Events Relating to Maher Arar. Mr. Justice O'Connor addressed the transmission of questions by Canadian to Syrian officials to be put to Messrs. Arar and Almalki in a context where Canadian officials knew or ought to have known of Syria's poor human rights record and the specific risk of

[60] Reasons of the Federal Court of Appeal, *supra* note 8 at para. 8.
[61] *Khadr v. Canada, supra* note 20 at para. 23(h), B of A, Tab 30.
[62] It is impossible to know whether and to what extent the information shared with U.S. officials will materially contribute to the evidence used against Khadr in the Military Commission proceeding. The MCA privileges sources of information under the rubric of national security confidentiality: *MCA 2006*, *supra* note 40, s. 3, §949d(f), B of A, Tab 33.
[63] Affidavit of Richard Wilson, A.B. Vol. II, p. 55 paras. 8-11.
[64] See also the submissions of the British Columbia Civil Liberties Association on "constitutional complicity".

torture. Even though Justice O'Connor concluded he could not be certain of the effect of transmitting the questions on the views of the Syrian officials, he observed that:

> ...there are significant risks attached [to such interactions], particularly when the country in question is detaining a Canadian. The officials of the detaining country may interpret communication with Canadian investigative officials as a sign of approval of their abusive tactics...[65]

39. This approach would also conform to trends in the international human rights jurisprudence regarding the requisite nexus between state conduct and the violation of international human rights. The European Court of Human Rights has ruled that state responsibility under a human rights treaty may be engaged by acts which have "sufficiently proximate repercussions on rights guaranteed by the treaty, even if those repercussions occur outside its jurisdiction."[66] This principle flows from States Parties' obligation to *ensure* rights, which imposes a duty to take reasonable steps within the state's power to protect its nationals from rights violations at the hands of another state.[67]

40. A state is not relieved of its obligations to its nationals simply because they are in the control of another state. Rather, it must "endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign states and international organizations, to continue to guarantee the enjoyment of rights and freedoms defined" in the treaty.[68] At the very least, a state must not abet or condone violations by the other state. Canadian officials' conduct in unconditionally sharing the fruits of their interrogation with U.S. officials breached Canada's obligation to take reasonable steps to guarantee Omar's rights.

41. The IHRC and HRW submit that, by condoning and acquiescing in the manifestly unfair Military Commissions process to which Omar was, and is, being subjected, Canadian officials participated in the violation of Omar's international human rights. In so doing, they deprived Omar

[65] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, (Ottawa: Government of Canada, 2006) at 198, B of A, Tab 7.
[66] *Ilascu and Others v Moldova and Russia*, Application No. 48787/99, 8 July 2004, para. 317, B of A, Tab 25; *Soering v. United Kingdom* 11 EHRR 439, B of A, Tab 49.
[67] See Nowak, *supra* note 43 at 38, B of A, Tab 36; See also *Ilascu, ibid.* at paras. 332-352 on the concept of positive obligations in respect of persons not within the state's control, B of A, Tab 25.
[68] *Ilascu, supra* note 66 at para. 333, B of A, Tab 25.

of his liberty and security of the person in a manner that does not accord with fundamental justice. Accordingly, Omar is entitled to a remedy under section 24(1) of the *Charter*.[69]

## D. Omar is entitled to the remedy of disclosure under section 24(1) of the *Charter*

42. Section 24(1) of the *Charter* grants the Court broad remedial jurisdiction: anyone whose rights or freedoms have been violated may be granted a remedy that the court considers "appropriate and just in the circumstances". This Court held in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*[70] that courts must craft "responsive" and "effective" remedies.[71] In other words, the Court should be guided by a sense of pragmatism.

43. This approach is consistent with the international human rights jurisprudence on remedies. Both the *ICCPR* and the *CRC* contain an obligation on all branches of the state – legislative, executive and judicial – to provide effective remedies to redress violations.[72] The HRC has held that an effective remedy under the *ICCPR* ought to be proportionate to the gravity of the violations suffered and the resulting damage, and shall include measures of restitution, compensation, rehabilitation and satisfaction, and guarantees of non-repetition.[73] The HRC has countenanced a very wide range of non-monetary measures, including directing government authorities to take certain positive judicial, legislative and executive actions.[74]

---

[69] *Hape, supra* note 2 at para. 101, B of A, Tab 41.
[70] [2003] 3 S.C.R. 3, B of A, Tab 14.
[71] *Ibid,* at 24, B of A, Tab 14
[72] See *ICCPR*, *supra* note 6, Art. 2(3), B of A, Tab 28; see Committee on the Rights of the Child, *General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6), U.N. Doc. CRC/GC/2003/5 (2003), para. 24, B of A, Tab 8.
[73] Nowak, *supra* note 43 at 70, B of A, Tab 36; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 60/147, UNGAOR, 16 December 2005 at 19-24, B of A, Tab 3; *Papamichalopoulos and others v Greece*, Application 14556/89, Judgment of 31 October 1995, at para. 34, B of A, Tab 38; *Factory at Chorzów (Germany-Poland),* Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, 21, B of A, Tab 17; *Factory at Chorzów (Germany Poland),* Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, 29, 47, B of A, Tab 18.
[74] *de Casariego*, *supra* note 12, B of A, Tab 6; *Reece v. Jamaica*, Communication No. 796/1998, U.N. Doc. CCPR/C/78/D/796/1998(2003) at para. 9, B of A, Tab 44; *Mr. Abduali Ismatovich Kurbanov v. Tajikistan*, Communication No. 1096/2002, U.N. Doc. CCPR/C/79/D/1096/2002 (2003), B of A, Tab 34; *Fei v. Columbia*, Communication No. 514/1992, U.N. Doc. CCPR/C/53/D/514/1992 (1995) at para. 10, B of A, Tab 19; *Mr. L.P. v. The Czech Republic*, Communication No. 946/2000, U.N. Doc. A/57/40 at 294 (2002), B of A, Tab 35; *Karakurt v. Austria*, Communication No. 965/2000, U.N. Doc. CCPR/C/74/D/965/2000 (2002) at para. 10, B of A, Tab 29; *Vazquez v. Spain*, Communication No. 701/1996, U.N. Doc. CCPR/C/69/D/701/1996 (2000) at para. 13, B of A, Tab 59.

44. Production of the information sought in the Disclosure Request ought to be granted under section 24(1) pursuant to these principles, in order to remedy the international human rights and *Charter* violations that Canadian officials have committed against Omar.

45. Canadian officials unlawfully interrogated Omar while he was detained at Guantánamo Bay and unconditionally shared the information so obtained with U.S. authorities in circumstances where it was reasonably foreseeable that the information would be used in the Military Commissions process. Having thus become a participant in such a process, Canada should be required to divulge all documents sought in the Disclosure Request to Omar in order to facilitate, to the greatest degree possible, full adversarial challenge.

46. While disclosure of the documents will not give full restitution to Omar for the international human rights and *Charter* violations that took place during Omar's interrogation in Guantánamo Bay and thereafter, it will go some distance toward remedying the manifest unfairness that Omar has been subjected to in this entire ordeal, from his interrogation by Canadian officials in Guantánamo Bay to his ongoing prosecution before the Military Commissions.

47. Accordingly, the IHRC and HRW submit that this Honourable Court should dismiss this appeal and uphold the Court of Appeal's order of disclosure.

## PART IV – COSTS

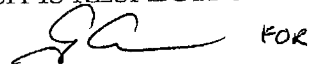
48. The IHRC and HRW do not seek costs in this proceeding.

## PART V – ORDER REQUESTED

49. The IHRC and HRW request that the order sought by the Respondent be granted in its entirety.

February 22, 2008

ALL OF WHICH IS RESPECTFULLY SUBMITTED.




Tom Friedland / Gerald Chan / Audrey Macklin

Counsel to the University of Toronto, Faculty of Law – International Human Rights Clinic and Human Rights Watch

## PART VI – TABLE OF AUTHORITIES

| Authority | Paras. |
|---|---|
| Alston, P., "The Legal Framework of the Convention on the Rights of the Child" (1992) 91 Bulletin of Human Rights 2 | 14 |
| *Baker v. Canada (Minister of Citizenship & Immigration*, [1999] 2 S.C.R. 817 | 15 |
| *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 60/147, UNGAOR, 16 December 2005 at 19-24 | 43 |
| *Cagas et. al. v. The Philippines*, Communication No. 788/1997 | 30 |
| *Canadian Foundation for Children Youth & the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 | 15 |
| *Celiberti de Casariego v. Uruguay*, No. 56/1979 | 10, 43 |
| Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, (Ottawa: Government of Canada, 2006) | 38 |
| Committee on the Rights of the Child, *General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6), U.N. Doc. CRC/GC/2003/5 (2003) | 43 |
| Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice,* 44th Sess., UN Doc. CRC/C/GC/10 (2007) | 15, 19, 20, 24, 28, 30 |
| *Conclusions and recommendations of the Committee against Torture, United States of America,* U.N. Doc. A/55/44, (2000) | 29 |
| *Conclusions and recommendations of the Committee against Torture, United States of America,* U.N. Doc. CAT/C/USA/C/2 (2006) | 29 |
| *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, Can. T.S. 1992 No. 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991) | 7, 9, 10, 12-14, 18-20, 22-24, 30, 32, 43 |
| *Deweer v Belgium*, Application No. 6903/75, 27 February 1980 | 19 |
| *Doucet-Boudreau v. Nova Scotia (Minister of Education),* [2003] 3 S.C.R. 3 | 42 |

| | |
|---|---|
| *Drescher Caldas v. Uruguay*, Communication No. 43/1979 | 30 |
| *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur. T.S. 1950 No. 5 | 30 |
| *Factory at Chorzów (Germany-Poland),* Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, 21 | 43 |
| *Factory at Chorzów (Germany Poland),* Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, 29, 47 | 43 |
| *Fei v. Columbia*, Communication No. 514/1992, U.N. Doc. CCPR/C/53/D/514/1992 (1995) | 43 |
| Forcese, C., ed., *Repatriation of Omar Khadr to be Tried under Canadian Law* (Ottawa: University of Ottawa Foreign Policy Practicum, January 2008) | 34 |
| *Hamdi v. Rumsfeld*, (2004) 542 US 507 | 33 |
| *Hill v. Spain*, Communication No. 526/1993 | 30 |
| Human Rights Committee, *General Comment 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) | 30 |
| Human Rights Committee, *General Comment 32, Article 14* (CCPR/C/GC/32) 23 August 2007 | 28-30, 32 |
| *Ilascu and Others v Moldova and Russia*, Application No. 48787/99, 8 July 2004 | 39-40 |
| *Imbrioscia v Switzerland*, Application No. 13972/88, 24 November 1993 | 19 |
| International Committee of the Red Cross (Henckaerts and Doswald Beck, eds), *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005) | 29 |
| *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368, (entered into force 23 March 1976, ratified by Canada 19 August 1976) | 7, 9, 10, 12, 19, 20, 23, 33, 43 |
| *Karakurt v. Austria*, Communication No. 965/2000, U.N. Doc. CCPR/C/74/D/965/2000 (2002) | 44 |
| *Khadr v. Canada* (2005), 257 D.L.R. (4th) 577, 2005 FC 1076 | 17, 19, 24, 35 |
| *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory,* Advisory Opinion, [2004] I.C.J. Rep. 136 | 10 |
| *Lopez Burgos v Uruguay*, No. 52/1979 | 10 |

| | |
|---|---|
| *Military Commissions Act of 2006*, U.S.C. tit. 10 § 948d | 27, 29, 31, 36 |
| *Mr. Abduali Ismatovich Kurbanov v. Tajikistan*, Communication No. 1096/2002, U.N. Doc. CCPR/C/79/D/1096/2002 (2003) | 43 |
| *Mr. L.P. v. The Czech Republic*, Communication No. 946/2000, U.N. Doc. A/57/40 at 294 (2002) | 43 |
| Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed. (Kehl: NP Engel, 2005) | 28, 29, 43 |
| *Ocalan v Turkey*, Application No. 46221/99, 12 May 2005 | 19 |
| *Papamichalopoulos and others v Greece*, Application 14556/89, Judgment of 31 October 1995 | 43 |
| Parliamentary Assembly of the Council of Europe, Resolution 1433 (2005), "Lawfulness of detentions by the United States in Guantánamo Bay", adopted by the Assembly 26 April 2005 (10th Sitting), Article 10(iii) | 34 |
| *Pereira Montero v Uruguay*, No. 106/1981 | 10 |
| *R v. Hape*, [2007] 2 S.C.R. 292 | 4, 5, 41 |
| *R. v. Oickle,* [2000] 2 S.C.R. 3 | 22 |
| *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 | 4 |
| *Reece v. Jamaica*, Communication No. 796/1998, U.N. Doc. CCPR/C/78/D/796/1998 (2003) | 43 |
| *Reference Re Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 313 | 4 |
| *Samuel Lichtensztejn v Uruguay*, No. 77/1980 | 10 |
| *Saunders v United Kingdom*, 43/1994/490/572 | 20 |
| *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 | 4 |
| *Soering v. United Kingdom* 11 EHRR 439 | 39 |
| *Statute of the Special Court for Sierra Leone*, annexed to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone*, 16 January 2002, 2178 U.N.T.S. 137 | 28 |
| Steyn, J., "Guantanamo Bay: The Legal Black Hole" (2004) 53 I.C.L.Q. 1 at 15 | 11 |
| *Suresh v. Minister of Employment and Immigration,* [2002] 1 S.C.R. 3 | 4 |

Trechsel, S., *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005) 20

*United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules"), G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985) 30

*United States of America v. John Walker Philip Lindh (a/k/a "Suleyman al-Faris," a/k/a "Abdul Hamid,"),* Criminal No. 02-37a, United States District Court for the Eastern District of Virginia, February 2002 Term, Grand Jury Indictment 33

United States of America, Secretary of Defence, *The Manual for Military Commissions*, January 2007 29

United States of America, Secretary of Defense, *Military Commissions Order No. 1*, March 21, 2002 21, 27, 29

*Varela Nunez v Uruguay*, No. 108/1981 10

*Vazquez v. Spain*, Communication No. 701/1996, U.N. Doc. CCPR/C/69/D/701/1996 (2000) 43

*Youth Criminal Justice Act*, S.C. 2002, c. 1, Preamble 15

## PART VII – STATUTES

None

THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA, THE MINISTER OF FOREIGN AFFAIRS, THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE, and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Appellants (Respondents)

and

OMAR AHMED KHADR

Respondent (Appellant)

Court File No: 32147

**IN THE SUPREME COURT OF CANADA**
(On Appeal from the Federal Court of Appeal)

# JOINT FACTUM OF THE UNIVERSITY OF TORONTO – INTERNATIONAL HUMAN RIGHTS CLINIC AND HUMAN RIGHTS WATCH


**GOODMANS LLP**
Barristers & Solicitors
250 Yonge Street, Suite 2400
Toronto, ON M5B 2M6

Tom Friedland
Gerald Chan
Tel: 416.979.2211
Fax: 416.979.1234

**UNIVERSITY OF TORONTO, FACULTY OF LAW**

Audrey Macklin
Tel: 416.946.7493

Solicitors for the Applicants The University of Toronto, Faculty of Law – International Human Rights Clinic and Human Rights Watch

GOODMANS\\5551171