

Welcome Back Khadr: Re-Examining Extraterritorial Applicability of the Charter after the Omar Khadr Decisions and Amnesty International v. The Canadian Forces

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Introduction

There have been several recent cases involving the treatment of Omar Khadr by Canadian officials and a challenge by Amnesty International concerning the conduct of the Canadian Forces (CF) in Afghanistan. The Khadr cases surround issues of his detention, questioning and extradition by Canadian officials,¹ while Amnesty International Canada and the BC Civil Liberties Association brought an application for judicial review of the conduct of the CF with respect to detainees held by Canadians in Afghanistan.²

This paper will argue that these precedents are inconsistent, and the Khadr decisions have moved the bar for the extraterritorial conduct of the Canadian agents, such that it can now be asserted that the *Canadian Charter of Rights and Freedoms*³ (*Charter*) can apply to the actions or potential actions of the CF and those they whom they detain in conflict zones such as Afghanistan. Although the appeal by Amnesty International was dismissed by the Supreme Court of Canada (SCC) without reasons in 2009 (presumably on the same reasoning as the Federal Court of Appeal (FCA) that Afghan and international law apply) two crucial questions have yet to be answered in the aftermath of the Khadr decisions.⁴ First, can the *Charter* apply to CF personnel in the conduct of

¹ *Canada v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 [Khadr 2010], *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. [Khadr 2008].

² *Amnesty International Canada v. Canada (Minister of National Defence)*, 2007 FC 1147, 2007 Carswell FC at 3688 at 19. [Amnesty FC].

³ *Charter of Rights And Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.

⁴ *Khadr 2010* and *Khadr 2008*, *supra*.

operations, and secondly, could it apply to those the CF detain? This is particularly poignant in those state-building situations where effective host state sovereignty is highly ambiguous.⁵

This paper will analyse these questions in aftermath of the *Khadr* cases and the critical and seemingly divergent recent precedents that impact this issue. On one hand, the *R. v. Hape* and *Amnesty* cases purportedly support the Department of National Defence (DND) position, while the decisions in other common law jurisdictions and *Khadr* oppose it. These questions will be placed within the context of SCC precedents and global legal trends. Working through the factors engaged in these cases and those factors yet to be addressed, this paper suggests that the issue of *Charter* application in war and conflict is far from extinguished. Legal issues surrounding detention and capture in Afghanistan and elsewhere will be the subject of litigation for years to come, so long as Canada continues to send its sons and daughters into situations where combat occurs and prisoners are captured. The applicability of the Charter in many of these situations is the inevitable direction of the Court. Just as the CF is Canada's representative on the battlefield, and the personification of its foreign policy, the *Charter* is the embodiment of Canada's values as a people. The two cannot be separated. This paper concludes with recommendations to mitigate the constraints of *Charter* in war and conflict.

Global Norms on Jurisdiction

In the persuasive Dalhousie research paper *Global Reach*, jurisdiction is defined as;

“the capacity of the state, whether via the legislature, the executive or the courts, to exert power over persons, places and things. Most importantly, jurisdiction at international law “reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs.”⁶

⁵ The Federal Court of Appeal decision, *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, 2008 FCA 401, [2009] 4 F.C.R. 149 [*Amnesty* FCA], dismissed the latter point on the grounds that International and Afghani law applied, but skirted directly addressing the former.

⁶ M. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2003), at 572.

Based on the *Global Reach* analysis, there are two bases for extraterritorial jurisdiction pertinent to these issues raised in the *Amnesty* case. First, this case might fall within the parameters of concurrent jurisdiction where “two or more states have some legal claim to exercise jurisdiction over a particular matter.”⁷ Alternatively, Canada could claim sole jurisdiction based on the Nationality principle arguing that;

“states may assert jurisdiction over the acts of their nationals, wherever the act might take place. This principle is employed more often by civil law than by common law countries, but has equal status with territoriality as a universally-accepted valid ground of jurisdiction.”⁸

Recently, the principles described above have been employed as criteria in a global test for the legality of an exercise of jurisdiction: is there “a substantial and *bona fide* connection between the subject-matter and the source of the jurisdiction.”⁹ A variant of this test, usually expressed in the phrase “real and substantial connection,” appears in SCC jurisprudence as the preferred test Canadian courts apply in deciding whether to take territorial jurisdiction.¹⁰ Under this test, Canada’s capacity to legally exercise extraterritorial jurisdiction would be dictated by;

the amount and degree of connection between Canada and the subject matter in question, as balanced with the similar connections of other states to the same subject matter. Canadian law can apply if Canada has jurisdiction over both the act and the actor.¹¹

In keeping with the Supreme Court’s treatment of the Khadr cases, contemporary legal trends have witnessed domestic law expanding to encompass greater extraterritorial application, but

⁷ Steve Couglan, Robert J. Currie, Hugh M. Kindred et al, *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization*, online: Dalhousie Law Library <www.library.dal.ca/law/Guides/FacultyPubs/Joint/GlobalReachFinal.pdf>, at 5. A paper prepared for Prepared for the Law Commission of Canada, June 23, 2006. [*Global Reach*] at 5.

⁷ *Amnesty FC, supra*, at para 8.

⁸ *Ibid.*

⁹ *Ibid.* Further, this position has found new support in the test for jurisdiction laid out by the Nova Scotia Court of Appeal in *Bouch v. Penny (Litigation Guardian of)*, 2009 NSCA 80, 281 N.S.R. (2d) 238 at para 14.

¹⁰ *Ibid.*

¹¹ *Global Reach, supra*, at 8.

despite the construction of an extensive international legal regime, or perhaps in deference to it, Canadian domestic courts have been reticent to assert *Charter* applicability to military operations.

Yet the CF do not operate in a legal nadir abroad. In his testimony to the House of Commons Special Committee the then-Judge Advocate General, Brigadier General Watkin, affirmed that,

“Military Law means all international and domestic law relating to the Canadian Forces...[t]his includes operational law, which is the domestic and international law applicable to all domestic and international Canadian Forces operations. The Afghan government has not consented to the application of Canadian Law...The exception involves offences committed by “Canadian Personnel.” The court found that under the technical arrangements signed between the Government of Canada and Afghanistan, the detention of persons was governed by International Law.”¹²

A successful *Charter* challenge would have been viewed by many as a cankerous impediment to the military’s day to day execution of the war plan (or “battle rhythm”), made all the more impermissible having been injected in the midst of this nation’s largest conflict since the Korean War. It need not be so. Certainly many police officers have privately mused about the constraints and frustrations the *Charter* has placed upon their work, which is often no less dangerous and important to the safety of Canadians. But the vast majority also readily recognize that frustrations alone are not sufficient cause to renege on rights and constitutional obligations. Regardless of the perceived difficulties involved in implementation, the Khadr rulings foreshadow the inevitable position the Supreme Court will settle upon when the guns of this current conflict turn silent, that Canadian agents are not free to negotiate away their Constitutional obligations, including the *Charter*. Perhaps it is simply beyond their jurisdictional competency to do so.”¹³

¹² Brigadier General Ken Watkin, Q.C. 28 Oct 09, The House of Commons Special Committee on the Canadian Mission in Afghanistan, as found in *Sword and Scale*, February 2010, online: <www.cba.org/CBA/newsletters-sections/2010/2010-02_military.aspx >.

¹³ Jurisdictional Competence prevents a branch of government, administrative body or state actor from making decisions that are *ultra vires* their jurisdictional competence. See *Johannesson v. The Rural Municipality of West St. Paul*, [1952] S.C.R. 292. As a Federal Department DND is a ‘government actor’ in the Dolphin Delivery sense of the term [*RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 1986 CanLII 5]. Therefore, DND is bound by the Constitution, including the *Charter*, and it is not free to contract out of its terms when it is convenient to do so. One cannot unilaterally ‘unbind’ oneself from the *Charter*.

Detainees

In *Amnesty*, the Federal Court of Appeal found that the *Charter* had no application to non-Canadian detainees because Afghanistan had not ceded jurisdiction under the *Afghan Compact*, and further, that Canada had not exercised “effective control” over the CF detention facilities at Kandahar Airfield within the meaning of the European Court of Human Rights definition of the term found in *Bankoviae v. Belgium*.¹⁴ This paper respectfully argues that key factors were not engaged in the Federal Court of Appeal’s analysis in *Amnesty*. These will inevitably surface. It is not credible to suggest that agents of Canada are relieved of their obligations to adhere to the *Charter* by contracting with foreign powers, when such contractual terms violate the constitutional and legislative constraints placed upon those Canadians making it.¹⁵ Subsection 32(1)(a) declares that the *Charter* applies to, “the Parliament and government of Canada in respect of all matters within the authority of Parliament...” In gauging the applicability of the *Charter* abroad, DND relied on an the expert opinion of Professor Christopher Greenwood, arguing that its soldiers are not in Afghanistan as an national force, but as an integral component of the International Stabilisation and Assistance Force (ISAF), which is under UN and NATO mandates.¹⁶ Professor Greenwood cites various resolutions of the United Nations Security Council, and the *Afghan Compact* in

¹⁴ *Amnesty FCA, supra*, at para 24-27, citing the European Court of Human Rights definition in *Bankoviae v. Belgium* decision no. 52207/99. While the SCC has stated in *Khadr* that International obligations are a factor in determining extraterritorial application of the Charter, with respect to the Federal Court of Appeal, it is far from clear that the ECHR’s definition can be regarded as anything more than influential in this argument since Canada holds no ‘obligation’ to this court. Further, the record shows that the arguments this paper raises were not comprehensively considered at bar.

¹⁵ S.52. (1) of the Constitution Act, 1982 famously states that, “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” Logically, any provision of a contract made by Canadian state actors who are bound by the *Charter*, that violates the *Charter* should similarly be of no force and effect.

¹⁶ *Amnesty FC, supra*, at para. 75.

addressing the character and capacity of Canada's involvement in Afghanistan.¹⁷ DND pointed to evidence on the record such as the *Technical Arrangements between the Government of Canada and the Government of the Islamic Republic of Afghanistan*,¹⁸ which they said show Canada and Afghanistan have agreed to a very limited spectrum of Canadian laws in Afghanistan which does not include the application of Canadian domestic law to CF' detention activity.¹⁹

Given their position that the CF in Afghanistan are not acting as Canadian "state actors", DND submitted that their activities fall outside of the ambit of subsection 32(1) of the *Charter*. Moreover, they contended that it would be absurd to impose a particular country's laws on a multinational international effort.²⁰ Even if the soldiers deployed in Afghanistan can properly be viewed as Canadian state actors in the same manner the SCC deemed the RCMP in *Hape* to have been, DND says that the *Charter* still has no application, as there is no exception to the principle of state sovereignty that would have justified giving the *Charter* an extraterritorial effect in the *Amnesty* case.²¹

The DND position is difficult to reconcile with Canadian domestic law. The *Geneva Convention Act* passed by Parliament states;²²

7 (1) Every prisoner of war is subject to the Code of Service Discipline as defined in section 2 of the *National Defence Act* and every prisoner of war who is alleged to have committed an offence referred to in subsection 3(1) shall be deemed to have been subject to the Code of Service Discipline at the time the offence was alleged to have been committed.

¹⁷ *Ibid.* at para. 75.

¹⁸ "Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan," online: National Defence and the Canadian Forces <<http://www.forces.gc.ca/site/operations/archer/agreement>>.

¹⁹ *Amnesty, FC, supra*, at para. 78.

²⁰ *Ibid.* at para. 76.

²¹ *Ibid.* at para 77.

²² *Geneva Convention Act*, R.S., 1985, c. G-3, s.7; 1990, c.14, s.4.

(2) A prisoner of war shall, for the purposes of the Code of Service Discipline, be deemed to be under the command of such unit or other element of the Canadian Forces as may be holding that prisoner in custody.

Under this legislation, it is difficult to argue that a detainee does not fall within “matters within the authority of Parliament.” Perhaps doubly so in the wake of the Supreme Court decisions in *Khadr* and *Baker v. Canada* which focus on the importance of domestic adaptation of international obligations.²³

Not only could a detainee in Afghanistan be subject to the Code of Service Discipline in the *National Defence Act* (NDA), they may also be subject to Canadian courts through NDA paragraph 273;

Where a person subject to the Code of Service Discipline does any act or omits to do anything while outside Canada which, if done or omitted in Canada by that person, would be an offence punishable by a civil court, that offence is within the competence of, and may be tried and punished by, a civil court having jurisdiction in respect of such an offence in the place in Canada where that person is found in the same manner as if the offence had been committed in that place, or by any other court to which jurisdiction has been lawfully transferred.”²⁴

Further, any doubt that the courts will eventually migrate towards the view that CF capturers are obligated to respect *Charter* norms has been diminished by *Khadr* 2010, which concluded that Canada violated both the *Charter* and fundamental justice by actively participating in a process that contributed to Mr. Khadr’s ongoing deprivation of his right to liberty and security of the person guaranteed by S.7.²⁵

By permitting the application of some federal law to both CF personnel and detainees, the Government of Afghanistan may have implicitly extended Canadian legal jurisdiction. The Canadian Task Force commander is federally appointed, the soldiers are federally paid, and the mission is federally sanctioned. What is more, their detainees are held subject to Canadian statute.

²³ *Khadr* 2008, and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699.

²⁴ *National Defence Act*, R.S.C. 1985, c. N-5. at 273.

²⁵ *Khadr* 2010, at para 48.

If detainees are held under the authority of a Canadian federal power and are subject to *some* law within the authority of Parliament, they also ought to be subject to the legal hierarchy these federal laws are subordinate to. By picking the apple, we acknowledge the tree.

Canadian Forces as Agents of Canada

The same argument regarding Section 273 of the NDA equally applies to members of the CF. As former Capt. Robert Semrau is unfortunately all too aware, members of the CF in Afghanistan are at all times subject to the Code of Service Discipline and are held to account for their actions on the battlefield.²⁶ Anyone subject to that Code who commits an offence outside of Canada that would be punishable by a Canadian civilian court may be tried for that offence by a Canadian court of law. So if those conducting operations abroad are subject to Canadian law in Canadian courts, why are they not subject to the Canadian Constitution? The NDA s. 273 inescapably places the actions of CF personnel under domestic law, although the matters contemplated by the legislator were probably more in the nature of personal criminal conduct than of overarching public policy as raised by Amnesty International.

As for the CF not being Canadian, in the sense that they are acting in the capacity of a multinational force, this is a superficial distinction. Although acting as part of a multinational force, CF personnel are paid agents of the Government of Canada, in Canadian uniform, operating under Canadian legislation (the NDA) and fulfilling a mission mandated by Parliament.²⁷ While “Operational Command” is indeed turned over (or “chopped”) to ISAF, Professor Greenwood has not addressed an important issue that complicates his argument. Proof that Canada intends to retain

²⁶ *R. v. Semrau*, 2010 CM 4010. Capt Semrau was ultimately found not guilty of Second Degree murder and convicted of an offence under the NDA. What is instructive from this case is that there can be occasions where the NDA and the Criminal Code of Canada is applied extraterritorially to Canadian citizens.

²⁷ *House of Commons, Debates*, 1st Session, 38th Parliament, 150 (15 November 2005) at 9693.

ultimate possession and control of the CF abroad, regardless of the “Operational Control” exercised under an alliance or international mandate is found in the policy direction of the officer responsible for all foreign operations. It clearly states that “Full Command” is never surrendered by the Chief of Defence Staff;

“102(1)(a) the CDS always retains full command of any Canadian Task Force (TF); and 104(1)(c)(3) ...The Canadian National Commander will not normally have a role in the operation from a national or an alliance perspective, but will have Administrative Control and would be responsible for such matters as discipline and administrative support to Canadian personnel or TFs.”²⁸

Thus, while decisions relating to tactical and operational objectives are often ceded to a supranational structure, the administrative, legal and disciplinary frameworks that govern how the CF achieve their missions are firmly under Canadian control.

Hinging on *Hape*

It can be argued that CF actions in Afghanistan are substantively similar to the situation with RCMP actions in Turks and Caicos in *R. v. Hape*. Both are Federal government agencies operating in other countries. DND contended that the *Hape* ruling was crystal clear; *Hape* does not contemplate the extension of *Charter* rights to non-Canadians outside of Canada.²⁹ Moreover, the venerable principle of international comity³⁰ prevents the enforcement of Canadian domestic law in another state’s territory without the permission of the host country. Where the host state consents,

²⁸ *DCDS Direction for International Operations*, (Ottawa: DND, 2002) revised as of 28 November 2002. Online: <http://dcds.mil.ca/cosj3/ndcc/pages/sops/default_e.asp>.

²⁹ *Ibid.*, at para. 83.

³⁰ ‘Comity’ in the legal sense, is neither a matter of absolute obligation on one hand, nor a matter of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive and or judicial acts of another nation, having both due regard to both its own citizens, or other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S. Ct. 139, 143 (1895). Cited in *Black’s Law Dictionary*, 8th ed., s.v. “comity”.

the *Charter* can apply to the activities of Canadian actors.³¹ DND argued that in the absence of the host's consent, the *Charter* cannot apply since it would constitute an "impermissible encroachment on Afghanistan's sovereignty."³² Afghanistan had never expressly consented to the application of the *Charter* within its sovereign territory.

Amnesty differentiated *Hape* from their case by parsing the comments of the *Hape* majority decision, specifically;

In the instant case, **the police officers were clearly government actors to whom, *prima facie*, the *Charter* would apply** [emphasis mine], but the searches carried out in Turks and Caicos were not a matter within the authority of Parliament. It is not reasonable to suggest that Turks and Caicos consented to Canadian extraterritorial enforcement jurisdiction. The trial judge's findings clearly indicate that Turks and Caicos controlled the investigation at all times, repeatedly making it known to the RCMP officers that, at each step, the activities were being carried out pursuant to their authority alone.³³

In fact, *Hape* is not as useful a precedent as DND hoped for. In *Hape* a *prima facie* case that the *Charter* applied had been successfully made and it was through the foreign control of the activity that Canadian law failed to apply. Since then, the *Khadr* 2008 case has curtailed more freewheeling interpretations of comity. "The principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law, do not extend to participation in processes that violate Canada's international human rights obligations."³⁴ This case stands for the principle that "[t]he Charter bound Canada to the extent that the conduct of Canadian officials involved in a process that violated Canada's international obligations."³⁵ *Charter* applicability is no longer a matter of absolutes, but of degree.

³¹ *R. v. Hape*, 2007 SCC 26, SCC [2007] 2 S.C.R. 292, at para. 104. explains an instance where the scope of S. 32(1) can apply outside of Canada.

³² *Amnesty FC*, at para. 82.

³³ *Hape*, *supra*, at 103, and 115-116.

³⁴ *Khadr 2008*, *supra*, at 2.

³⁵ *Ibid.*, at 26.

Emerging Common Law Consensus Favouring Extraterritoriality

The application of the *Charter* to Canadian actors outside of Canada is about the relationship these agents have to Canada. It is as much about respect for our own domestic legal hierarchy as it is about adherence to our international commitments. *Charter* application can no longer be nullified by simply stepping foot in a foreign jurisdiction. There is ample Canadian jurisprudence, such as *Purdy v. Canada* (Attorney General),³⁶ to confirm that police actions can be subject to the *Charter* beyond Canadian soil. The SCC is also clear that Canadian representatives operating in the territory of another sovereign state are compelled to adhere to the principle of comity of nations and must be wary so as not to interfere in another state's jurisdiction. However, as long as the exercise of Canadian justice does not interfere in the exercise of the host state's affairs, there is no impediment to holding Canadian actors to account.³⁷

Amnesty International had sought to clarify the impact of the comity principle applied in *Hape*³⁸ by citing a key caveat in the decision of the majority in that case;

“That deference [to comity] ends where clear violations of international law and fundamental human rights begin. If no such violations are in issue, courts in Canada should interpret Canadian law, and approach assertions of foreign law, in a manner respectful of the spirit of international cooperation and the comity of nations.”³⁹

If violations have occurred, then it would seem that the comity shown in *Hape* would be inapplicable since the *Charter's* application would serve to augment human rights in a way that does not trample upon the host state's domestic law. In short, while applying *Charter* rights in *Hape* would have interfered with the expressed wishes of a foreign government on its own soil,

³⁶ *Purdy v. Canada* 2003 BCCA 447, 230 D.L.R. (4th) 361.

³⁷ So long as the “real and substantial connection” test is satisfied.

³⁸ Cited with approval in *Khadr 2008* at 18.

³⁹ *Hape, supra*, at 51, cited in *Amnesty FC, supra*, at 86.

applying the *Charter* to the CF in Afghanistan or on a future battlefield may not.

Respect for fundamental human rights and the *Charter* must follow the Maple flag. Granted, applying the *Charter* in a war zone is very different from the law enforcement “search and seizure” context in *Hape*. Lebel J expressly left open the possibility that “the Charter may have extraterritorial application in cases where fundamental human rights are at stake.”⁴⁰ Amnesty International also quoted Justice Binnie's concurring decision in *Hape* cautioning against sweeping pronouncements as to the lack of extraterritorial effect of the *Charter*.⁴¹ Justice Binnie left open the question as to whether those harmed by the extraterritorial conduct of Canadian authorities should be denied *Charter* relief in situations where they did not face trial in Canada.⁴² It would seem that question was answered in *Khadr* 2010 where a unanimous Court concluded that Canadian conduct had violated Mr. Khadr's S.7 *Charter* rights.⁴³ However, the Court remained cautious to not declare any remedy that would overreach into the Crown prerogative on foreign affairs. While reaffirming in principle the judiciary's authority to oversee the Crown prerogative on foreign affairs and make orders ensuring that it is exercised in line with the Constitution,⁴⁴ the Court's remedy for Mr. Khadr was not the repatriation he sought. It was to passively declare that rights are being violated, “and leave it to the federal government to decide how best to respond to this judgement in light of current information, its responsibility for foreign affairs, and conformity with the Charter.”⁴⁵ Thus, even if it could be found that the CF is bound by the *Charter* abroad, it is far from clear what a ‘purposive’ remedy for a violation would entail.

⁴⁰ *Amnesty, FC, supra*, at paras.86-87.

⁴¹ *Ibid.*, at para. 88.

⁴² *Ibid.*, at para. 91.

⁴³ *Khadr 2010*, at para. 26.

⁴⁴ *Ibid.*, at para. 37, citing both *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283. and *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481.

⁴⁵ *Khadr 2010*, at para. 39.

Hape had set the stage for the conflicting rulings of *Khadr* and *Amnesty*, and will be the progenitor of the leading case yet to come that eventually clarifies the law on *Charter* extraterritoriality. The current consensus that the *Charter* can apply to some Canadian actors but not others acting in a similar context allegedly committing similar substantial violations, is ultimately not intellectually viable.

Amnesty's case was greatly strengthened by two recent decisions in other common law jurisdictions. The House of Lords in *Al Skeini et al. v. Secretary of State for Defence*,⁴⁶ and the United States Court of Appeal for the District of Columbia in *Omar et al. v. Secretary of the United States Army et al.*,⁴⁷ both held that domestic human rights legislation applied to detainees of their respective military forces in Iraq. Both American and English courts ruled that constitutional rights guarantees do indeed "follow the flag" when state security authorities operate outside their home territory. As a consequence, Amnesty argued that Canadian human rights law should be extended to cover individuals similarly detained by the CF in Afghanistan.⁴⁸

Does the application of Canadian law to detainees create a dichotomy? Some would say that if the laws of Canada apply to an Afghan detainee on Afghan soil, then the laws of Afghanistan must not. A detainee of an International or UN force would be subject to a multiplicity of sovereignties. 'Liberation' permitted Afghans the right to elect their own legislators, who have endeavoured, under the most difficult of circumstances, to develop and enforce their own legal norms. They may strongly oppose such a perceived encroachment on their jurisdiction. Imagine a Canadian court that would permit, for example, the air control squadron of the United States Air Force permanently stationed in North Bay Ontario as part of the North American Air Defence

⁴⁶ *Al Skeini et al. v. Secretary of State for Defence*, [2007] UKHL 26.

⁴⁷ *Omar et al. v. Secretary of the United States Army et al.*, 479 F.3d 1 (D.C. Cir. 2007).

⁴⁸ *Amnesty*, FC, *supra*, at para. 94.

(NORAD) arrangement to detain Canadians on Canadian soil under American law. Defenders of the DND position would doubtless respond that that is an unfair hypothetical since Afghanistan has implicitly assented to a degree of Canadian sovereignty in Afghanistan by surrendering a hallmark of state sovereignty; the monopoly on the legitimate use of force.⁴⁹ It is this critical point that distinguishes overseas operations from the North Bay example. In the US and UK examples cited above, the host country, Iraq, did not exercise its dominion over the accused. The argument Amnesty fruitlessly made was that Canada is exercising control over its detainees in a similar manner.

Impact on the Public Policy Interest: Winning the War v. Protecting Human Rights

Applying the Charter in warzones and zones of conflict would not be easy and there is no “one size fits all” set of criteria. For example, to argue that an enemy combatant actively engaged in fighting Canadian soldiers should be endowed with *Charter* protections would certainly hamstring the CF on the battlefield and place increased risks on our soldiers. But broad declarations that the *Charter* can never apply in the context of armed conflict are equally untenable. Such declarations would ignore, firstly, that there are already a myriad of international laws that already apply to hold the actions of soldiers to account⁵⁰ and secondly, the reality that a number of Acts of Parliament apply in the same situations. If ordinary statutes can apply, surely the *Charter* must as well.

The *Charter* must be interpreted purposely and applied whenever possible. In *R. v. Gamble*,⁵¹ the SCC examined the availability of a *Charter* remedy in the matter of an incarceration that occurred before the *Charter* had come into effect. In this regard, the Supreme Court stated that

⁴⁹ *Ibid.*, at para. 95.

⁵⁰ *International Human Rights In Context: Law, Politics, and Morals*, Henry J. Steiner and Philip Alston, Oxford: Clarendon Press, 1996.

⁵¹ *R. v. Gamble*, [1988] 2 S.C.R. 595, 45 C.C.C. (3d) 204.

a purposive approach should be applied to the administration of *Charter* remedies as well as to the interpretation of *Charter* rights. The majority had found a violation of S.7 of the *Charter*, not by the retroactive applicability of that document, but by the continued action of illegal incarceration and denial of parole. Even if the original actions of soldiers on the battlefield were exempt from the *Charter* scrutiny, those actors who administer detainees after the battle may still be required respect *Charter* guarantees.

In *R. v. Kindler* the SCC held that extraditing an American in Canadian custody to face the death penalty was not a violation of the *Charter*. In *Kindler*, the majority effectively upheld the international comity principle. However, an obligation not to interfere with the judicial process of another country does not speak to the application of the *Charter* in matters chiefly involving Canadian actors. In their dissent, Cory J and Lamer CJ recognized that even though the death penalty violates s.1 of the *Charter*, such a penalty may be justified, “in vary rare circumstances, such as conviction for a very serious military offence committed during time of war or emergency.”⁵² This exemption could cover many of the circumstances CF soldiers find themselves in when they are forced to take a life. Nonetheless, DND argues for absolute freedom from the *Charter* on the basis that the *Charter* is incompatible with military operations in time of war. But this paper differentiates active combat from the case of detainees where the immediacy of the threat in combat has long passed. It is not manifestly impossible that the *Charter* can apply to the CF generally, just as other domestic legislation does, but not in active combat. Or if it did, a legal defence of self defence would seem sound, or even a novel defence of lawful combat.

Conclusion

⁵² *Kindler v. Canada (Minister of Justice)*, 84 D.L.R. (4th) 438, [1991] 2 S.C.R. 779, at 179.

Given the extraordinary implications *Charter* applicability in combat has for human rights and national security, a reassessment of the Amnesty position post-Khadr, and post-Afghanistan is likely. To resolve the lingering incoherence with *Amnesty* on one hand, and the recent trend in American courts and the House of Lords and the *Khadr* decisions on the other, the SCC would either have to overturn the freshly minted *Khadr* rulings or find that the *Charter* applies to the actions of the CF abroad as well as at home. It should find that the *Charter* has at least some extraterritorial effect in foreign operations, such as Afghanistan, and can include protection for detainees of the CF.

Jurisprudence must be mindful of the special circumstances that armed forces face, including a broadly inclusive reading of self defence, so as not to paralyze military operations. To the extent that military necessity is incompatible with the *Charter*, exceptions will have to be carved out in the course of time, absent a constitutional amendment to specifically address this question.

The Way Ahead: Reconciliation of the *Charter* and Conflict Zones

Arguing that the *Charter* may apply to military actions abroad does not make the case that it should in all circumstances. There are significant foreign policy objectives which might be crippled by overzealous adherence to rights designed to apply in a peaceable kingdom to a war zone in an entirely different socio-political context. One can expect a substantial impact on the CF concept of operations, training and associated costs to bring foreign operations inline with the *Charter*.

If the *Charter* does apply, fighting a war is not rendered impossible. In *R. v. Oakes*, the SCC held that *Charter* rights are not absolute and it is necessary to limit them in order to achieve

"collective goals of fundamental importance".⁵³ Reasoning similar to the *Oakes* test would allow proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance". Canadian soldiers exercising reasonable judgement in the heat of lawful combat would meet the threshold of proportionality. If aspects of the *Charter* could not rationally be applied in the heat of battle, that may not relieve military police, jailors, and lawyers from their *Charter* duties to human rights in others when survival is not immediately at risk, particularly given the fundamental importance of the *Charter* to the Canadian identity, and the *Charter's* place in the constitution and primacy over other federal legislation. The *Charter* is the embodiment of Canada's core values; it must be given purposive effect whenever possible.

⁵³ *R. v. Oakes*, [1986] 1 S.C.R. 103, 1986 CanLII 46, at para. 65.

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