TORTURE AND THE SUPREME COURT OF CANADA*

Gib van Ert**

INTRODUCTION

As far as international legal questions go, torture is an easy one. The prohibition of torture is one of the least controversial aspects of international human rights law and, indeed, of international law itself. For as long as human rights have been a feature of the international legal system, torture has been outlawed. Article 5 of the Universal Declaration of Human Rights 1948 declares, eloquently and categorically, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[1] Article 7 of the International Covenant on Civil and Political Rights 1966 ("ICCPR") repeats the prohibition and gives it further force by providing, in art 4(2), that no derogation from the prohibition is permissible even in time of public emergency.[2]

With the Convention against Torture 1984 ("CAT"), states reaffirmed and expanded upon the international legal prohibition on torture and created a treaty-monitoring body, the Committee against Torture, to enforce the new agreement. The treaty's first three articles are especially important. Article 1(1) defines torture 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, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity…

Article 2(1) requires states parties to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." This provision is remarkable for expressly recruiting state judiciaries into the fight against torture. Article 2(2) makes undeniable what was already clear

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[1] *Universal Declaration of Human Rights*, GA Res 217 A (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71 at 73.

[2] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, arts 9-14, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976).

in the previous international instruments: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Finally, art 3(1) follows the logic of the international prohibition of torture to its natural conclusion by affirming that "No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." The CAT has 154 states parties, including Canada, which ratified it in 1987.[3]

The international prohibition of torture is thus a central and indisputable aspect of international human rights law. As was famously observed by the United States Court of Appeals, Second Circuit in *Filártiga v Peña-Irala*, "the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[4] The prohibition is clearly conventional, but also customary. Indeed, it must surely be a norm of *jus cogens*. To test that assertion, one need only ask oneself, could two states lawfully conclude a treaty in which each agrees to permit the other to torture THEIR nationals? The answer is obvious: such a treaty would not be a treaty at all.

In deflating contrast to the startling clarity of international law on the illegality of torture, the recent jurisprudence of the Supreme Court of Canada on the topic is marked by misunderstanding, wilful blindness and even recalcitrance. In the last thirty years or so the Court (mostly in *obiter*) has gone from strongly opposing torture (including refoulement), to potentially permitting refoulement and upholding legislation that allowed it, to ignoring what must surely be the most notorious case of Canadian complicity in torture in our legal history. In this paper I do not attempt to explain the Supreme Court of Canada's regression from compliance to parochialism, from enlightenment to obscurity, for I do not understand it myself. My purpose is not to explain but to expose, in the hope that (as Justice Brandeis once said) sunlight will prove the best of disinfectants.

EARLY SUPREME COURT OF CANADA JURISPRUDENCE ON TORTURE

The first consideration of the international prohibition of torture by the Supreme Court of Canada came in an extradition case, *Canada v Schmidt*.[5] Ms Schmidt was a Canadian citizen resisting extradition to the United States on a charge of child

[3] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 39/46, UNGAOR, 1984, Supp No 93, UN Doc A/Res/39/36.

[4] *Filártiga v Peña-Irala*, 630 F 2d 876 (2d Cir 1980) at 890.

[5] *Canada v Schmidt*, [1987] 1 SCR 500 [*Schmidt*].

stealing contrary to Ohio law. She argued that she had been acquitted of the charge of kidnapping for the same offence under federal US law, and, therefore, to face extradition on the Ohio charge violated her ss 7 and 11(h) *Charter* rights, as well as the provisions of the Canada-US Extradition Treaty. Schmidt's defence was rejected by the courts below and by the Supreme Court of Canada. La Forest J, for the majority of the Court, made the following observations about the application of the *Charter* to extradition:

> I should at the outset say that the surrender of a fugitive to a foreign country is subject to *Charter* scrutiny notwithstanding that such surrender primarily involves the exercise of executive discretion. In *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, Dickson J (now C.J) made it clear that "the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the *Charter*" (p. 455) and that even "disputes of a political or foreign policy nature may be properly cognizable by the courts" (p. 459); see also Wilson J at p. 464.
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> I have no doubt either that in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances. To make the point, I need only refer to a case that arose before the European Commission on Human Rights, *Altun v. Germany* (1983), 5 E.H.R.R. 611, where it was established that prosecution in the requesting country might involve the infliction of torture. Situations falling far short of this may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7. I might say, however, that in most cases, at least, judicial intervention should await the exercise of executive discretion. For the decision to surrender is that of the executive authorities, not the courts, and it should not be lightly assumed that they will overlook their duty to obey constitutional norms by surrendering an individual to a foreign country under circumstances where doing so would be fundamentally unjust.[6]

The *Altun* case[7], approved by La Forest J, was a European Commission decision holding that the surrender of a fugitive to a country in which he is in danger of being subjected to torture is prohibited by art 3 of the European Convention on Human Rights 1950.[8] Article 3 is almost word-for-word the same as art 5 of the Universal Declaration of Human Rights 1948. It reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

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[6] *Ibid* at 521-22.

[7] *Altun v Germany* (1983), 5 EHRR 611.

[8] *European Convention on Human Rights*, 4 November 1950, Rome, 4.XI.1950.

What is important about *Schmidt* for the purposes of this paper is La Forest J's view that there may be cases in which surrendering a fugitive to a requesting state would be prohibited by s 7 of the *Charter* based on the foreign state's expected treatment of the fugitive. One such case is where the requesting state may inflict torture on the surrendered person. It is not the foreign state's conduct that is being scrutinized under the *Charter*, of course, but Canada's decision to extradite the fugitive to such conduct. La Forest J's observations on refoulement to torture in *Schmidt* are, of course, *obiter*. They are nevertheless the considered view of a renowned jurist, and attracted the support of the majority of the Court.

The Supreme Court of Canada's next consideration of torture and international law came in *Kindler v Canada (Minister of Justice)*.[9] Kindler had been found guilty of first degree murder, conspiracy to commit murder, and kidnapping in Pennsylvania, where the jury recommended the death penalty. Before his sentencing, Kindler escaped from prison and fled to Canada. He was arrested and the US sought his extradition. The extradition judge allowed the application and committed Kindler to custody. The Minister of Justice then ordered his extradition without seeking assurances from the US, under art 6 of the Canada-US Extradition Treaty, that the death penalty would not be imposed or carried out. Kindler challenged the Minister's refusal to seek such assurances under ss 7 and 12 of the *Charter*. The lower courts dismissed Kindler's application. The majority of the Supreme Court of Canada did likewise in reasons by McLachlin J (L'Heureux-Dubé and Gonthier JJ concurring) and La Forest J (L'Heureux-Dubé and Gonthier JJ again concurring).

McLachlin J (as she then was) held that there was no *Charter* violation in Parliament's conferral upon the Minister of a discretion as to whether or not to seek death penalty assurances from the US (as permitted under the Extradition Treaty) and that there was no error in the Minister's decision not to do so in Kindler's case. In the course of her reasons, she made the following *Schmidt*-like observation about extradition to torture:

> When an accused person is to be tried in Canada there will be no conflict between our desire to see an accused face justice, and our desire that the justice he or she faces conforms to the most exacting standards which have emerged from our judicial system. However, when a fugitive must face trial in a foreign jurisdiction if he or she is to face trial at all, the two desires may come into conflict. In some cases the social consensus may clearly favour one of these values above the other, and the resolution of the conflict will be straightforward. This would be the case if, for instance, the fugitive faced torture on return to his or her home country.[10]

[9] *Kindler v Canada (Minister of Justice)*, 1991 SCC 70, [1991] 2 SCR 779 [*Kindler*]. There was a companion appeal for *Kindler–Reference Re Ng Extradition (Can)*, [1991] 2 SCR 858.

[10] *Kindler*, *ibid* at 851.

McLachlin J went on to observe that there was no such social consensus in Canada that capital punishment is morally abhorrent and absolutely unacceptable[11]—the implication being that refoulement to torture is contrary to the *Charter* but refoulement to the death penalty is not.

La Forest J expressed his substantial agreement with McLachlin J while adding observations of his own, including the following observations contrasting torture to the death penalty:

> There are, of course, situations where the punishment imposed following surrender—torture, for example—would be so outrageous to the values of the Canadian community that the surrender would be unacceptable. But I do not think the surrender of fugitives who may ultimately face the death penalty abroad would in all cases shock the conscience of Canadians. My colleague, Cory J, refers to the free votes taken in the House of Commons in 1976 and 1987 rejecting the reinstatement of the death penalty as evidencing a "basic abhorrence" for the death penalty and providing "a clear indication that capital punishment is considered to be contrary to basic Canadian values" (p. 812). However, the fact that only four years ago, reinstatement of the death penalty was voted down by the relatively narrow margin of 148 to 127 attests to the contrary. As Marceau JA. states in his judgment in the Federal Court of Appeal, [1989] 2 F.C. 492, that a vote was even taken on the issue suggests that capital punishment is not viewed as an outrage to the public conscience. One could not imagine a similar vote on the question of whether to reinstate torture….
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> There are also a number of major international agreements mentioned by Cory J supporting the trend for abolition [of the death penalty] but, except for the *Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, Europ. T.S. No 114, all fall short of actually prohibiting use of the death penalty. This contrasts with the overwhelming universal condemnation that has been directed at practices such as genocide, slavery and torture; cf., for example, Articles 6 and 7 of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 172.[12]

In these passages La Forest J identifies torture as a universally condemned practice and an obvious example of foreign state conduct that would justify *Charter* intervention in the extradition process. In saying so, La Forest J is effectively reaffirming his observations in *Schmidt* and concurring with McLachlin J in the case before the Court. Both judges appear to agree that torture is such an outrageous crime that any proposed extradition of a fugitive to face it would be unconstitutional. While neither *Schmidt* nor *Kindler* refers to the prohibition of refoulement to torture in art 3(1) of the CAT, both decisions are consistent with that obligation.

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[11] *Ibid*.

[12] *Ibid* at 832-33.

SURESH

Suresh v Canada (Minister of Citizenship and Immigration)[13] was the first case before the Supreme Court of Canada in which the international prohibition of torture was directly in issue. The main question was whether s 53(1)(b) of the *Immigration Act*[14], effectively a statutory exception to the international prohibition of refoulement to torture, was constitutional. Section 53(1)(b) permitted the federal government to remove a person from Canada to a country where his or her life or freedom would be threatened if that person was a member of an inadmissible class (including persons who there are reasonable grounds to believe are members of an organization that there are reasonable grounds to believe will engage in terrorism) and the Minister was of the opinion that the person constituted a danger to the security of Canada.[15] The federal government alleged that the appellant, Suresh, was a member of and fundraiser for a Sri Lankan terrorist organization, the Liberation Tigers of Tamil Eelam, and sought to deport him to Sri Lanka. Suresh alleged he would be tortured if sent back to Sri Lanka, and argued that deportation in such circumstances would

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[13] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*].

[14] *Immigration Act*, RSC 1985, c I-2 (repealed).

[15] The relevant provisions (now repealed) were as follows:

> 19. (1) No person shall be granted admission who is a member of any of the following classes:
> …
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> (e) persons who there are reasonable grounds to believe...
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> (iv) are members of an organization that there are reasonable grounds to believe will...
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> (C) engage in terrorism;
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> (f) persons who there are reasonable grounds to believe...
>
> (ii) have engaged in terrorism, or
>
> (iii) are or were members of an organization that there are reasonable grounds to believe is or was engaged in…
>
> (B) terrorism,
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> except persons who have satisfied the Minister that their admission would not be detrimental to the national interest;
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> 53. (1) Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(a), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless…
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> (b) the person is a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada;

violate his s 7 *Charter* right. The federal government acknowledged that refugees enjoyed s 7's protections, and that torture is obviously a violation of the right to personal security (and possibly also to liberty and life), so the only issue was whether deportation to torture was in accordance with the principles of fundamental justice.[16]

In reasons attributed only to "The Court", the Supreme Court of Canada reversed the course it appeared to have set in *Schmidt* and *Kindler*. More importantly, the Court upheld legislative provisions that permitted refoulement to torture and, in doing so, rendered a judgment which departed from Canada's obligations under the Convention against Torture and other international human rights instruments. The Court's missteps began with the following observation:

> Determining whether deportation to torture violates the principles of fundamental justice requires us to balance Canada's interest in combatting [sic] terrorism and the Convention refugee's interest in not being deported to torture. Canada has a legitimate and compelling interest in combatting [sic] terrorism. But it is also committed to fundamental justice. The notion of proportionality is fundamental to our constitutional system. Thus we must ask whether the government's proposed response is reasonable in relation to the threat.[17]

This "balancing" approach is a familiar part of the Court's s 7 jurisprudence. Whatever its merits in a purely Canadian constitutional setting, it is impossible to reconcile with the absolute prohibition of torture, including refoulement to torture, in international law.

The Court in *Suresh* structures its consideration of torture around two "perspectives", one Canadian and one international. While this is more a rhetorical device than a legal insight, it is nevertheless regrettable that the Court should depict the Canadian and international positions as distinct. Canada, like 153 other states in the world, is a party to the CAT, as well as being a party to the ICCPR and an active participant in the United Nations human rights system more generally. The purpose of multilateral treaty-making, whether in human rights or any other field, is to harmonize domestic legal systems around agreed-upon standards, thus eliminating local norms in favour of universal ones. After over 50 years of international law-making on the subject, to which Canada has fully subscribed, there ought not to be a distinctly Canadian perspective on torture anymore, if (as seems doubtful) there ever was one in the first place.

Under the rubric of "The Canadian Perspective", the Court refers briefly to its previous observations on torture in *Schmidt* and *Kindler*, only to conclude—astonishingly—that "Canadian jurisprudence does not suggest that Canada may

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[16] *Suresh*, *supra* note 13 at para 44.

[17] *Ibid* at para 47.

never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil."[18] Surely that is precisely what *Schmidt* and *Kindler* suggested. The Court goes on to repeat that "the appropriate approach is essentially one of balancing" and that the outcome of the balancing exercise "will depend not only on considerations inherent in the general context but also on considerations related to the circumstances and condition of the particular person whom the government seeks to expel."[19] It is difficult not to read this passage as a statement that refoulement to torture is permissible, under the Canadian perspective, where the person facing torture has earned it. The Court concludes its observations on the Canadian perspective with another invocation of balancing:

> On the one hand stands the state's genuine interest in combatting [sic] terrorism, preventing Canada from becoming a safe haven for terrorists, and protecting public security. On the other hand stands Canada's constitutional commitment to liberty and fair process. This said, Canadian jurisprudence suggests that this balance will *usually* come down against expelling a person to face torture elsewhere.[20]

Turning to "The International Perspective", the Court begins by considering a submission by the intervener Amnesty International that the prohibition of torture is a rule of *jus cogens*, i.e., a peremptory norm of international law. The relevance of this submission is far from clear. Whether the prohibition of torture is a peremptory norm or not (and, as noted, I do not doubt that it is), it is indisputably a legal obligation of Canada under the Convention against Torture 1984 and the International Covenant on Civil and Political Rights 1966. Thus Canada (together with every other state party to those conventions) has an international obligation to observe the prohibition and give effect to it in domestic law. There was simply no need for the Court to consider the separate, theoretical question of whether the international prohibition of torture had passed beyond the status of conventional norm and into the lofty realm of fundamental principles of international law accepted by the international community of states as norms from which no derogation is permitted. Regrettably, Amnesty's *jus cogens* submission appears to have distracted the Court, and possibly confused it, about the legal significance of the prohibition of torture in treaties to which Canada is a party. Having asked itself unnecessarily whether the prohibition of torture is a matter of *jus cogens*, the Court gave this beguiling answer:

> Although this Court is not being asked to pronounce on the status of the prohibition on torture in international law, the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by

[18] *Ibid* at para 58.

[19] *Ibid*.

[20] *Ibid* at para 58 [emphasis added].

> many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from.[21]

This passage betrays a misunderstanding of the concept of derogation as it relates to peremptory norms of international law. As conceived of in the Vienna Convention on the Law of Treaties 1969,[22] a peremptory norm of general international law is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Article 53 of the Vienna Convention provides that a treaty is void if, at the time of its conclusion, it conflicts with such a peremptory norm. The derogation referred to here is clearly an attempt by two or more states to vary or depart from a pre-existing international legal norm by treaty. Understood in this way, there can be no such thing as "an emerging, if not established peremptory norm…that…cannot be easily derogated from", in the words of the Court in *Suresh*. The Court appears to be confusing derogation with breach; for Canada to unilaterally enact a law permitting it to deport suspected terrorists to face torture abroad is not a derogation from the international prohibition of torture, but a breach of its legal obligation to other states. The sense one gets from reading *Suresh* is that Amnesty International's *jus cogens* submission had the unintended consequence of emboldening the Court to depart from Canada's clear treaty obligation not to extradite, expel, deport, or otherwise return persons to states where there are substantial grounds for believing that they would be in danger of being subjected to torture. If the prohibition of torture is not yet clearly *jus cogens* (the Court may have reasoned), we are free to leave the government some wiggle room.

Despite this bad start to the Court's consideration of the international perspective on torture, it goes on to set out fully and fairly Canada's international obligations relating to torture. Notably, the Court rejects the Federal Court of Appeal's attempt to narrow the prohibition of refoulement in art 3(1) of the CAT, concluding that "the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s 7 of the Charter."[23] Then comes a bewildering *volte-face*: having held that both the Canadian and international perspectives reject deportation to torture, the Supreme Court of Canada makes room for it in our law by the addition of unexplained and inexplicable qualifications of the international prohibition. I have underscored the qualifications below:

> The Canadian rejection of torture is reflected in the international conventions to which Canada is a party. The Canadian and international perspectives in turn inform our constitutional norms. The rejection of state

[21] *Ibid* at para 65.

[22] *Vienna Convention on the Law of Treaties*, 23 May 1969, Can TS 1980 No 37.

[23] *Suresh*, *supra* note 13 at paras 66-74, 75.

> action leading to torture generally, and deportation to torture specifically, is virtually categoric. Indeed, both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests. This suggests that, barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*. ...
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> In Canada, the balance struck by the Minister must conform to the principles of fundamental justice under s. 7 of the *Charter*. It follows that insofar as the *Immigration Act* leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture.
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> We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1….Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the *Charter* generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.
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> In these circumstances, s. 53(1)(b) does not violate s. 7 of the *Charter*. What is at issue is not the legislation, but the Minister's obligation to exercise the discretion s. 53 confers in a constitutional manner.[24]

None of these qualifications on the international prohibition of torture is reconcilable with international law. Canada and the other states parties to the CAT expressly rejected such qualifications in art 2(2), declaring and promising that "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

International reaction to *Suresh* was predictably negative. In a 2005 decision of the Supreme Court of New Zealand, *Attorney-General v Zaoui & Ors*, the Supreme Court of Canada's "extraordinary circumstances" formulation of the prohibition of torture in *Suresh* was referred to just long enough for both the government and the court to reject it. Keith J for the Court noted that the Crown had not pleaded such a qualification on the prohibition and that counsel for the Solicitor-General "in argument accepted that, contrary to what was said in *Suresh*, the obligations in respect of torture and arbitrary deprivation of life were absolute."

[24] *Ibid* paras 76-79.

Keith J added, "That position appears plainly to be the correct one….We need not consider that matter further."[25]

The UN treaty body critiques of *Suresh* were more explicit. Unusually, the Committee against Torture referred to the decision by name, expressing its concern at "The failure of the Supreme Court of Canada, in *Suresh v Minister of Citizenship and Immigration*, to recognize at the level of domestic law the absolute nature of the protection of article 3 of the Convention, which is not subject to any exception whatsoever" and "The explicit exclusion of certain categories of persons posing security or criminal risks from the protection against refoulement provided by the Immigration and Refugee Protection Act 2002 [s 115(2)]."[26] The Human Rights Committee did not refer to *Suresh* by name but took dead aim at the decision's balancing approach. After expressing its concern with "the State party's policy that, in exceptional circumstances, persons can be deported to a country where they would face the risk of torture or cruel, inhuman or degrading treatment, which amounts to a grave breach of article 7 of the Covenant", the Committee recommended that Canada:

> …recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from. Such treatments can never be justified on the basis of a balance to be found between society's interest and the individual's rights under article 7 of the Covenant. No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment. The State party should clearly enact this principle into its law.[27]

All the Committee is saying here, of course, is what the ICCPR and CAT already say. It is as though the Committee, having witnessed Canada's failure of the torture test in *Suresh*, felt obliged to give it a remedial course in human rights law.

So far it seems the Supreme Court of Canada has been unfazed by international criticism of *Suresh*. In a 2007 decision, *Charkaoui v Canada (Citizenship and Immigration)*, McLachlin CJ, for the Court, quoted *Suresh* for the proposition that "barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s 7 of the *Charter*", without hesitation about the legality of that proposition in international

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[25] *Attorney-General v Zaoui & Ors*, [2005] NZSC 38 at para 16.

[26] *UN Committee against Torture, Report on the Thirty-Fourth Session*, 2005, Supp No 44, UN Doc CAT/C/CR/34/CAN at para 4; Section 115(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 is effectively a re-enactment of s 53(1)(b) of the former *Immigration Act*, RSC 1985, c I-2.

[27] *International Convention on the Elimination of All Forms of Racial Discrimination*, UNOHCHR, 85th Sess, UN Doc CCPR/C/CAN/CO/5 (2006) at para 15.

law.[28] In a 2010 decision, *Németh v Canada (Justice)*,[29] Cromwell J gave a very strong judgment for the Court explaining Canada's non-refoulement obligations in the extradition context, but did not engage in any reconsideration of *Suresh* on the constitutionality of the present-day enactment of s 53(1)(b) of the old *Immigration Act*, namely s 115(2) of the *Immigration and Refugee Protection Act*.[30]

KHADR (NO 2)

The clearest indicator of the Court's continuing ambivalence toward the international prohibition of torture came in 2010 in a case that did not concern refoulement. Omar Khadr was fifteen years old when taken prisoner by American forces in Afghanistan in mid-2002. He was charged with killing an American soldier and conspiring with Al Qaeda to commit acts of murder and terrorism. The US held Khadr on these charges, and without trial, at its prison in Guantanamo Bay, Cuba for eight years. In October 2010 he was sentenced to forty years in prison after pleading guilty in a plea bargain that capped his remaining jail time at eight years. Khadr was finally returned to Canada in September 2012, the last national of a western country to be released from Guantanamo for the reason that Canada never sought his repatriation.

Khadr's first trip to the Supreme Court of Canada, *Canada (Justice) v Khadr*,[31] produced a strange decision in which settled, and seemingly correct, propositions about the extra-territorial application of the *Charter*,[32] and the constitutional requirement that treaties be implemented in domestic law, were disturbed in unnecessary ways.[33] The second Khadr appeal, *Canada (Prime Minister) v Khadr*,[34] arose from Khadr's legal challenge to the Canadian government's refusal to seek his repatriation (prior to his guilty plea and conviction). The Prime Minister, Mr. Harper, had declared his intention not to seek Khadr's repatriation during a July 2008 interview. Khadr sought judicial review in the Federal Court before O'Reilly

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[28] *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 15.

[29] *Németh v Canada (Justice)*, 2010 SCC 56.

[30] *Immigration and Refugee Protection Act*, SC 2001, c 27.

[31] *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125 [*Khadr (No 1)*].

[32] The disturbance of Canadian law on the extraterritorial application of the *Charter* in fact began with *R v Hape*, 2007 SCC 26, but Khadr's appeal was on the Supreme Court's docket when *Hape* was decided, and the "exception" that *Khadr (No 1)* purported to add to *Hape* was planted by the majority in *Hape*, seemingly in contemplation of the upcoming Khadr appeal: see *Hape* at paras 101, 113, and 186-91.

[33] Regarding *Khadr (No 1)* see: John H Currie, "International Human Rights Law in the Supreme Court's Charter Jurisprudence: Commitment, Retrenchment and Retreat in No Particular Order" (2010) 50 Sup Ct L Rev (2d) 423 at 446-50.

[34] *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 [*Khadr (No 2)*].

J,[35] alleging that the prime minister's decision infringed his rights under s 7 of the *Charter*.

O'Reilly J agreed and ordered the Government of Canada to request Khadr's repatriation from the US authorities. O'Reilly J relied on the government's admission that US authorities had subjected Khadr to a sleep deprivation regime known as the "frequent flyer program." O'Reilly J explained the "frequent flyer program" in his reasons as a scheme to deprive Khadr of rest and sleep by moving him to a new location every three hours over a period of weeks. The learned judge quoted the following March 2004 report from the Department of Foreign Affairs and International Trade:

> In an effort to make him more amenable and willing to talk, [blank] has placed [Khadr] on the "frequent flyer program." [F]or the three weeks before [the] visit, [Khadr] has not been permitted more than three hours in any one location. At three hours interval he is moved to another cell block, thus denying him uninterrupted sleep and a continued change in neighbours. He will soon be placed in isolation for up to three weeks and then he will be interviewed again.[36]

Canada admitted that its authorities knew Khadr was enduring this abuse when, in the spring of 2004, they interrogated Khadr (then 17) at Guantanamo.

O'Reilly J noted that the Supreme Court of Israel found that sleep deprivation for the purpose of "breaking" a suspect is unlawful,[37] and that, in another case brought by Khadr,[38] Mosley J held that the subjection of Khadr to sleep deprivation techniques offended the CAT. He added:

> In addition to its [CAT] 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" (article 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.[39]

O'Reilly J also reviewed, at length, Canada's obligations under the Convention on the Rights of the Child 1989,[40] including those under that treaty's Optional Protocol

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[35] *Khadr v Canada (Prime Minister)*, 2009 FC 405, [2010] 1 FCR 34 [*Khadr 1st instance*].

[36] *Ibid* at para 15.

[37] *Ibid* at para 56.

[38] *Khadr v Canada (Attorney General)*, 2008 FC 807.

[39] *Khadr 1st instance*, *supra* note 35 at para 57.

[40] *Convention on the Rights of the Child*, 20 November 1989, Can TS 1992 No 3, 1577 UNTS 3 (entered into force 2 September 1990)

on the Involvement of Children in Armed Conflict.[41] From these instruments he concluded as follows:

> 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.
>
> ...
>
> 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.[42]

Having determined that Canada's conduct with regard to Khadr was in repeated breach of its international obligations in respect of torture and other human rights, O'Reilly J concluded that, in the circumstances, no remedy other than an order requiring Canada to request Khadr's repatriation was capable of mitigating the effect of the *Charter* violations he had suffered. The Federal Court of Appeal upheld O'Reilly J's decision (Evans and Sharlow JJA.; Nadon JA. dissenting).[43]

This, then, was the case that came before the Supreme Court of Canada. Canada's international legal obligations concerning torture were squarely before the Court. The unusually aggressive remedy directed by O'Reilly J was justified, in his view at least, by Canada's breaches of the CAT and other international instruments relating to torture and child protection. One would have therefore expected the Supreme Court of Canada to tackle these issues itself. Yet if one reads the Court's decision in *Khadr (No 2)* without also reading the judgments below, one would believe the international prohibition of torture was not in issue.

In another judgment attributed anonymously to "The Court", the Supreme Court of Canada, in *Khadr (No 2)*, not only ignored the international instruments so prominent in the decisions below, but studiously avoided even using the word "torture" in its reasons for judgment. The word appears only once in the reasons, in a

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[41] *Khadr 1st instance*, *supra* note 35 at paras 58-68.

[42] *Ibid* at paras 64, 68.

[43] *Khadr v Canada (Prime Minister)*, 2009 FCA 246, [2010] 1 FCR 73.

citation of a decision by a US military commission.[44] Instead of saying that Khadr had been tortured (or at least subjected to cruel, inhuman or degrading treatment), the Court said only that Khadr's statements to Canadian officials were obtained in "oppressive circumstances" and that "these conditions" and "improper treatment" offended "the most basic Canadian standards about the treatment of detained youth suspects."[45] The closest the Court came to acknowledging the treatment O'Reilly J regarded as contrary to the CAT was to describe the March 2004 "interview", in which Khadr had refused to answer Canadian officials' questions, as having been "conducted knowing that Mr. Khadr had been subjected to three weeks of scheduled sleep deprivation, a measure described by the U.S. Military Commission…as designed to 'make [detainees] more compliant and break down their resistance to interrogation.'"[46]

Applying *R v Hape* and *Khadr (No 1)*, the Court concluded that the *Charter* applies to the actions of Canadian officials at Guantanamo Bay, despite the supposed extraterritoriality problem, because the US Supreme Court has held that the Guantanamo regime constitutes a clear violation of fundamental human rights protected by international law.[47] Turning, then, to Khadr's s 7 claim, the Court held that it was "reasonable to infer from the uncontradicted evidence before us that the statements taken by Canadian officials are contributing to the continued detention of Mr. Khadr, thereby impacting his liberty and security interests."[48] On fundamental justice, the Court concluded that the statements taken by Canadian officials during their interrogation of Khadr were "obtained through participation in a regime which was known at the time to have refused detainees the right to challenge the legality of detention by way of *habeas corpus*."[49] That is quite true, but it is also a massive understatement of O'Reilly J's findings and conclusions. On this basis, the Court concluded that Khadr's s 7 rights had been violated.

Notably, the Court did not engage in any justification (s 1) analysis, but moved directly to the appropriateness of O'Reilly J's remedy. The Court asked itself two questions: (1) Is the remedy sufficiently connected to the breach?; and (2) Is the remedy precluded by the fact that it touches upon the Crown prerogative over foreign affairs? On the first question, the Court found that Canadian officials contributed to Khadr's detention by virtue of their interrogations of him at Guantanamo Bay "knowing Mr. Khadr was a youth, did not have access to legal counsel or *habeas*

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[44] E.g., in *United States of America v Mohammad Jawad*, D-008 Ruling, "Ruling on Defense Motion to Dismiss—*Torture* of the Detainee" [emphasis added]; see *Khadr (No 2)*, *supra* note 34 at para 20.

[45] *Khadr (No 2)*, *ibid* at paras 20, 25, 30.

[46] *Ibid* at para 24.

[47] *Ibid* at paras 14-18.

[48] *Ibid* at para 21.

[49] *Ibid* at paras 22-26.

corpus at the time and, at the time of the interview in March 2004, had been subjected to improper treatment by the U.S. authorities."[50] The Court concluded that the breach of Khadr's s 7 rights remained ongoing and that "the remedy sought could potentially vindicate those rights."[51]

Where Khadr effectively lost his appeal was on the second question the Court put to itself. The Court affirmed its previous decisions that foreign affairs and other prerogative powers are not exempt from constitutional scrutiny, yet described its review of exercises of the prerogative power as "limited" and "narrow."[52] The Court then reversed O'Reilly J, saying that he had misdirected himself in exercising this review power. How O'Reilly J misdirected himself is left rather unclear. The Court complained that O'Reilly J's remedy "gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests."[53] But these are just words. The Court makes no attempt to elaborate on this indictment of O'Reilly J's reasoning. In particular, we are not told what national interest Canada has that is broader than its interest in meeting its human rights obligations in respect of child nationals being detained without trial in foreign prisons.

From here the Court passes on to a brief attempt to distinguish Khadr's case from *USA v Burns*,[54] in which the federal government was ordered not to surrender two young Canadian fugitives to the US without death penalty assurances. The difference, the Court says, is that in Khadr's case "the likelihood that the proposed remedy will be effective is unclear" and "the impact of Canadian foreign relations of a repatriation request cannot properly be assessed by the Court."[55] How these considerations are at all relevant is not explained. Finally, the Court complained that O'Reilly J's remedy could not be assessed against the supposedly inadequate record before it. The Court described the record as giving "a necessarily incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request. We do not know what negotiations may have taken place, or will take place, between the US and Canadian governments over the fate of Mr. Khadr."[56]

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[50] *Ibid* at para 30; Note the Court's description of Khadr as a "youth" rather than a "child." Khadr was a child for the purposes of the *Convention on the Rights of the Child*, *supra* note 40 at art 1, which defines "child" to mean "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

[51] *Khadr (No 2)*, *ibid* at para 30.

[52] *Ibid* at paras 37-38.

[53] *Ibid* at para 39.

[54] *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283.

[55] *Khadr (No 2)*, *supra* note 34 at para 43.

[56] *Ibid* at para 44.

There is, of course, very little an applicant in a *Charter* case against the government can do to improve the record of diplomatic negotiations between Canada and foreign states—particularly those that have not yet occurred! The federal government necessarily controls the documents in such matters. By complaining about failings in the record on this point, the Court set an impossible, and therefore unfair, standard for Khadr. If there truly were any deficiencies in the record (and the courts below did not say so), they would be entirely attributable to the government and should not therefore be erected as a barrier to *Charter* relief.

The Court therefore reversed the judgment of O'Reilly J (and the majority of the Federal Court of Appeal) on the repatriation request, and replaced that order with a declaration that:

> …through the conduct of Canadian officials in the course of interrogations in 2003-2004…Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by s. 7 of the *Charter*, contrary to the principles of fundamental justice.[57]

Earlier in its reasons, the Court described this "remedy" as a declaration that Canada infringed Khadr's s 7 rights, and "le[ft] it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*."[58] I have observed elsewhere:

> This is like leaving the fox to decide how best to guard the henhouse. As I write, over a year has passed since the court made its declaration, and we now know the government's response to it: deafening silence, broken only perhaps by muted celebration of the astonishing victory it secured over Khadr by means of this anaemic judgment. While the court rightly noted the effectiveness of declarations of unconstitutionality in general, the ineffectiveness of mere declaratory relief in Khadr's case ought to have been abundantly obvious to the court. It did not take hindsight to see that the remedy fashioned for Khadr in this case would prove to be no remedy at all.
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> Left unstated throughout this decision is the fact that Khadr has been subjected to torture, or at least cruel, inhuman or degrading treatment contrary to Canadian treaty obligations and general international law. Both O'Reilly J and the Federal Court of Appeal gave serious consideration to the illegality of Khadr's treatment at international law. Both courts invoked and considered the *Convention against Torture* and the *Convention on the Rights of the Child*. By contrast, the word "torture" appears only once in the Supreme Court of Canada's decision, and there only in a citation of a decision by a US military commission. Rather than confronting the nature and legal significance of the wrong Khadr has

[57] *Ibid* at para 48.

[58] *Ibid* at para 39.

> suffered—at American hands but with Canadian complicity—the court repeatedly downplays the importance of Khadr's mistreatment and emphasizes instead its own decision in *Khadr No 1* to the effect that Guantanamo Bay is a bad place because the US Supreme Court said so. *Khadr No 2* will ease the sleep of those Canadian politicians and diplomats complicit in Khadr's nightmare, but ought to cause Canada's international lawyers and human rights advocates to lose some.[59]

TORTURE AND THE SUPREME COURT OF CANADA

In its most recent concluding observations on Canada, the Committee against Torture again raised its concerns about the status of torture in Canadian law. The Committee noted Canada's position "that the law allowing deportation despite a risk of torture is merely theoretical", but observed that "the fact remains that it is the law in force at present." The Committee declared itself "seriously concerned that…Canadian law, *including* subsection 115(2) of the *Immigration and Refugee Protection Act*, continues to provide legislative exceptions to the principle of non-refoulement."[60] The word "including" in that passage was carefully chosen by the Committee, for it is not only the presence of s 115(2) on the statute book that is irreconcilable with our torture obligations. So long as *Suresh* remains good law in this country, our compliance with one of human rights' most basic doctrines is imperfect. But *Khadr (No 2)* tells us that Canada's torture problem is not isolated to a single legislative provision or a single Supreme Court judgment. There is, it seems, a deeper ambivalence in the Supreme Court of Canada toward recognition of, and compliance with, Canada's torture obligations.

It is difficult to see why this should be so. The Supreme Court of Canada has repeatedly affirmed and applied the interpretive presumption of conformity with international law in the last twenty-five years. While it had previously appeared hesitant to adopt that same interpretive approach to *Charter* cases, more recent decisions have invoked it in the *Charter* context.[61] Sadly, the Supreme Court of Canada's torture case law undermines its credibility as a court committed to international law and human rights. The Court should take the next opportunity that presents itself to overturn *Suresh*, strike down s 115(2) of the *Immigration and Refugee Protection Act*, and decline to follow *Khadr (No 2)*. Above all, the Court should quit treating Canada's international human rights obligations as occasional

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[59] Gib van Ert, Greg J Allen & Eileen Patel, "Canadian Cases in Public International Law in 2010-11" (2011) 49 Can YB of Int'l Law 512.

[60] *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture*, UNCATOR, 48th Sess, UN Doc CAT/C/CAN/CO/6, (2012) at para 9 [emphasis added].

[61] E.g., *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292 at paras 55-56; *Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 at paras 70, 79; *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 SCR 157 at paras 24-27.

decorative features of its jurisprudence—baubles to display from time to time, but mostly kept out of sight. Except where the presumption of conformity with international law is found to be rebutted on some compelling basis, Canada's international human rights obligations should be determinative of human rights cases before Canadian courts. That is not asking much. International human rights standards are not very demanding when viewed from the perspective of an advanced, generally rights-respecting legal system such as ours. The international prohibition of torture should be regarded as the least controversial, least doubtful of these obligations. Yet our highest court has repeatedly refused to give it effect.